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INTERNATIONAL FINANCIAL INSTITUTIONS S & HUMAN RIGHTS LAW
Legal Analysis by the Center for International Environmental Law[♣♦]

International Financial Institutions (IFIs) are international organizations created and governed by member States, and they have distinct legal personality under international law. This basic description allows us to examine certain legal issues relevant to IFI's responsibilities with respect to fundamental human rights. In this regard, this section will address three distinct baskets of issues: first, issues concerning the international legal personality of IFIs; second, issues of State responsibility in regards to IFI operations; and third, issues of IFI responsibility at international law. These three baskets will shed further light on the potential roles that the Commission may play with regard to IFIs and human rights, addressed in our next section.

1. IFIs International Legal Personality

The starting point in the legal analysis of the linkages between IFIs and human rights concerns the IFI's international legal personality. As creatures of international law, IFIs are inextricably linked to the international legal order, including *erga omnes* and peremptory norms. This conclusion of law flows very clearly from the International Court of Justice's advisory opinion in the *Reparations* case, and then reinforced in its Advisory Opinion in the *WHO and Egypt case.* In this case, the Court declared that,

> "[i]nternational 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 constitutions or under international agreements to which they are parties."[1]

This conclusion of principle has been endorsed by virtually all qualified publicists that have examined the question. For example Thomas Buergenthal, former President of the Inter-American Human Rights Court and now Judge of the International Court of Justice, has written that that the World Bank has obligations that arise under the United Nations Charter and other human rights treaties.[2]

♣ This analysis was prepared by Marcos A. Orellana, Senior Attorney, Center for International Environmental Law (CIEL) and reviewed by Anne Perrault and Daniel Magraw from CIEL.

♦ This presentation forms part of a collaborative effort between the Indian Law Resource Center, OxfamAmerica and CIEL. The presentation of this legal analysis follows previous speakers at the hearing that have addressed: general issues concerning IFI responsibilities; particular examples of problem projects; and a general description of IFI operational policies and inspection mechanisms.

[1] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, 73 at 89-90.

[2] Thomas Buergenthal, *The World Bank and Human Rights in* E. BROWN WEISS, A. RIGO SUREDA & L. BOISSON DE CHAZOURNES (EDS.), THE WORLD BANK, INTERNATIONAL FINANCIAL INSTITUTIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW (1999).

Perhaps because the International Bank for Reconstruction and Development – the World Bank – was established before the advent of international human rights law, and perhaps because many regional multilateral development banks followed the World Bank's model, IFI charters are generally silent on the issue of human rights. This silence does not mean, however, that IFIs are barred from considering human rights in their operations. In this vein, to the extent that charters define the sphere of legality for the acts of an international organization, the examination of how IFI charters relate to human rights can illuminate IFI responsibilities in this area.

A critical and distinct feature of IOs as subjects of international law is that they can legally operate only within the orbit of their mandate, as defined by their charters. Each IFI's mandate is unique and is defined by its charter, as interpreted and applied in practice. In fact, over time IFIs have re-interpreted their charters to include in their mandate issues which link directly with human rights, such as poverty alleviation, development, and good governance.

To the extent that an IFI charter prohibits the organization from engaging human rights considerations in its activities, the IFI Charter itself could be found to be incompatible with the general body of international human rights law, including *ius cogens* norms. Such finding would carry important consequences for the legitimacy of the IFI in question, as well as for the responsibility of States that act within it. We note that there is no IFI charter that expressly prohibits considerations of human rights. We also note, for example, that according to its charter, respect for human rights is one of the central purposes of the countries that established the European Bank for Reconstruction and Development.[3]

The case of the World Bank is also instructive because it is re-considering its position vis-à-vis human rights. The discussion starts with the Bank's Articles of Agreement, *i.e*., its charter, which provide that,

> "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I." (Article IV.s10)

This provision, which does not expressly deal with human rights, was interpreted in 1990 by the then-General Counsel of the World Bank, Mr. Ibrahim Shihata.[4] In Shihata's view, the Bank's Articles exclude political considerations and "prohibit [the IBRD and IDA] from taking non-economic considerations into account".[5] However, despite such a bright line rule on paper, the Bank had recognized that in reality, economic considerations may be "difficult to isolate from political considerations", especially in "policy based" lending.[6] Indeed, some "internal or external

