



**The Role and Responsibilities of International Financial  
Institutions with Respect to Human Rights and Their  
Relevance to the Private-Sector**

A Submission to the U.N. Special Representative  
to the Secretary General on Human Rights and  
Transnational Corporations and other Business Enterprises

Bank Information Center  
February 2007

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**AMPLIFYING LOCAL VOICES TO DEMOCRATIZE DEVELOPMENT**

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# **The Role and Responsibilities of International Financial Institutions with Respect to Human Rights and Their Relevance to the Private-Sector**

## **I. INTRODUCTION**

This submission to the United Nations Secretary General's Special Representative on the issue of human rights and transnational corporations and other business enterprises (Special Representative) addresses the role and responsibilities of international financial institutions (IFIs) as financiers of private-sector projects that may entail risks of human rights violations.

The Special Representative has expressed his keen interest in the important role that financial institutions can play in defining and promulgating human rights standards for the companies that they finance.<sup>1</sup> In his *Interim Report*, the Special Representative noted that the policies financial institutions have adopted to control their exposure to environmental and social risks have had important spillover effects in reducing human rights violations by their clients.<sup>2</sup> In order to explore how financial institutions can be a more effective vehicle for improving human rights practices, the Special Representative has decided to convene a consultation on "Human Rights and the Financial Sector" on February 16, 2007, in Geneva Switzerland. We hope that this submission will be a useful input into this consultation.

The Special Representative has also recognized that while the objective of his mandate is to "strengthen the promotion and protection of human rights in relation to transnational corporations and other business enterprises...",<sup>3</sup> he must pay due regard to the fact that "governments bear principal responsibility for the vindication of [human] rights."<sup>4</sup> Towards this end, the Special Representative has been specifically asked to "elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, *including through international cooperation.*"<sup>5</sup> (emphasis added). We believe that the question of how states address the human rights challenges of business operations through international cooperation necessarily raises issues regarding the proper role and responsibilities of multilateral institutions.

Given the Special Representative's interest in the opportunities and challenges presented by the financial sector, and his mandate to address the human rights obligations of governments when they cooperate through multilateral institutions, we believe that the

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<sup>1</sup> Interim Report of the Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises, at 11 (February 2006).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1.

Special Representative should closely consider the role and obligations of IFIs with respect to human rights. IFIs are public institutions that are owned and controlled entirely by their member governments. They have considerable impact and influence on the ways in which human rights are addressed by private-sector actors. First, they play a critical role in providing financing for high-impact, private-sector projects in weak governance zones. Second, one IFI in particular, the International Finance Corporation (IFC), has become the most influential generator of international standards regarding the responsibility of other project financiers to ensure acceptable environmental and social outcomes in the projects that they finance. Through the Equator Principles, IFC's environmental and social policies now apply to a large and growing segment of the global project finance market.

This submission addresses the relevance and responsibilities of IFIs in several parts. Part II explains the importance of IFIs as a financier of high risk projects and as a norm generator for the private sector, and thus their relevance to the Special Representative's mandate to "strengthen the promotion and protection of human rights in relation to transnational corporations and other business enterprises...."<sup>6</sup> Part III discusses the current practices of IFIs with respect to human rights. In particular, it highlights some of the ways in which their internally generated policies do not meet international human rights standards. Next, Part IV details the international law obligations of IFIs. It identifies and discusses a consensus among courts, UN entities, scholars and practitioners that IFIs are bound by general principles and customary norms of international law, including certain human rights norms. Finally, Part V offers some conclusions and recommendations. It finds that since the international legal obligations of IFIs are well established in international law, the central challenge in improving the impact and leveraging the policy influence of IFIs is to persuade them to implement their existing human rights obligations in a consistent and comprehensive manner. It also notes that the Special Representative may have a unique opportunity in this regard, and offers some recommendations on how he could help encourage IFIs to address their human rights obligations more comprehensively and effectively.

## **II. THE IMPORTANCE OF THE ACTIVITIES OF IFIs TO THE WORK OF THE SPECIAL REPRESENTATIVE**

### **A. The Role of IFIs in Financing Projects with Acute Human Rights Risks**

As a result of their development mandate and their unique niche in the private-sector project finance market, IFIs often play a key role in supporting projects that have particularly acute human rights risks. To maximize their development impact, IFIs tend to focus on countries, or sectors within countries, that lack sufficient access to private-sector capital,<sup>7</sup> and are prohibited (or strongly discouraged) by their charters from financing

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<sup>6</sup> *Id.*, at 2.

