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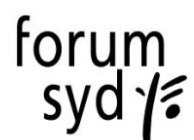
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SAYING – BUT NOT DOING – THE RIGHT THING

Sweden, the World Bank and Human Rights Obligations

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It is not uncommon to find statements to the effect that human rights obligations only pertain to states, and that states' responsibility for human rights are restricted to the geographical area that they control. This reasoning is based on the fact that the Universal Declaration of Human Rights (UDHR, 1948) was signed by states, and that the principle of national sovereignty is strongly stressed in the UN Charter². All this *could* be interpreted to imply that the responsibility for Human Rights rests with the signing states alone.

If this were the case, two consequences would follow:

- Neither international financial institutions (IFIs) like the World Bank, nor multinational enterprises (MNEs) would be bound by human rights obligations, since such obligations only refer to states.
- States, on the other hand, would not have any human rights responsibility for the activities of the IFIs (or the MNEs), since they finance and/or carry out activities which lie outside the geographical areas of the respective states.

Taken together, this could be interpreted to mean that human rights obligations of international institutions such as the World Bank would be outside the scope of internationally binding rules. Fortunately, this is not in conformity with international law. As argued by Mark Gibney (2008, p 11), the very idea that propelled human rights into being was to extend obligations beyond national borders:

“The entire premise behind all international human rights instruments is that Swedes are not only concerned with the well-being of other Swedes, and Nigerians are not solely concerned with the well-being of other Nigerians [...]. Rather, in becoming a party to an international human rights treaty, the Nigerian government and the Nigerian people are proclaiming (legally and otherwise) that they are also concerned with the well-being of Swedes, as well as nationals of all other countries.”

Thus, states have human rights obligations beyond their borders, and carry at least some responsibility for violations of rights that they themselves have not committed directly. This should also include, as argued by Karyn Keenan (2008, p 1) in another context – export credit agencies – the institutions that states own:

“[U]nder international law, specifically the principles of ‘state responsibility’, the acts and omissions of export credit agencies are attributable to their states. States are therefore responsible under international law for the operations of

² Article 2:7 of the UN Charter: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.” And Article 55 of the UN Charter reiterates “the respect for the principle of equal rights and self-determination of peoples”.

their export credit agencies, including any ‘wrongful acts’ that these agencies may commit.”

So, although states certainly have a responsibility for human rights within their own borders, they simultaneously have some responsibility for human rights also beyond them. Although “there is no question that the primary duty to protect human rights rests with the territorial state”, this has erroneously been reduced in meaning so that “‘primary’ responsibility has come to be interpreted as ‘sole’ responsibility.” (Gibney 2008, p 10 and 5).

International human rights law also carries an obligation for a state not to impede another state from realizing its human rights obligations. Hence, some human rights experts argue that although the IFIs themselves may not have human rights obligations, their owners, the member states, certainly do. Thus the member states are required to make sure that their institutions take human rights obligations into account by avoiding formulating policy conditions for loans and debt cancellation that weaken or hinder the capacity of member states to fulfil their own human rights obligations. (Commission on Human Rights 2004).

But we must not rest here, with the fact that state responsibility also goes beyond national borders, we can take one more step. There are convincing arguments in favour of the IFIs themselves having human rights obligations. A growing consensus among scholars of international law supports the position that institutions such as the World Bank (including the International Finance Corporation, IFC, a part of the World Bank Group which extends loans to the private sector) and the International Monetary Fund (IMF) in fact do have human rights obligations of their own (see Bradlow 1996, Alston & Robinson 2005, Skogly 2006, Darrow 2006, Hertz 2007):

- In the preamble, the UDHR states that “every organ of society” shall

”promote respect for these rights and freedoms and by progressive measures, national and international [...] secure their universal and effective recognition and observance [...].”