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[3] Agreements Establishing the European Bank for Reconstruction and Development, Preamble (Committed to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics [...].).
[4] Generally, a legal opinion by the General Counsel of the World Bank is a tool to guide the legal department and Bank staff with respect to the interpretation and application of internal or external issues of law.
[5] Shihata, *Governance*, at pg. 65.
[6] *Id,* at pg. 71.

political events may have significant direct economic effects which, due to their economic nature, may properly be taken into consideration by the Bank." One of these is the issue of "governance."

Mr. Shihata argued that the Bank may only consider human rights through the narrow nexus of economic and political considerations that touch on general issues of good governance. The result was that the Bank bifurcated human rights into civil and political rights (which it thought was barred from considering) and economic and social rights, where the Bank has played "a very significant role,"[7] including the "right to development", "freedom from poverty," and access to health, education and the environment, among other economic and social rights.[8] "The Bank's practice [has been that] respect paid by a government to political and civil rights … has not been considered … a basis for the Bank's decision to make loans to that government."[9]

In the XXIst Century, an interpretation of the charter that bars human rights considerations from Bank activities is no longer tenable. This view has more recently been endorsed by the outgoing Legal Counsel of the World Bank in 2006, who released a legal opinion that recasts the relationship between human rights and national sovereignty, noting that "the balance has ... shifted in favor of protecting human rights."[10] The legal opinion also observes that,

> "Consequently, there are instances in which the Bank *may* take human rights into account, and others in which it *should*. Indeed, there are some activities which the Bank cannot *properly* undertake without considering human rights."[11]

While this analysis has focused on the World Bank, this conclusion is even more cogent with respect to the Inter-American Development Bank (IDB) because it is immersed in the legal context and juridical space defined by the OAS Charter, which expressly mandates the Commission to promote the observance and protection of human rights.

The question that immediately arises in regard to the human rights obligations incumbent upon IFIs concerns the mechanisms established to discharge these obligations. In this context, it must first be noted that IFIs have not directly and explicitly established mechanisms for the promotion and protection of human rights. While safeguard policies examined earlier contain some elements of human rights, these policies have not been designed to reflect human rights standards and in many ways fall short of human rights protections. Similarly, accountability mechanisms have not been designed to provide an effective remedy for human rights violations. This assessment of the deficiencies apparent in the policies and inspection mechanisms has also been found by the UN SG Special Representative on the issue of human rights and transnational corporations and other business enterprises.[12] The fact that IFIs internal mechanisms cannot be deemed "equivalent" to the mechanisms established in the universal and regional systems of human rights protection is an issue of particular consequence to the responsibilities of States controlling IFIs, addressed further below.

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[7] Shihata, *Human Rights Article*, pg. 109.
[8] *Id,* at pgs. 116-129
[9] *Id,* at pg. 83.
[10] Roberto Dañino, *Legal Opinion on Human Rights and the Work of the World Bank,* January 27, 2006. at para. 17.
[11] *Id*, at para. 18.
[12] John Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97 (2006) para. 53.

In sum, the examination of the first basket of issues relating to IFI international legal personality leads us to conclude that: (1) IFIs, by virtue of their international legal personality, cannot escape human rights obligations; (2) IFIs have been reluctant to recognize human rights obligations in the civil and political arena; (3) IFIs internal mechanisms, including operational policies and inspection mechanisms, are not equivalent to universal or regional mechanisms for the protection of human rights.

2. Responsibility of States acting in IFIs

If IFIs are bound by human rights law but are reluctant to either recognize this responsibility or to set up mechanisms to ensure the protection of human rights, then, what is the responsibility of States controlling IFIs? This questions leads to the examination of our second basket of issues relating to State responsibility in cases of violations of rights resulting from IFI projects and activities.

We submit that the State responsibility for human rights violations resulting from IFI activities can be addressed from three perspectives. First of all lies the responsibility of a State that participates in the IFI's decision-making structures. Second of all lies the responsibility of a State that directly contracts with an IFI. And finally lies the responsibility of a State that permits private parties to implement IFI-funded projects in its jurisdiction.