<sup>7</sup> International Finance Corporation, IFC Strategic Directions: Implementation Update and FY07-FY09 Outlook, i (April 11, 2006)

private-sector clients that could obtain adequate capital on reasonable terms.<sup>8</sup> This emphasis on underserved, “frontier” markets leads to greater exposure to human rights risks. Often, these countries, sectors and projects are not being served by the private capital markets precisely because they present political, social, and environmental challenges that exceed the risk tolerance of private-sector financiers. In those circumstances, the imprimatur of support from an IFI may be more important to the project sponsor than any financing the IFI may contribute, since IFI participation can provide a measure of political cover and risk assurance that makes it much easier for the project to attract support from the private capital markets. For example, the Exxon-led consortium that sponsored the controversial Chad-Cameroon pipeline would not have proceeded with the project had the World Bank and IFC not mitigated the political risks for the consortium by supporting the project, even though their financing amounted to only a small fraction of the overall project costs.<sup>9</sup> Similarly, World Bank Group support and political risk insurance helped to facilitate critical private sector financing for the controversial Nam Theun 2 dam in Laos.<sup>10</sup>

IFIs are therefore often linchpin financiers and catalysts for “high risk-high reward” development projects, particularly in countries with weak, corrupt or authoritarian governance. As such, their decision to pass on a project that they believe to be too risky to merit their support can play a decisive role in determining whether the project is likely to move forward. And where they do agree to provide financing, they have the leverage to ensure that appropriate safeguards are put in place to minimize risks that the project will adversely affect the human rights of their employees and members of the host communities.

## **B. The Role of the IFC in Setting Standards for the Private-Sector Project Financiers and Their Clients**

One IFI—the IFC—has also come to play a critical role in generating international standards regarding the responsibility of other project financiers to ensure acceptable environmental and social outcomes in the projects that they finance. Over the

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[http://www.ifc.org/ifcext/about.nsf/AttachmentsByTitle/Strategy\\_Dev\\_Paper\\_2006/\\$FILE/Strategy\\_Dev\\_Paper\\_2006.pdf](http://www.ifc.org/ifcext/about.nsf/AttachmentsByTitle/Strategy_Dev_Paper_2006/$FILE/Strategy_Dev_Paper_2006.pdf)

<sup>8</sup> International Finance Corporation, *Articles of Agreement*, Article III, sec. 3(i) (1993) (IFC “shall not undertake any financing for which in its opinion sufficient private capital could be obtained on reasonable terms”); Asian Development Bank, *Agreement Establishing the Asian Development Bank*, Article 14(v) (requiring the Bank “to pay due regard to the ability of the borrower to obtain financing or facilities elsewhere on terms and conditions that the Bank considers reasonable for the recipient...”); Inter-American Development Bank, *Agreement Establishing the Inter-American Development Bank Article 3, §7(a)(ii)* (as amended 1995) (requiring the IDB to “take into account the ability of the borrower to obtain the loan from private sources of financing on terms which, in the opinion of the Bank, are reasonable for the borrower....”) The degree to which IFIs actually respect these provisions is contested, as they often lend in emerging markets where private banks are also quite active.

<sup>9</sup> World Bank, *Chad-Cameroon Petroleum Development and Pipeline Project: Project Appraisal Document*, 22 (April 13, 2000).

<sup>10</sup> J. LESLIE, DEEP WATER, 220 (2005); <http://www.miga.org/sitelevel2/level2.cfm?id=1076>

past few years, many of the world's leading private-sector project financiers have agreed to follow the "Equator Principles," a set of environmental and social standards based on IFC's Performance Standards.<sup>11</sup> Signatories to the Equator Principles have agreed to require their clients to adhere to IFC standards regarding issues such as environmental and social assessment, indigenous peoples, labor protection and involuntary resettlement. The Equator Principles have quickly become the most important operational standards for the global project finance industry—the nearly fifty institutions that have now agreed to abide by the Principles arrange about 80 percent of global project finance loans by volume.

