

## Human rights and the Bretton Woods Institutions: Moving beyond institutional remedies<sup>i</sup> By Celine Tan

The 75th anniversary of the World Bank and IMF provides an opportunity to assess the human rights legacy of these institutions that have had and continue to hold significant power to influence the international economic landscape and have far-reaching impacts on human rights. Considering the well-documented negative human rights consequences of the programmes and practices of the World Bank and IMF, and in line with developments in international human rights law, it is evident that both institutions must be held responsible for their actions through external instruments of accountability.

As we approach the 75<sup>th</sup> anniversary of the World Bank and the IMF and contemplate their legacies, an arena that has long been subject to debate and critique is the institutions' record on respecting, protecting and fulfilling fundamental human rights.

As important sources of development and crisis financing for a significant number of developing countries, the Bretton Woods Institutions (BWIs) have wide-ranging influence not only over the social and economic policies of states, but also over their political landscape and their governments' engagement with a range of internal stakeholders and external actors.

Despite this broad operational mandate and their significance in client states and communities, the Bank and the Fund remain largely insulated from the conventional norms of accountability, including adherence to international human rights norms.

Other international organisations, including other parts of the UN system, have expressed concerns with the impact of BWIs' development projects and economic reform policies on a wide-range of areas, including health, education, environment and public participation. A landmark report by UNICEF in 1987 entitled *Adjustments with a Human Face* called on the World Bank and IMF to take account of poverty and human rights concerns in their policymaking. Subsequent reports from the UN, including investigations by its human rights special procedure mandate holders, have drawn links between the BWIs' policies and practices and their impact on human rights. As recently as 2015, the United Nations Special Rapporteur on extreme poverty and human rights declared that "for most purposes, the World Bank is a human rights-free zone."<sup>ii</sup> The report contributed to other critical analysis of the impact of BWI policies on labour rights,<sup>iii</sup> women's rights and gender equality<sup>iv</sup> and other socio-economic rights.<sup>v</sup>

In July 2019, a report by the UN Independent Expert on the effects of foreign debt and human rights<sup>vii</sup> addressed the complicity of international financial institutions (IFIs), such as

the World Bank and IMF, for human rights violations caused by their policies and operations. The report argues that austerity measures and other economic reforms implemented by states as conditions of IFI lending can impact negatively on a wide range of human rights, including the right to health, education and housing, and that IFIs should be held accountable for such human rights violations. The report finds evidence in international law and institutional practice to suggest an attribution of responsibility on the part of IFIs for harms caused by their economic reform policies and that, while states remain the main duty bearers within the international human rights regime, international organisations, such as IFIs, can be complicit in the pursuit of a wrongful act. This includes prescribing policies and imposing conditions on financing that have the potential to harm or contribute towards violations of human rights.

The UN Independent Expert's report addresses an important but often neglected aspect in relation to the BWIs' human rights record, which is that much of the debates, scholarship, policy and operational work have focused for far too long on establishing internal mechanisms of accountability, while neglecting issues of external culpability through domestic and international law for human rights violations.

The World Bank was the first international organisation to set up an internal accountability mechanism (IAM) in the form of the Inspection Panel (for the operations of the International Bank for Reconstruction and Development [IBRD] and International Association for Development [IDA], the World Bank's middle and low-income lending arms respectively), which not only became a template for the establishment of IAMs at other IFIs,<sup>viii</sup> but also provided the basis for the development of many project-level grievance mechanisms for private corporate operations. Since its inception, the Inspection Panel and its sibling organisation, the Compliance Advisor Ombudsman (CAO), which serves the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA), the Bank's private sector and guarantee arms respectively, have been the central focus for investigating and redressing harms caused by projects financed by the World Bank Group.

This process was complemented by the development of substantive operational policies, known as environmental and social standards (ESS) at the IBRD and IDA, and Performance Standards (PS) at the IFC and MIGA, which are supposed to guide World Bank staff in their dealings with state and private sector clients and provide the basis for claims for project-affected peoples against the institution, including in areas that fall under international human rights protection, such as those relating to indigenous peoples, resettlement, public participation and labour.