The second and third perspectives raise issues that are not significantly different from issues concerning State responsibility generally. Where a State contracts with an IFI or otherwise permits an activity in its jurisdiction that is funded by an IFI, it is subject to the same obligations to observe human rights. With regard to industrial projects, for example, the State would thus be obliged to, *inter alia:* conduct an environmental impact assessment (EIA) of the project, establish an adequate regulatory framework, monitor the implementation of the project, and diligently pursue any breaches of internal laws and regulations.[13]

In contrast, the situation in which the State participates in the decision-making structures of an IFI raises more novel issues. First of all, the approval vote by a State remains a State act, and thus subject to human rights law and the general law on State responsibility. This conclusion of principle has been challenged, however, on the basis that the IO enjoys distinct international legal personality. Because of this distinct personality, the argument goes, the decisions adopted by the IO's organs can be attributed to the organization, but not to the States that participated in the IO organs. This argument, however, fails to distinguish between the act of the State and the act of the IO. The question is not one of attribution of the IO's act to the State, but rather of the responsibility of the State for its own act. Further, this argument creates a legal limbo, one where States control IOs but are immune of legal responsibility for the consequences of such control. It appears that the better approach is to recognize both the responsibility of the State for the acts of its organs, *e.g.*, an executive director that votes to approve a project, as well as the responsibility of the IFI for the acts of its organs, *e.g.*, a board of directors that approves a project.

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[13] African Commission on Human and Peoples' Rights, The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Comm. No. 155/96, ¶ 53, (2001); Oneryildiz v. Turkey, 39 Eur. H.R. Rep 12 (2004), at ¶¶ 89, 90; Fadeyeva v. Russia, Eur. Ct. H.R., June 9, 2005, at ¶ 89.

The related notions of causality and equivalence may shed further light on the question of State responsibility for State acts in IFI organs. We will explore these issues in turn.

The notion of "causality" sheds light on the link between the State's vote in an IFI Board of Directors that approves a project and any resulting infringement of human rights resulting from the project. It is submitted that this causal link exists because the State's approval of a project is a necessary step in a series of stages that lead toward the implementation of the project on the ground. Within this chain of causality and inter-connected steps, the IFI will act as a vehicle to the materialization of the State's approval of the project. Consequently, there is a causal linkage between the State's approval of a project and any human rights impacts resulting from the project.

The notion of "equivalence" also illuminates the analysis on State responsibility for State acts within IFI organs. The notion of "equivalence" has been elaborated in the jurisprudence of the European Court of Human Rights, which has addressed cases involving the responsibility of the State for acts of international organizations. Under the criterion of "equivalence", the Court will evaluate the mechanisms established in the IO for the protection of human rights, and a rebuttable presumption of legality will be established,

> "[…]as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."[14]

It follows that under the criterion of "equivalence", States are under a duty to ensure that operational policies and inspection mechanisms reflect, and do not fall below, human rights standards. It also follows that the human rights courts can evaluate whether an IFI has adequate and effective mechanisms for the protection of human rights.

The notion of equivalence is also of consequence to issues of foreseeability. In this context, States evaluating whether to vote in favor or against a project will generally rely on the reports prepared by the IO staff. In this regard, the IFI itself and not individual States should establish protection mechanisms: *inter alia*, conduct and EIA; ensure adequate supervision of project implementation; and investigate and remedy any infringement of human rights. While there have been instances, as in the *BíoBío case* discussed earlier, where IFI staff have deliberately misled Board Members as to the social and environmental implications of the project,[15] it could be argued that States have a legitimate expectation that a project submitted by IFI management to their approval or rejection does not compromise human rights and otherwise complies with internal operational policies.

This expectation, however, is not fully warranted in the IFI context, because IFIs generally have not explicitly and directly addressed the human rights implications of their work. Rather, the fact that operational policies and inspection mechanisms are not substantively or procedurally

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[14] Bosphorus Airways v. Ireland, 45036/98 [2005] ECHR 440 (30 June 2005), para. 155-6.