IFC's Performance Standards are also likely to be adopted as the common environmental and social standards for the public export credit agencies (ECAs) of the world's major industrial powers. The OECD countries are currently renegotiating their "Recommendations on Common Approaches on Environment and Officially Supported Export Credit." It is widely anticipated that they will follow the lead of the private-sector project financiers and harmonize the policies of ECAs with IFC's Performance Standards.

With both the private sector banks and the ECAs benchmarking their client's performance against IFC standards, the IFC will solidify its position as by far the most influential generator of soft-law environmental and social norms for international project and trade finance. Going forward, individual banks or ECAs will still have the prerogative to use other standards. But for the foreseeable future, industry-wide best practices will almost certainly be developed and promulgated in the first instance by the IFC.

### **III. WEAKNESSES IN THE CURRENT PRACTICES OF IFIS WITH RESPECT TO HUMAN RIGHTS**

Despite the fact that they play such an important role in financing high-impact projects in weak governance zones and in promulgating standards for the project financiers, no IFI has adopted a comprehensive human rights policy. True, most IFIs do have operational policies that address substantive areas that are also covered by internationally agreed human rights standards—such as labor, involuntary resettlement, and indigenous peoples. In some cases, these policies are consistent with international human rights standards. IFC's new Performance Standard on Labor and Working Conditions, for example, is based in part upon the ILOs core labor standards.<sup>12</sup> But as the Special Representative has noted about the policies of financial institutions generally, the policies of IFIs exhibit wide variability in how they address human rights issues, and too often fail to address important human rights values. And where they do address human

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<sup>11</sup> <http://www.equator-principles.com/>

<sup>12</sup> International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, 7 (April 2006).

rights concerns, they often employ definitions and standards that do not meet international human rights norms.<sup>13</sup>

Two examples should illustrate how the failure of IFIs to directly address human rights concerns compromises their ability to ensure that the projects that they finance do not cause human rights violations. First, while IFIs are increasingly requiring their clients to integrate social assessments into their environmental due diligence procedures, no IFI specifically requires its clients to assess potential human rights impacts. As the Special Representative's Discussion Paper on *Human Rights Impact Assessments* explains, generic social assessments can overlook "important human rights conditions that are embedded in a particular society, such as discrimination ... or restrictions on freedom of expression or collective bargaining."<sup>14</sup> Human rights impact assessments, on the other hand, "use international human rights standards (the Universal Declaration of Human Rights and International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights) as their framework, and assess the state of realization of a broad spectrum of rights...."<sup>15</sup>

Second, in addition to shortcomings in the assessment of potential impacts, there are also important weaknesses with respect to the substantive requirements of some human rights-related policies. The weaknesses with indigenous peoples policies are emblematic of the problem. Some IFIs—such as the European Investment Bank and African Development Bank have no indigenous peoples policies at all. Others, including the IFC,<sup>16</sup> European Bank for Reconstruction and Development,<sup>17</sup> and Inter-American Development Bank<sup>18</sup>—have explicit and relatively comprehensive indigenous peoples' policies that approximate international norms in many respects. But even these policies do not reference international standards, and arbitrarily define important concepts in ways that may not be as rights-protective as international agreements and jurisprudence. In particular, they largely eschew any reference to the rights of indigenous peoples to give their "free, prior and informed consent" to projects on their lands.<sup>19</sup>

IFIs also miss an important opportunity to "promote" human rights when they fail to make clear that their policies are intended to meet human rights norms as defined by relevant international agreements. Because of the influence and stature of IFIs, their operational policies often serve a normative and declarative function. By explicitly

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<sup>13</sup> Interim Report of the Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises, at 11 (February 2006).

<sup>14</sup> Office of High Commissioner for Human Rights, *Discussion Paper on Human Rights Impact Assessments*, at 2 (2006).

<sup>15</sup> *Id.*

<sup>16</sup> International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, 28 (April 2006).

<sup>17</sup> EBRD, *Environmental Policy*, 21 (July 2003).