This provision is applicable to the IFIs as well as to MNEs. It also speaks of states’ extra-territorial obligations and to the obligation to extend foreign aid. As commented by the UN Special rapporteur on the right to health after visiting Sweden:

“a rich State’s human rights responsibility to provide international assistance is underpinned by a *legal obligation*.” (Hunt 2007 p 27, emphasis added)

This position is based on a number of human rights instruments, as well as the UN Charter, all of which Sweden has signed.³

³ Hunt 2007, pp. 27-28, makes explicit reference to the UN Charter, Articles 1, 55 and 56; to the Universal Declaration of Human Rights, Articles 22 and 28; to the Covenant on Economic, Social and Cultural Rights, Articles 2, 11, 15, 22 and 23; and to the Convention on the Rights of the Child, Article 4.

- The World Bank and the IMF are specialized agencies of the UN which, according to the charter of the UN (articles 55 and 59) entails an obligation to respect human rights.
- In addition, the World Bank and the IMF have independent legal identities and they enter into legally binding international agreements with states and enterprises. This legal standing entails an obligation for the IFIs themselves to abide by binding international law, including at least some aspects of human rights. (Skogly 2001). That the IFIs in fact do have such obligations was established by the International court of justice in The Hague already in 1951 (Salomon & Sengupta, p 41):

“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitution or under international agreements to which they are party”.

Such arguments influenced the former legal counsel of the World Bank (but not of the IMF, see Gianviti 2001) who concluded that the World Bank’s Articles of Agreement

“permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities since it is now evident that human rights are an intrinsic part of the Bank’s mission.” (Daniño 2006:9).⁴

This is a sharp break with the position of a previous World Bank legal counsel who claimed that the Articles of Agreement prohibited “political” considerations, including human rights obligations.⁵ Surprisingly, the Swedish government sides with this limited view of IFI responsibility, as witnessed by a recent government paper on “aid in support of democracy” which claims that

“the statutes of the multilateral development banks stipulate that only economic aspects shall be considered when taking decisions.” (Government of Sweden 2008a, p 71)

⁴ “Permit” is as important a word as “require” in this legal analysis: IFI owner governments use the argument that it is not required by the Articles of Agreement for the World Bank to assume human rights obligations and hence that it should not. But if the legal counsel is correct in reasoning that the Articles in fact do *permit* the World Bank to recognize its human rights obligations, this is a strong argument in favour of utilizing the “permit” to strengthen human rights.

⁵ Article IV:10 of the World Bank statutes reads as follows: “Political Activity Prohibited. The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.” This is presumably the article that the Swedish government refers to in its position paper, see below. The IFC has an identical formulation in its Articles of Agreement, Article III:9.

However, it is now increasingly being recognized that this article was not intended to legitimize human rights violations, but only to restrain World Bank staff from interfering with member states internal political affairs, and to avoid favouring one political party at the expense of another. Furthermore, it is ironic that World Bank staff and owners (like Sweden) should make reference to this Article, since intervention into domestic affairs, including the proscription of specific economic policies, has been a hallmark of the World Bank (and the other IFIs) for decades, and continues to the present. (Eurodad 2007).

But more important in connection with Sweden's position is the fact that human rights are not something which a state or an international institution can freely choose to adhere to or to disregard. Human rights are not unjustified political intervention in a country's domestic affairs but international binding law.

Fortunately, the World Bank has already recognized (partially) that it has human rights obligations by incorporating human rights considerations into three of the Banks safeguards, namely those regarding indigenous peoples rights (WB Operational Policy 4.10, January 2007, and IFC Performance Standard No 7, April 2006), as well as when it comes to labour rights (in IFC Performance Standard No 2, April 2006).⁶

This means that the World Bank already in words has recognized that it in fact does have human rights obligations. This is positive, but it does not answer two outstanding questions: which obligations does the World Bank have when it comes to human rights? And how is it in practice meeting those obligations?

Which human rights obligations?

Stating that the IFIs in fact do have human rights obligations does not fully answer the question what these obligations consist of. Human rights obligations are normally divided into three categories:

⁶ World Bank OP 4.10 on Indigenous Peoples, January 2007, reads: "This policy contributes to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples."

IFC Performance Standard 7 Indigenous Peoples, April 2006, states: "Objectives. To ensure that the development process fosters full respect for the dignity, human rights, aspirations, cultures and natural resource-based livelihoods of Indigenous Peoples". Note that indigenous peoples' rights are limited to the obligation to respect in both safeguards.