[15] CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, *Indigenous Peoples, Energy and Environmental Justice: The Pangue/Ralco Hydroelectric Project in Chile's Alto BíoBío* (2004).

equivalent to the guarantees offered by the universal and regional mechanisms for the protection of human rights means that a State cannot escape its responsibility by claiming that it relied on the IFI's assessment or that impacts were not foreseeable.

To sum up the analysis of this second basket of issues concerning State responsibility, the following conclusions are warranted: (1) in cases where the State contracts with an IFI or permits an IFI-funded project in its jurisdiction, the State can be held responsible under general rules of State responsibility; (2) in cases where a State participates in the IFI decision-making structure that results in human rights violations, it may be held internationally responsible; and (3) States are under an obligation to ensure that the IFI has in place the required mechanisms to guarantee substantive and procedural observance of human rights.

3. IFIs Responsibility at International Law

Having examined issues concerning State responsibility, the third basket of issues relates to the responsibility of the IFI at international law for breaches of human rights law. This is an area that is evolving and thus the Commission could make a particularly significant contribution to strengthening the mechanisms of human rights protections in situations involving IFI-funded projects.

As a matter of principle, as observed by the UN International Law Commission, the violation of an international obligation by an international organization attracts its international responsibility.[16] Thus, generally stated, in cases where IFIs have failed to respect human rights, they attract their international responsibility, including the obligation to provide reparation.

Similarly, the International Law Association Committee on the Accountability of International Organizations has noted that the characterization of an act of an IO as internationally wrongful is governed by international law and that such characterization is not affected by the characterization of the same act as lawful by the IO's internal legal order.[17] In other words, regardless of whether a project complies with operational policies, it can engage the responsibility of the IFI if it infringes on human rights. This conclusion is all the more relevant to IFIs, in light of the fact that their internal operational policies and investigation mechanisms are not equivalent to human rights mechanisms of protection.

In the context of implementation, certain IFIs are starting to recognize the relevance of human rights considerations in their activities. For example, the new Performance Standard on Labor and Working Conditions of the World Bank's private-sector arm, the International Finance Corporation, is based in part upon the ILOs core labor standards.[18] Similarly, the IFC is preparing a guide to human rights impact assessment.

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[16] ILC Report, A/58/10, 2003, paras.41-54; ILC Special Rapporteur, *First Report on responsibility of international organizations*, 26 March 2003, A/CN.4/532, Article 3; ILC Drafting Committee, *Titles and texts of the draft articles 1, 2 and 3 adopted by the Drafting Committee*, A/CN.4/L.632.

[17] Report of the Seventy-First Conference, Berlin, Aug. 16–21, 2004 Final Report of the International Law Association Committee on Accountability of International Organizations, 27.

[18] International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, 7 (April 2006).

The fact that some IFIs are beginning to discuss their roles with respect to human rights is highly significant for the role of the Commission vis-à-vis IFIs. In this regard, the legal basis for a strong role for the Commission regarding IFIs is established on the following ground: the fact that the Commission is the principal specialized organ of the Organization of American States responsible for promoting human rights in the Americas leads to a recognition of the role of the Commission in relation to IFIs that operate in the Americas. By virtue of the OAS Charter, all OAS Member States are bound to observe the rights recognized by the American Declaration on Human Rights.[19] Similarly, when an IFIs decides to fund a project in an OAS Member State, it subjects itself to the public international order governing human rights in the Americas, including *erga omnes* obligations. Thus, given the Commission's chief responsibility to promote human rights in the OAS system, it can directly engage IFIs that threaten or compromise fundamental rights.

To sum up, the Commission, by virtue of its mandate, the OAS structure, and the American Declaration, is empowered to hear petitions directly involving IFI responsibilities. Also, the Commission can scrutinize whether a State's behavior is compatible with its human rights obligations, including in respect of its approval of IFI projects. Further, the Commission can also evaluate whether IFI internal policies and procedures ensure continued performance of human rights obligations.

We are aware that these conclusions open new ground in the roles that the Commission could play in regard to IFI-funded projects. With that in mind, it is only proper to further elaborate on these potential roles, to which my colleague from Indian Law Resource Center turns next. Thank you.

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[19] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, July 14, 1989, Inter-Am. Ct. H.R. (Ser.A) No.10 (1989).