<sup>18</sup> IDB, *Operational Policy on Indigenous Peoples* (Feb. 2006) <http://www.iadb.org/sds/doc/ind-pgn2386e.pdf>

<sup>19</sup> For a discussion of "free prior and informed consent in international law, see Forest Peoples Programme & Tebtebba Foundation, *Indigenous Peoples' Rights, Extractive Industries and Transnational and Other Business Enterprises: A Submission to the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises*, 45-48 (December 2006).

tethering its operational policies to international human rights standards, an IFI could make a powerful and influential statement about the nexus between human rights and a private-sector led approach to economic development. Conversely, by refusing to integrate human rights into their policy frameworks, IFIs say—loudly, if implicitly—that they are not as important as the other considerations that are given concrete policy expression.

#### **IV. THE INTERNATIONAL LAW OBLIGATIONS OF IFIs**

In crafting an appropriate response to the role and influence of IFIs with respect to human rights, the Special Representative should consider the nature of the legal obligations of IFIs to adhere to international law. A key question is whether IFIs have a legal obligation to comply with the requirements of international human rights law, or conversely, whether they operate outside of the purview of these norms and need only consider them as a matter of discretion or aspiration. Legal authority and scholarly commentary provide a clear answer—by virtue of their status as subjects of international law, IFIs do indeed have binding obligations to comply with international law, including basic human rights norms. This includes an obligation to avoid complicity in human rights violations committed by the project sponsors that they support. As a result, the primary challenge with respect to improving the impact and leveraging the policy influence of IFIs is to persuade them to implement their existing obligations in a consistent and comprehensive manner.

##### **A. The Obligations of IFIs as Subjects of International Law**

There is now a broad consensus among international jurists, legal scholars and practitioners that “international organizations, as a result of their international personality, are considered to be bound by general international law, including any human rights norms, that can be viewed as customary law or general principles of law.”<sup>20</sup> Several international courts and tribunals have concluded that international organizations must operate within the broader rubric of international law, and that their international law obligations are not circumscribed by their charter agreements. Most notably, the International Court of Justice concluded in its *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* that “International Organisations 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 a party.”<sup>21</sup> Similarly, in the criminal context, the International Criminal Tribunal for the Former Yugoslavia has found that the Statute of the Tribunal applies not only to individual States, but equally to “collective enterprises undertaken by States, in the framework of international organizations.”<sup>22</sup> Finally, in a

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<sup>20</sup> August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in P. ALSTON, ED., *NON-STATE ACTORS AND HUMAN RIGHTS* 46 (2005).

<sup>21</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, 73 at 89-90.

<sup>22</sup> *Prosecutor v. Simic et al.*, Case IT-95-9-PT, Decision on motion for judicial assistance to be provided by SFOR and others, 18 October 2000, para. 46 (concluding that the Statute of the Tribunal applies to

case that specifically addressed the human rights obligations of an international organization, the European Court of Justice concluded that while the European Community could not formally accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, “respect for human rights is a condition of the lawfulness of Community acts,” because human rights, including the provisions of the ECHR, must be given binding effect as “general principles” of EC law.<sup>23</sup>

United Nations entities that have considered the question have also concluded that international organizations have obligations under international law. Most importantly, the influential International Law Commission, in its *Draft Articles on the Responsibility of International Organizations*, concluded that “[e]very internationally wrongful act of an international organization entails the international responsibility of the international organization.”<sup>24</sup> Similarly, Special Rapporteurs of the United Nations Commission on Human Rights have observed that as “creatures of the international legal system,” intergovernmental organizations are bound by “fundamental principles of international law such as the obligation to respect universal human rights norms.”<sup>25</sup>

Leading scholars, publicists and other commentators have been virtually unanimous in their affirmation of the principle that international organizations have obligations under international law.<sup>26</sup> For example, before she became the President of the International Court of Justice, Rosalyn Higgins served as a Special Rapporteur to the Institut de Droit International on *The Legal Consequences for Member States of the Non-*

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“collective enterprises undertaken by States, in the framework of international organizations” such as the NATO-led Stabilisation Force (SFOR)).

<sup>23</sup> *Advisory opinion of 28 March 1996 of the European Court of Justice on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. See also, the European Court of Justice decision in Ellinki Radiophonia Tileorassi (ERT), Case C-260/89 (1991) (“[T]he Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.... It follows that...the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed); Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125 Case 4/73, Nold v. Commission [1974] ECR 491, Case 36/75, Rutili [1975] ECR 1219; Case 5/88, Wachauf [1989] ECR 2609, para.2639.*

<sup>24</sup> United Nations Int’l L. Comm’n, First Report on Responsibility of International Organizations, Art. 3 (March 2003).