IFC Performance Standard 2 Labour and Working Conditions states: "The requirements set out in the Performance Standard have been in part guided by a number of international conventions negotiated through the International Labour Organization (ILO) and the United Nations (UN)." The conventions referred to in this Performance Standard are the ILO Convention 87 on Freedom of association and protection of the right to organize, 98 on the Right to organize and collective bargaining, 29 on Forced labour, 105 on Abolition of forced labour, 138 on Minimum age of employment, 182 on the Worst forms of child labour, 100 on Equal remuneration, 111 on Discrimination in employment and occupation, and the UN Convention on the Rights of the Child, Article 32.1 on the right of children to be protected against economic exploitation. This Performance Standard thus recognizes the overriding importance of international agreements, which perhaps makes it more significant than Performance Standard No 7 which only mentions human rights in general.

- To respect human rights. This entails not to violate the rights of people. This is sometimes called a “negative” obligation, an obligation to do no harm;
- To protect human rights, i.e. to make sure that third parties, such as MNEs, do not violate human rights; and
- To fulfil human rights, i.e. to make sure that peoples’ rights in fact are realized, hence a “positive” obligation to secure rights in practice.

States have all three of these obligations, in their own countries but also, as we have argued, beyond their national borders. As regards the obligations of the IFIs, scholars of international law consider the IFIs to be affected by the first two obligations, to respect and to protect against violations of human rights. The third and most demanding obligation, to fulfil, only pertains to the states. Thus, the human rights obligations of states and IFIs can be summed up as follows (see Figure 1).

Figure 1. Human rights obligations of states and IFIs: similar but not identical

Obligation	States vis-à-vis their own population and beyond	States as owners of the IFIs	IFIs
To respect human rights (not violate)	Yes	Yes	Yes
To protect human rights against violation of rights by third parties)	Yes	Yes, against the effects of the conditionalities of the IFIs	Yes, in their relation to third parties such as the MNEs
To fulfil human rights (to realize human rights)	Yes	Yes, through international cooperation and in co-owned institutions	No

Based on Clapham 2006.

What difference does it make if the IFIs recognize their human rights obligations?

The debate regarding whether IFIs have human rights obligations or not, is far from being an academic exercise alone. An affirmative answer to the question carries great practical consequences.

First, in order to secure that the IFIs assume their responsibilities regarding human rights, it is essential that their charters be rewritten in conformity with international law (Alston 2005). Here, the IMF has more work to do than the World Bank, which, as we have seen, already has taken the first steps towards recognizing its obligations.

Secondly, the IFIs must begin to evaluate their own work in human rights terms, not only in terms of financial results or development outcomes in general. This in turn necessitates a dramatic change in the two internal control mechanisms that the World Bank has established,

the Inspection Panel (for the World Bank) and the Compliance Advisory Ombudsman (for the IFC). The mandate of these control mechanisms is restricted to the safeguards and policy guide lines of the institutions themselves, and does not include judging their performance against human rights (apart from the three cases mentioned above where the World Bank and the IFC do recognize their human rights obligations).

However, the World Bank inspection Panel is not quite as weak as it often made out to be. On the contrary, the World Bank board resolution that established the Panel in 1993 in fact mentioned R-word – rights – when stipulating the conditions that had to be present for the Panel to investigate a complaint (Article 12):⁷

“The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operations policies and procedures [...].”

It is the latter part of this Article which most often is noted, and criticized, because it does not allow the Panel to apply an internationally agreed standard – such as the human rights conventions – but only the internal rules and regulations of the institution itself. But the first part of the Article is equally central to the task of the Panel: to investigate whether the World Bank respects and protects the rights of affected populations.

Even if the self regulatory mechanisms of the World Bank and the IFC may not be as strong as they ought to be, they can contribute to strengthen the understanding that IFIs have human rights obligations. To date, the World Bank Inspection Panel prides itself for at least once having raised the issue of human rights with the board, “a delicate topic for the Bank as well as for the Panel” in the words of the Panel itself (Inspection Panel 2003, p 96). When presenting their conclusion regarding a pipeline in Chad, the chairman of the Panel told the World Bank board that he considered human rights to be “implicitly embedded in various policies of the Bank” and hence “within the boundaries of the Panel’s jurisdiction” (Inspection Panel 2003, p 97).