At the IMF, operational references to human rights-related norms are almost non-existent, although efforts have been made over the years to consider some aspects relating to social and economic rights through aligning poverty reduction strategies and the Sustainable Development Goals (SDGs) with lending to low- and middle-income countries.<sup>ixx</sup>

This treatment of human rights in BWI operational policy and practice reflects the institutions' approach to addressing human rights concerns and their aversion to binding normative frameworks relating to external legal oversight of their activities. In particular, the BWIs have consistently made it clear that while their operations may take human rights considerations into account insofar as they are consistent with their constitutional mandates (as interpreted by the institutions), they view the primary duties of respecting, protecting and fulfilling human rights as resting with states, not international organisations.<sup>xi</sup>

The Bank has also consistently argued for, and for the most part been granted, immunity from legal action in relation to their activities in client states when asserted in the limited cases brought against it in national courts,<sup>xii</sup> although this immunity has been slightly dented after the US Supreme Court decision in the case of *Jam v IFC* in 2019,<sup>xiii</sup> which found that the IFC does not enjoy absolute immunity from suit in the US.<sup>xiv</sup>

The difficulties in securing legal redress through domestic and international legal means have meant that IAMs for accountability have become attractive to stakeholders and their advocates seeking redress and remedy for harms caused by the BWIs, notably the World Bank. But the focus on these mechanisms has been problematic for a number of reasons.

First, the IAMs only relate to a specific aspect of the BWIs' operations, namely project lending. Both the Inspection Panel and the CAO only have jurisdiction over harms that have occurred in investment project lending, such as loans for the construction of infrastructure or agricultural development, and social and environmental safeguards only apply to such lending. These mechanisms and policies do not apply to technical assistance projects or development policy lending (which finance policy or institutional reforms through direct budget support and are dependent on specific conditions)<sup>xvi</sup> from the World Bank.

The IMF does not have an IAM and so has no means of being held accountable for its economic reform policies that violate human rights. This is a serious omission given that numerous reports and studies, including the aforementioned UN reports, have indicated a link between policy conditionalities prescribed by the World Bank and IMF and human rights violations.<sup>xvii</sup> The recent UN reports provide additional weight to long-standing concerns about the negative human rights legacy of IMF-mandated structural adjustment programmes, which are still felt today<sup>xviii</sup> and the dire consequences of recent programmes, such as in the case of Greece.<sup>xix</sup>

Second, the IAMs have limited operational scope and focus on breaches of internal operational policies, the ESS under the new Environmental and Social Framework (ESF) and the Performance Standards. While the standards enshrined in these policies may be derived from external standards, including human rights principles, these standards are in no way equivalent to the protection afforded by national and international human rights law. They have very little normative effect in international law and only come into play as part of contractual negotiations between the Bank and its clients. In fact, it has been argued that human rights language in these policies and the practices of the IAMs have been traditionally instrumentalised by the World Bank to legitimise its operations to certain audiences while ensuring that their financial bottom line remains unaffected.<sup>xx</sup>

Third, given these are internal institutional mechanisms, remedies for affected communities, even where the Inspection Panel or CAO have found breaches of operational policies, are limited. The Inspection Panel and CAO can only request management action to redress these breaches through remedial action and, in the case of the IFC and MIGA, mediation between the private project sponsor and communities. However, the Bank has been clear about the non-legal nature of its operational policies, stressing that findings of Bank violations by its IAMs cannot be taken as conclusive evidence of Bank wrongdoing in judicial proceedings.<sup>xxi</sup>

Fourth, as operational policies, the standards of protection for affected communities can change and be downgraded without the usual safeguards accorded to human rights under national or international law. Most notably, the ESF, which replaced the old environmental and social safeguards in 2018, have been criticised for diluting protections for affected communities even as it references the Universal Declaration of Human Rights in its non-operationally binding 'Vision Statement'. Many observers have argued that the ESF represents a regulatory and accountability 'race to the bottom', as the World Bank faces competition from other multilateral development banks, such as the Asian Infrastructure Investment Bank and New Development Bank.<sup>xxii</sup>

This experience clearly indicates that internal policies of accountability are subject to institutional and political imperatives and can be redesigned or revised when the institutions are under pressure to reform and the political will is in correspondence with financial considerations.

Meanwhile, the IMF has yet to mobilise sufficient political support or face any institutional pressure to establish similar safeguards in its financial operations, partly because it does not provide project support but also largely because the Fund has traditionally been reluctant to engage with non-state actors or establish third party relationships. The Fund is also less porous to external influence as a financier given its importance as the lender of last resort. The same conversations on human rights which began at the Bank 30 years ago have not even begun at the Fund.

And finally, a focus on internal mechanisms shifts the responsibility for human rights adherence away from the BWIs and onto the borrower states and, in many ways, reinforces the asymmetrical relationship between the BWIs and their client states. Imposing some level of social and environmental safeguarding through operational policies yet refusing to be subjected to external accountability reinforces the normative authority of these institutions over countries in the Global South. It enables the BWIs to define what does and does not constitute standards of appropriate behaviour and enables the utilisation of the human rights discourse to reinforce patterns of violating behaviour on the part of the BWIs, such as the application of economic policy conditionality under the guise of governance reforms.