<sup>25</sup> Joseph Oloka-Onyango and Deepika Udagama, *Globalization and its impact on the full enjoyment of human rights*,” Progress report submitted to the United Nations Commission on Human Rights, E/CN.4/Sub.2/2001/10, 25-27 (2 August 2001).

<sup>26</sup> See, e.g. August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in P. ALSTON, ED., NON-STATE ACTORS AND HUMAN RIGHTS 46 (2005); Eisuke Suzuki and Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms Of Multilateral Development Banks*, 27 Mich. J. of Int.L. 177, 179 (2006) (arguing that it is now clear that the legal personality of international organizations entails a responsibility to non-state actors.) Mahnoush H. Arsanjani, *Claims Against International Organizations: Quis Custodiet Ipsos Custodiet*, 7 Yale J. World Pub. Ord. 131, 133–34 (1981); S. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (2001); A. CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS, 137-59 (2006); M. DARROW, BETWEEN LIGHT AND SHADE: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND, AND INTERNATIONAL HUMAN RIGHTS LAW (2003).

*fulfilment by International Organisations of their Obligations toward Third Parties.*<sup>27</sup> The resolution she authored concluded that an international organization is liable for its own obligations towards third parties, and that those obligations may arise under international law—including, but not limited to, the internal rules of the organization.<sup>28</sup>

Perhaps the most authoritative treatment of the obligations of international organizations has come from the International Law Association's Committee on Accountability of International Organizations.<sup>29</sup> The Committee, comprised of distinguished international law scholars from around the world, observed that “[t]here is no reason in principle why primary rules of international law should not apply to collective enterprises undertaken by states in the framework of [international organizations]”<sup>30</sup> It concluded that it is now accepted as a principle of customary international law that international organizations are responsible for any acts that they may commit in violation of international law, even if those acts are in conformity with the organizations’ charter or internal policies and procedures.<sup>31</sup> Accordingly, the Committee issued the following “Recommended Rules and Practices” on the international legal responsibility of international organizations:

1. Every internationally wrongful act of an IO [International Organization] entails the international responsibility of that IO.
2. There is an internationally wrongful act of an IO when conduct consisting of an action or omission is attributable to the IO under international law and constitutes a breach of an applicable international obligation.
3. The characterization of an act of an IO as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by the IOs internal legal order....<sup>32</sup>

Specifically with respect to the human rights obligations of international organizations, the Committee concluded simply that “[international organizations] should comply with basic human rights obligations.”<sup>33</sup> The Committee explained:

Human rights obligations, which are increasingly becoming an expression of the common constitutional traditions of States, can become binding upon [international organizations] in different ways: through the terms of their constituent instruments; as customary international law; or as general

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<sup>27</sup> Institut de Droit International, *Resolution on The Legal Consequences for Member States of the Non-fulfilment by International Organisations of their Obligations toward Third Parties* (1995).

<sup>28</sup> *Id.*

<sup>29</sup> Report of the Seventy-First Conference, Berlin, Aug. 16–21, 2004 *Final Report of the International Law Association Committee on Accountability of International Organizations*, 26.

<sup>30</sup> *Id.*, at 18.

<sup>31</sup> *Id.*, at 26.

<sup>32</sup> *Id.*, at 27.

<sup>33</sup> *Id.*, at 22.

principles of law or if an [international organization] is authorised to become a party to a human rights treaty.<sup>34</sup>

The authors of four of the most prominent treatises on the law of international organizations have concurred with the ILA's assessment that international organizations have obligations under international law. Henry Schermers and Niels Blokker, in their *International Institutional Law: Unity Within Diversity 3<sup>rd</sup> ed.*, conclude that the rules of international law apply to international organizations "directly as part of the legal order of the organization in question...."<sup>35</sup> Similarly, Moshe Hirsch argues in *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* that since "[t]he principles of state responsibility apply by analogy *mutatis mutandis* to the responsibility of international organizations...international organizations are bound to comply with the norms of international law flowing from any source...."<sup>36</sup> C.F. Amerasinghe likewise concludes in *Principles of the Institutional Law of International Organizations* that "...there can be no doubt that under customary international law...international organisations can also have international obligations towards other international persons...."<sup>37</sup> And Philippe Sands and Pierre Klein concur in *Bowett's Law of International Institutions* that the proposition that international organizations are bound by the generally accepted standards of international law, including those relating to the protection of fundamental human rights and the environment, is "unimpeachable."<sup>38</sup>