Still, in general, the internal control mechanisms are too weak to foster respect for human rights in the IFIs, and this is not their only weakness. The fact that the World Bank Inspection Panel reports to the board of the institution leaves the final decision in the hands of the share holders whether to investigate a complaint, or not. Likewise, if the panel, after investigating a complaint, finds that the World Bank is violating its own rules and regulations, the final say is left with the board, which may or may not agree with the panel ruling.

At the IFC, the formal set-up is different, but equally problematic. The Compliance Advisory Ombudsman reports directly to the President of the World Bank (who also is the President of the IFC) and not to the board, which means that it is less independent from the staff of the

⁷ The resolution establishing the panel was agreed to by the board of the World Bank on September 22, 1993; see Inspection Panel (2003), Annex VII-A.

institution than the Inspection Panel. Furthermore, the CAO has conflicting roles in that it *simultaneously* is advising the management of the IFC *and* evaluating the activities commissioned by the very same management. This has been criticized for damaging the integrity of the CAO, thus limiting the usefulness of its control over the IFC operations. Similar control mechanisms at other development banks have avoided such confusing roles. (Dysart et al 2003).

A further step must be taken: evaluating the policies of the IFIs as far as their human rights obligations are concerned cannot be limited to an internal process within the institutions themselves, but needs to be transferred to an independent entity where the evaluation takes place in a transparent manner and with adequate representation for the peoples affected by the policies and activities of the IFIs

Thirdly, the IFIs must fulfil their obligations as bearers of human rights obligations to report to the relevant instances of the UN, a duty which not even all countries uphold today.

Fourthly, the whole set-up of safeguards, operational policies and performance standards has to be rewritten with human rights at the centre of attention. This would allow the IFIs to evaluate their own performance against internationally agreed standards, and not just against their own more or less informed rules and regulations. Likewise, it would authorize the IFIs, and especially the IFC, to hold all its commercial partners responsible for human rights violations.

An example of what this would mean was recently underlined by the UN independent expert on the effects of economic reform policies and foreign debt argued in favour of a new approach for defining debt sustainability and appropriate debt cancellation. Creditor countries, and IFIs, should secure that

“compliance with the commitments arising from foreign debt does not undermine the capacity of States to fulfil their obligations for the full realization of fundamental human rights.” (Human Rights Council 2008, p 2)

This is along the lines of an argument already presented above: the member states of the IFIs have a responsibility not to hinder other countries from fulfilling their duties to respect, protect and fulfil human rights. Or in other words, debt sustainability must be defined taking human rights obligations of debtor countries into account, not by calculating how much money countries can afford to pay without going bankrupt. In the words of the independent expert (Human Rights Council 2008, p 13):

“The central issue to be tackled would, therefore, be how to secure a sufficient fiscal space to respect human rights standards while receiving financial assistance with non-disabling repayment obligations.”

Fifthly, a central human right is access to information, in its own right and also since it may facilitate the realization of other rights.⁸ Today, the IFIs claim that they have the right to limit such access with reference to states' interests or MNEs' commercial needs, but by accepting the standards established by the Global transparency initiative regarding the right to information, the IFIs could strike a balance between conflicting rights and thus contribute to spreading acceptable international norms in conformity with their human rights obligations. (Global Transparency Initiative 2006)

Here, the internal disclosure policy of the World Bank is found to be seriously flawed, with a presumption of non-disclosure of information. By contrast a rights based approach, accepting the right to information, would turn the logic around: information shall be made available unless there are reasons not to, in other words a policy based on disclosure.