Moving forward, there should be much more focus on developing external instruments of accountability for the BWIs so as to secure genuine and effective accountability from the Bank and the Fund. The institutions could start by adhering to internationally agreed codes of conduct, such as the recently developed Guiding Principles on Human Rights Impact Assessments of Economic Reform Programmes, but more importantly, to open themselves up to legal scrutiny by national and international legal processes. Locating the BWIs' human rights obligations within a wider framework of public and private international law and incorporating human rights concerns into domestic legal processes may assist us in going beyond a conceptual analysis of human rights violations and towards establishing an operational framework for achieving BWI accountability.

- i. This article draws on my paper, C. Tan, "Mandating rights and limiting mission creep: Holding the World Bank and International Monetary Fund accountable for human rights violations", *Human Rights and International Legal Discourse* 2, 2008, 79-116. The author thanks Luiz Fernando Vieira for his support in drafting this article and Giedre Jokubauskaite for her comments on the paper. All errors and omissions remain her own.
- ii. United Nations, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, A/70/274, 2015, 2.
- iii. Bretton Woods Observer, *IMF and World Bank labour policies criticised by UN expert*, Spring 2017.
- iv. J. P. Bohoslavsky, *Bretton Woods Institutions' instrumental gender approach ignores structural elephant in the room*, Bretton Woods Observer, Winter 2018.
- v. Bretton Woods Observer, *The IMF in Argentina: Can an old dog learn new tricks?*, Winter 2018.
- vi. Bretton Woods Observer, *IEO finds IMF follows "nebulous standard" on social protection engagement*, Autumn 2017.
- vii. United Nations, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on the Responsibility for complicity of international financial institutions in human rights violations in the context of retrogressive economic reforms*, A/74/178, 2019.
- viii. K. Lewis, *Citizen-driven accountability for sustainable development*, 2012.
- ix. IMF, *IMF support for low-income countries*, 8 March 2018, accessed 12 September 2019.
- x. IMF, *Review of implementation of IMF commitments in support of the 2030 agenda for sustainable development*, 2019.
- xi. See for example, R. Dañino, *Legal opinion on Human Rights and the work of the World Bank by the Senior Vice-President and General Counsel*, 1, 9, 2006, accessed 14 February 2008 & F. Gianviti, *Economic, Social and Cultural Rights and the International Monetary Fund*, IMF, 2002.
- xii. I. Shihata, *The World Bank Inspection Panel: In practice*, Oxford University Press: 2000 (2<sup>nd</sup> ed.), 244-246.
- xiii. D. Desierto, *SCOTUS decision in Jam et al v. International Finance Corporation (IFC) denies absolute immunity to IFC...with Caveats*, 2019.
- xiv. Bretton Woods Observer, *US Supreme Court rules against World Bank's claim of absolute immunity*, Spring 2019.
- xv. G. Brunswijck, *Flawed conditions: The impact of the World Bank's conditionality on developing countries*, Eurodad, 2019.
- xvi. Bretton Woods Project, *The World Bank and gender equality: Development Policy Financing*, 2019.
- xvii. See for eg: T. Stubbs and A. Kentikelenis, "International financial institutions and human rights: implications for public health," *Public Health Reviews*, 38, No 27, 2017; M. Salomon, "Of austerity, Human Rights and international institutions," *European Law Journal*, Vol. 21, Issue 4, 2015, 521-545.
- xviii. R. Rowden, *The Deadly Ideas of Neoliberalism: How the IMF has Undermined Public Health and the Fight Against AIDS*, New York: Zed Books, 2013.
- xix. Bretton Woods Observer, *Greece exits loan programme as impacts of Troika-led austerity are revealed*, Autumn 2018.
- xx. M. V. Caberra Ormaza and F. C. Ebert, "The World Bank, Human Rights and organizational legitimacy strategies: The case for the 2016 Environmental and Social Framework", *Leiden Journal of International Law*, Vol 32, No 3, 2019, 483-500.
- xxi. A. Naudé Fourie, *World Bank accountability: In theory and in practice*, The Hague: Eleven International Publishing, 2016.
- xxii. See Caberra and Ormaza, note 10 and P. Dann and M. Riegner, "The World Bank's environmental and social safeguards and the evolution of global order", *Leiden Journal of International Law*, Vol 32, No 3, 2019, 337-559.