Finally, there is a rich and growing scholarly literature that addresses how the general principle that international organizations have obligations under international law applies to the specific question of the human rights obligations of IFIs. Thomas Buergenthal, now a member of the International Court of Justice, has concluded that the World Bank has obligations that arise under the United Nations Charter and other human rights treaties.<sup>39</sup> Sigrun Skogly takes a similar position in her *The Human Rights Obligations of the World Bank and the International Monetary Fund*,<sup>40</sup> as have the vast majority of other academic commentators who have addressed the question.<sup>41</sup> Indeed, to

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<sup>34</sup> *Id.*

<sup>35</sup> H. SCHERMERS AND N. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 3<sup>rd</sup> ed., 822 (1995).

<sup>36</sup> M. HIRSCH, *THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES* 189, 190-91 (1995).

<sup>37</sup> C.F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS*, 240 (1996).

<sup>38</sup> P. SANDS AND P. KLEIN, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS*, 5<sup>TH</sup> ED. 458-59 (2001);

<sup>39</sup> Thomas Buergenthal, *The World Bank and Human Rights* in E. BROWN WEISS, A. RIGO SUREDA, AND L. BOISSON DE CHAZOURNES (EDS.), *THE WORLD BANK, INTERNATIONAL FINANCIAL INSTITUTIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1999).

<sup>40</sup> S. SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* (2001).

<sup>41</sup> See e.g., Daniel D. Bradlow, *The World Bank, the IMF and Human Rights*, *Transnational Law & Contemporary Problems* (Spring 1996); A. CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS*, 137-59 (2006); M. DARROW, *BETWEEN LIGHT AND SHADE: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND, AND INTERNATIONAL HUMAN RIGHTS LAW* (2003); Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 *Am. U. Int'l L. Rev.* 527 (2001), Adam McBeth,

the extent that there is a live debate in the academy over the human rights obligations of IFIs, it centers on the scope—not the existence—of those obligations.<sup>42</sup>

To summarize, the great weight of legal precedent and commentary recognizes that IFIs and other international organizations have binding obligations to comply with international law, including basic human rights norms. Nevertheless, some IFIs such as the World Bank and the International Monetary Fund have long denied that they operate within the rubric of international law, and have refused to recognize any international legal obligations beyond their charter obligations to their member states.<sup>43</sup> Recently, however, the World Bank has begun to relax this narrow understanding of its international law obligations. For example, in January 2006, the World Bank’s outgoing General Counsel concluded that its Articles of Agreement “permit, and in some cases require the Bank to recognize the human rights dimensions of its development policies and activities.”<sup>44</sup>

## V. CONCLUSIONS AND RECOMMENDATIONS

In light of the Special Representative’s interest in the important role that public and private-sector financial institutions can play in defining and promulgating human rights standards for the companies that they finance, and his mandate to address the human rights obligations of governments when they act through multilateral institutions, we believe that the Special Representative should closely consider the role and

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*Breaching the Vacuum: A Consideration of the Role of International Human Rights Law in the Operations of the International Financial Institutions*, 10 Int. J. of Hum. Rights 385 (2006). For a dissenting view see, Robert McCorquodale, *Overlegalizing Silences: Human Rights and Nonstate Actors*, American Society for International Law Proceedings, 384 (2002) (“The international human rights law system is a statebased system.... It ignores actions by nonstate actors, such as the United Nations and other intergovernmental organizations....”)

<sup>42</sup> In particular, there is some disagreement regarding whether IFIs have a duty to “respect,” “protect,” and “fulfill” human rights, or only some more limited range of duties. For an overview of this debate see CLAPHAM, *id.*, at 150-52.