It should be noted that the World Bank, although falling short of what a rights based approach would minimally require, still is far ahead of the IMF.⁹ Out of the nine principles that the Global Transparency Initiative have established, the IMF fails totally to meet five, and only partially meets the remaining four. The World Bank fares slightly better: three unacceptable principles and the rest need improvement. (See Figure 2) In other words, the IMF is even farther away from what a rights based perspective requires than the World Bank.¹⁰

Finally, WB standards have an influence beyond the institution itself in that they impact on internationally agreed standards, which are becoming international law. Hence, their norms are not just an internal affair of relevance only to the IFIs themselves. Firstly, because the preamble of the UDHR (already quoted above) states that every organ of society has a duty to promote the respect for human rights. And, secondly, as the IFC performance standards have

⁸ UDHR Art 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

⁹ The absence of disclosure of information has been made a principle which is considered to strengthen the IMF. In 1999, the IMF reaffirmed its policy of "not voicing 'reservations or divergent views [which might] reveal the absence of full consensus [in the board, which in turn] could potentially weaken the objective of building confidence in the member's program.'" (Independent Evaluation Office 2008, p 8)

The IMF is not becoming more transparent over time, either. Earlier, a "presumption of disclosure" existed at the IMF in regard to the so called Article IV reports (where IMF staff evaluates the economic policies of member countries on an annual basis, see www.imf.org/external/ns/cs.aspx?id=51), and countries had to request secrecy in writing. In 2004 this was switched around to a presumption of secrecy: now countries have to request disclosure for the reports to become available. See www.brettonwoodsproject.org: "Transparency at the World Bank and IMF", October 9, 2008.

¹⁰ A case in point that shows the importance of transparency: neither the World Bank nor the IMF make public board discussions in a way that discloses country positions. But there exists a "key" that can open the seemingly unintelligible protocols. This is how the IMF board protocols should be interpreted: When it is stated that "a few executive directors were of the view that..." this means 2-4 directors; "some" = 5-6 directors; "a number" = 6-9 directors; "many" = 10-15 directors; "most" = 15 or more directors; "nearly all" = about 20 directors; and "the view is held that" = USA. When this "key" was established, in 1983, there were 22 executive directors; their number was later increased to today's 24.

Similarly, the word "consensus" in IMF board protocols needs an explanation. It was early on – already in 1947 – defined to mean "a position by a majority, but not by all directors"; later that year it was decided to substitute "sense of the meeting" for "consensus"; "sense" was then defined as "the position supported by Executive directors having sufficient votes to carry the question if a vote were taken." See Independent Evaluation Office 2008, notes 24 and 19 respectively.

been accepted by over 60 commercial banks, the so called Equator Banks (see www.equator-principles.com). This multiplies the importance of the policies and rules of the of the IFIs, especially considering the fact that the Equator Banks account for more than 70 percent of all project finance in emerging markets. (Bank Information Center et al 2008, p 2).

Figure 2. Transparency scorecard 2008

Transparency principle	IMF	World Bank
The right to access information	Unacceptable	Needs improvement
Automatic disclosure	Needs improvement	Needs improvement
Access to decision making	Needs improvement	Needs improvement
Right to request information	Unacceptable	Unacceptable
Limited exceptions	Unacceptable	Unacceptable
Appeals	Unacceptable	Unacceptable
Whistleblower protection	Needs improvement	Needs improvement
Promotion of freedom of information	Unacceptable	Needs improvement
Regular review	Unacceptable	Needs improvement

Source: Global Transparency Initiative 2008

An example: the right to free and informed prior consent is a principle of international human rights law established by ILO Convention 169.¹¹ When this principle appears in the Operational Policy of the World Bank and in the Performance Standard of the IFC, the requirement of “consent” has been watered down to “consultation” (which neatly allows the IFIs to keep the same acronym, FPIC, for two very different principles).

It can easily be seen that a transformation of the operational guidelines of the IFIs in conformity with international human rights law would have a great impact on their day-to-day business. Take the issue of “ownership”, the principle that it is the countries concerned that should “own” the policies implemented (poverty reduction strategies, privatizations, deregulations, etc). However, we know that this is frequently not what takes place: in real life the IFIs impose their policy prescriptions as conditionalities.

By applying a human rights perspective, we can add that we should not only be concerned that the IFIs are forcing countries to adopt policies which contradicts the claim that ownership is a leading principle; equally important is that the policies which are in fact put into place respect, protect and contribute to fulfilling the human rights obligations of the countries in question.

But does this not imply that if the IFIs give more attention to human rights, they are in fact applying a kind of human rights conditionality, equally oppressing as any economic policy

¹¹ ILO Convention 169 on Indigenous and Tribal Peoples states in Article 6:2: “The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”

conditionality? No, this is not the case since human rights conditions only hold countries accountable for obligations that they themselves have agreed to by signing the human rights conventions. Thus, by forcing the IFIs to accept their human rights obligations – to respect and to protect – countries like Sweden can assure that they are not hindering or weakening the human rights obligations of other member states.

Sweden's foreign policy and human rights

2008 was a busy year for the Swedish government when it came to dissociating itself from some of its human rights responsibilities, particularly concerning the IFIs. As we have seen, the government reiterates the by now abandoned position – even by the World Bank itself – that the World Bank is hindered by its statutes to take human rights into account. (Government of Sweden 2008a).

The position paper regarding aid in support of democracy was preceded by a government paper (riksdagsskrivelse) outlining the overall relationship between Swedish foreign policy and human rights (Government of Sweden 2008). This policy paper is remarkable as it disregards the interlink between the two main human rights conventions, the Convention for Civil and Political Rights (CPR, 1976) and the one concerning Economic, Social and Cultural Rights (ESCR, 1976). These conventions are seen by human rights law as mutually supportive, and no serious human rights discussion would favour one before the other (e.g. by arguing in favour of CPR at the expense of ESCR, or vice-versa).

The Swedish government pays lip-service to this principle, but when it comes to the formulation of policies, *all* of the eight priority areas identified for action belong to the political realm (i.e. the CPR) and *none* to the economic and social sphere (i.e. the ESCR). The priority areas include democracy, freedom of expression, death penalty, torture, executions, and discrimination. In effect, this means that Sweden here sides with the USA, which so far has refused to ratify the ESCR convention.¹²

With this policy stance in mind – political and civil rights are more important than economic, social and cultural rights – it is perhaps no wonder that Sweden does not apply human rights considerations to the IFIs, since these institutions primarily deal with the ESCR, i.e. with the rights that are of least concern to the Swedish government. One instance, where Sweden could have applied human rights principles but missed the opportunity, was the recent replenishment of funds to the International Development Association (a part of the World Bank which extends loans to the poorest countries of the world). Another case in point has been the recurrent undemocratic processes of appointing the President of the World Bank, a right which the USA has reserved for itself all along the sixty plus years of the existence of the institution; the European countries have the same monopoly position regarding the

¹² A similar disconnect is evident in the government publication commemorating the 60 years anniversary of the UDHR: "So what has the highest priority?" (Så vilket är då viktigast?, Government of Sweden 2008b) where a number of invited writers express their personal opinion about the declaration and human rights. None of the contributions deal with the economic, social and cultural rights. This confirms the impression that the government of Sweden holds that only the civil and political rights should be given priority in Sweden's foreign policy.

appointment of Managing Director of the IMF). Sweden has so far accepted this “gentlemen’s agreement”, which leaves the majority of the owners of the institutions with no say over the election of the most important officers of the IFIs.¹³

The position of the Swedish government confirms an opinion that was transmitted to me in Washington, DC in 2007, when I interviewed staff of the World Bank and the IFC (including staff at the World Bank Inspection Panel, the World Bank legal department, the IFC Compliance Advisory Ombudsman, and the legal department of the IMF). The owners of the IFIs are very reluctant to take human rights obligations seriously, they reject the notion that international institutions have obligations of their own, which has led the World Bank previous legal counsel’s opinion (see above) to be known as a “non-position” due to the fact that neither the board nor the management of the World Bank has discussed it, much less endorsed its conclusions.