<sup>43</sup> For the IMF’s perspective, see François Gianviti, *Economic, Social and Cultural Human Rights and the International Monetary Fund: Working paper submitted by the General Counsel of the International Monetary Fund to United Nations Economic and Social Council* (May 7, 2001); Francois Gianviti, *Economic, Social, and Cultural Human Rights and the International Monetary Fund*, in P. ALSTON, ED., *NON-STATE ACTORS AND HUMAN RIGHTS* 113-38 (2005). The views of the former General Counsel of the World Bank can be found at Ibrahim Shihata, “The World Bank and Human Rights”, presented at International Commission of Jurists conference on economic, social and cultural rights, Abidjan, 1998, p. 145; Ibrahim F. I. Shihata, *Human Rights, Development, and International Financial Institutions*, 8 Am. U. J. Int’l & Pol’y 27, 28 (1992) (arguing that the World Bank’s Articles of Agreement preclude the Bank from applying certain human rights norms in its operations). The United Nations, by contrast, has been far more willing to interpret the provisions of its Charter in accordance with the basic norms of international law. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 294 (1973); United Nations, General Assembly, Vienna Declaration and Programme of Action, para. 4, U.N. Doc. A/Conf.157/23 (1993)(recognizing the promotion and protection of human rights as priority objective of the United Nations [despite the UN Charter’s prohibition on involvement in the domestic jurisdiction of any state]).

<sup>44</sup> World Bank, “Legal Opinion on Human Rights and the Work of the World Bank,” Senior Vice President and General Counsel, January 27, 2006, at 9.

obligations of IFIs with respect to human rights. Specifically, we respectfully request that the Special Representative:

**1. Recognize the considerable impact and influence IFIs can have on the ways in which human rights are addressed by private-sector actors.** The Special Representative should address the critical role IFIs play in providing support for high-impact projects in weak governance zones. He should also address the opportunities and challenges associated with the fact that the IFC has become the *de facto* standard-setter of environmental and social performance for private sector projects that are financed on the international capital markets.

**2. Recognize the shortcomings of the current approach of IFIs with respect to human rights.** As the Special Representative has already noted in his *Interim Report*, the policy frameworks of IFIs are not sufficiently protective of human rights values. They do not address the full range of human rights issues, and some of the human rights-related policies that they have adopted incorporate standards and definitions that fall short of international norms. As a result, they miss substantial opportunities to ensure that the projects that they support do not adversely affect human rights, and to promote stronger human rights policies throughout the private sector project finance market.

**3. Address the legal obligations of IFIs with respect to human rights.** The Special Representative should take note of the broad consensus that IFIs have binding obligations under international law, including any human rights norms that are customary law or general principles of law. We believe that the Special Representative should take these obligations as a point of departure in crafting an appropriate response to the opportunities and challenges of IFIs acting as a vehicle to improve the human rights performance of private-sector sponsors.

**4. Encourage IFIs to address their human rights obligations in a forthright and comprehensive manner.** The impact and policy influence of IFIs with respect to human rights could be greatly augmented if they were to revise their policy frameworks to ensure that they consistently implement their human rights obligations. We believe that the Special Representative may have a unique opportunity to encourage IFIs to take appropriate steps to implement their obligations, and we respectfully suggest that the Special Representative seek to do so as a matter of priority. In particular, the Special Representative should encourage IFIs to:

- (a) Assess the extent to which their operational policies are consistent with the full range of international human rights standards;
- (b) Based on this assessment, revise their operational policies to address any gaps in the policies, and to explicitly reference relevant human rights norms;
- (c) Require their clients to conduct comprehensive human rights impact assessments in all high-impact projects, as part of their environmental and social due diligence; and

(d) Require their clients to make clear, binding and enforceable commitments regarding how they will address the human rights issues that arise during project implementation.<sup>45</sup>

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<sup>45</sup> The IFC's Compliance Advisor Ombudsman made a similar recommendation to the IFC for mitigating human rights impacts in extractive industries projects. IFC Compliance Advisor Ombudsman, *Extracting Sustainable Advantage? A review of how sustainability issues have been dealt with in recent IFC & MIGA extractive industries projects. Final Report*, 36 (April 2003) ("IFC must "systematically consider risks to human rights at the project level, take appropriate [and effective] steps to mitigate them and provide clearer guidance to clients on both these aspects.")