The Swedish government positions itself in this not too rights-friendly group by opting for a non-position of its own. After presenting the statutes of the World Bank in anti-rights light, it confusingly states, without presenting any conclusion:

“For a long time there has been an argument in the [development] banks and among the member countries of the banks concerning whether democracy and human rights should be considered to be political interference, or not. Thus, it is of high importance that Sweden makes a strategic choice deciding how we will deal with this issue.”¹⁴

No such choice is presented, and we still do not know what the Swedish government has opted for, if anything. But it is not only the absence of clarity which is important here, although it is alarming. Sweden fails to recognize the obligations that it itself holds after having acceded to and ratified the human rights declarations and conventions.

In contrast to states who want to break the development of human rights law in the day-to-day operations of the IFIs, I was told in Washington, DC, that MNEs as well as the Equator Banks are more inclined to behave pro-actively in order to avoid being criticized for violating human rights in the course of conducting their business activities. Some of the Equator Banks, e.g. Barclays, Standard Chartered, Citigroup and Rabobank, have all been more explicit in their human rights obligations than required by the IFC sets of rules. Thus, human rights activists and legal scholars alike may have an ally in the international business community when it comes to promoting human rights obligations of international financial institutions.

¹³ The World Bank has recently expressed a wish to see “a merit-based, transparent and open selection process for the Bank’s President”. (World Bank 2008, p 22). Such a process may lead to the selection of a president for the World Bank who is not a US citizen, for the first time since the institution was founded 64 years ago.

¹⁴ Government of Sweden 2008a, p 71. The confusion is no less if you go by the Swedish original: ”Därmed är det viktigt att Sverige strategiskt väljer på vilket sätt vi arbetar med denna fråga.” And the conclusion?

The foggy wording of the Swedish government is also unacceptable on account of the need that exists to strengthen the human rights in the IFIs, as evidenced by a study that links complaints raised with the IFC Compliance Advisory Ombudsman, as well as with a number of similar complaints mechanisms, by affected communities.¹⁵ All in all, 61 complaints have been analysed, and in the majority of cases violations of one or several central human rights were implicated (see Figure 3). A majority of complaints cover at least four essential human rights.

Figure 3. Rights violations implicated in 61 cases

Rights	No of cases
Right to food	46
Right to property	44
Right to life	43
Right to health	37
Right to housing	28
Right to adequate standard of living	26
Right to freedom of movement	15
Right to freedom of torture	13
Right to culture	12
Right to freedom of opinion/religion	9
Right to assembly	5
Right to be free from forced labour	5
Right to participate in government	4
Right to work	1
Right to family life	1
Right to privacy	1
Right to fair trial	0
Right to intellectual property	0
Right to education	0

Source: Bank Information Center et al 2008

From this study it should be obvious, at least, that there is no foundation for the option picked by the Swedish government only to care about civil and political rights. Just as in the Universal Declaration of Human Rights, economic, social and cultural rights are present on an equal footing with the civil and political rights. There simply is no ground, legally, for separating the two human rights conventions from each other. While all human rights may not be equally important, civil, political, economic, social and cultural rights all have the same status.

¹⁵ In addition to complaints lodged with the IFC CAO, complaints with the OECD National Contact Points for the Guidelines for Multinational Enterprises and Oxfam Australia's Mining Ombudsman are included in this study, as are Bank Information Center's "Problem Projects", "Dodgy Deals" compiled by Bank Track and field investigation reports of civil society organizations that monitor projects.

Where do we go from here?

IFIs

Although it is clear that governments have the main responsibility to respect, protect and fulfil the human rights of their citizen, they are not the only bearers of human rights obligations, IFIs and multinational enterprises also have such (albeit different) obligations.

Three steps are central for IFIs at this juncture (Bank Information Center et al 2008):

- IFIs should openly and clearly accept international human rights obligations, including the obligation to protect human rights (and not only to respect).
- IFIs' assessment of projects and their outcomes should include their human rights impacts. This means that almost all of their safeguards must be reworked.
- Grievance mechanisms, such as an Ombudsman institution, must be based on international law and not upon the internal rules and regulations of the IFIs themselves.

States as owners of IFIs

Necessary change is not limited to the IFIs, but must also encompass their owners.

As a first step, states should make human rights responsibilities an explicit condition for future financial contributions to the IFIs (see Kennan 2008). Unfortunately, one such ideal occasion went unutilised by Sweden recently, when the World Bank agency International Development Association received 6 billion SEK 2008-2017 (approximately 600 million Euro) without Sweden establishing any conditions at all for its support.¹⁶

While individual states can mandate their export credit agencies to respect and protect human rights in their daily operations, a similar move has to be a joint undertaking by the major owners of the IFIs. Nevertheless, also individual member states may make their contributions conditional upon compliance with the members' own human rights obligations. As explained by a 2005 Guiding Note on the Human Rights Act by the UK Department for International Development, DFID (quoted by Salomon 2007 p 24):

“As a public authority, DFID is legally bound by the Human Rights Act. This means that if an act (or failure to act) by DFID, through its Ministers or staff, is incompatible with a Convention right, DFID acts unlawfully and a ‘human rights claim’ can be brought against the Secretary of State. It is therefore important that you are aware of the Human Rights Act and can spot potential problems before they arise. [...] Decisions related to our external programmes,

¹⁶ Press release, Ministry of Foreign Affairs, 24 October 2008. No mention of human rights was made in this connection.

as well as our internal arrangements, must be carefully considered from a human rights perspective.”

The conclusion here is quite straightforward: executive directors, acting on behalf of member countries in the boards of the World Bank, the IFC and other IFIs, are bound to comply with the human rights obligations of the states they represent. Furthermore, a vote cast or approvals voiced constitute “state actions” subject to international human rights law. (Salomon 2007, pp 24-25).

How large is the share of responsibility thus accrued by a government on account of the decisions made and/or accepted by its representative on the boards of the IFIs? A suggestion presented is that this responsibility should be in relation to ownership; hence a five percent share of voting stock would amount to an equal share of responsibility for violations or neglect of human rights responsibilities. (Gibney 2008, p 47). This may sound strange, but it is in conformity with the logic voiced by some member countries for accepting their “fair” share of the costs of cancelling unserviceable debts of the IFIs.

However, small share holders like Sweden, with only one percent of the ownership, would then only be held marginally responsible, which I believe would be contrary to the common understanding of what human rights obligations entails. But it does seem reasonable that Sweden should accept an overall responsibility not only for bad loans, but equally for the disrespect of human rights, as well as for the failure to protect rights being violated by third parties (e.g. MNEs), that the policies of the IFIs have brought on. After all, such responsibilities are part and parcel of what the signing of the human rights declarations and conventions means.

Sweden

Sweden must acknowledge the overriding duty to promote respect for human rights and freedoms as an obligation which must be at the centre of its political concern when it comes to formulate foreign policies.

Likewise, Sweden must in practice accept that the various human rights instruments constitute a mutually supporting set of international binding law, which Sweden is not allowed to pick and choose from as if it were a smorgasbord.

Furthermore, Sweden should not side with the limited and outdated perception that the statutes of the IFIs hinder them from acknowledging their human rights obligations, that they allegedly are prohibited from taking human rights consideration. As we have seen, this is no longer the position of the World Bank or the IFC, since they both have included human rights into their safeguards (although far from sufficiently), and since a former legal counsel has acknowledged that the World Bank is permitted and sometimes obliged to accept its human rights obligations. This is also the position that is gaining ground in the UN human right system. Sweden should not fight this development but on the contrary support it.

To put pressure behind words, Sweden should then utilize its position on the boards of these IFIs to argue in favour of human rights, thus enabling its IFIs to fulfil their human rights obligations, while simultaneously fulfilling its own.

Likewise, when new finance is put at the disposal of the IFIs, and when Sweden supports the various debt rescheduling mechanisms that today are accompanied by inappropriate forms of conditionality (i.e. by conditions that do not consider their human rights impact, nor their economic or social outcomes).

As Margot Salomon (2007, p 25) puts it, against the background of repeated judgments of the European Court of Human Rights:

“human rights responsibilities of member states continue even after the transfer of competences to international organisations.”

This gives us yet another – and hopefully a final – argument for the position that states have extraterritorial human rights obligations. And that those obligations extend to the international financial institutions as well.

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