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CONFERENCE ON HUMAN RIGHTS, PUBLIC FINANCE, AND THE DEVELOPMENT PROCESS

HUMAN RIGHTS, DEVELOPMENT, AND INTERNATIONAL FINANCIAL INSTITUTIONS

Ibrahim F.I. Shihata*

First, I would like to congratulate the Washington College of Law and the Human Rights Law Institute for convening this conference and thank them particularly for inviting me to be with you today. I intend briefly to address the theme of this conference from a personal perspective, taking into account the most recent thinking at the World Bank.¹

There is no doubt in my mind that development, in the broad sense of human progress, must encompass the culmination of a broad array of basic rights. These rights include not only economic, social and cultural rights, but basic political rights as well. Therefore, discussion of "development" *and* "human rights" as two distinct matters may appear misleading.

This broad concept of development is reflected in both United Nations (U.N.) resolutions and declarations on the issue, including the 1968 Proclamation of Tehran at the 27th meeting of the U.N. International Conference on Human Rights,² and the 1986 U.N. General Assembly Declaration on the Right to Development.³ This notion of development is also articulated in the latest World Development Report, which was published by the World Bank in 1991.⁴

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1. A more detailed account can be found in IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* (1991). Chapters 2, 3, 4, and 5 deal respectively with governance, human rights, involuntary resettlement and the environment.

2. Proclamation of Tehran, adopted at the International Conference on Human Rights, Tehran, Iran, 13 May 1968.

3. G.A. Res. 128, U.N. GAOR, 41st Sess., U.N. Doc. A/Res/41/128 (1987).

4. *WORLD BANK, DEVELOPMENT REPORT* (1991). This report is a basic World Bank document.

According to this staff document, which not only received the endorsement of the World Bank's management, but was also discussed in the Bank's Board of Executive Directors, the essence of development encompasses not only higher incomes but also better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom and a richer cultural life.⁵ As Jan Pronk, the Dutch Minister of Development Cooperation, advocates, development is not simply an economic concern, and does not just mean growth in the sense of more of the same. Using a more comprehensive definition of development, a guarantee of human rights protection does not merely relate to development but is central to the development process.⁶

For any international financial institution, such as the World Bank, the question becomes, not whether human rights are relevant to development, but whether the mandate of such an institution, as defined and limited by its Articles of Agreement,⁷ can cover the promotion and protection of all human rights, or is limited to the rights which have an economic or social character as opposed to a political character. This latter question is obviously a technical one which raises an important institutional issue as a matter of interpretation of the constituent agreement of the World Bank. This discussion is neither a philosophical issue about the meaning of development in the abstract, in which little disagreement is found, nor an ethical issue about the importance of political rights in human development, where little disagreement is also found.

The pressing issue should be further distinguished from the policy question of whether the charters of international financial institutions should be amended to enable them to serve all the purposes of development. In other words, the question which must be asked is whether these institutions should be required to move beyond addressing freedom from poverty, into the realm of addressing all types of freedoms. From the World Bank's perspective, reference to the Articles of Agreement, should be made in addressing this question. The same applies to the Bank's affiliated institution, the International Development Associ-

5. WORLD BANK, 1991 WORLD BANK ANNUAL REPORT 4 (1991).

6. John Pronk is currently the Minister of Development Cooperation in the Netherlands. See Tjitske Lingsma, *Netherlands: "Colonialist" Tag Touches Tender Dutch Nerve*, INTER PRESS SERV., Apr. 4, 1992 (referring to Minister Pronk's belief that development in Indonesia should be linked to human rights).

7. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ARTICLES OF AGREEMENT art. I (1989).

ation (IDA).⁸ The Articles of Agreement of the International Bank for Reconstruction and Development (IBRD), the parent institution, clearly describe the institution as a financial agency. The IBRD provides loans as well as loan guarantees primarily to finance specific projects, geared for particular purposes and performed through specific means, in member countries.⁹ The IBRD's purposes and means are stated as including: (1) assistance in the reconstruction and development of member territories by facilitating the investment of capital for productive purposes; (2) promotion of private foreign investment by guarantees and participation in loans, and supplementing such investments by direct loans; and (3) promotion of the growth of international trade, and the maintenance of equilibrium in balances of payments, by encouraging international investment.¹⁰ The goal of these loans (and guarantees) is to assist in raising productivity, the standards of living, and conditions of labor. Further, their rationale matches the purposes of the IBRD as stated in its first Article.¹¹ The International Development Association's Articles of Agreement entrust it with the mandate to, "promote economic development, increase productivity, and thus raise standards of living in the less developed areas of the world included within the Association's membership, in particular by providing financing to meet their important developmental requirements."¹²

Plainly, these provisions do not envisage a role for either institution in the political reform of their borrowing members. By expanding the scope and types of lending in order to adapt to the changing needs of its borrowing members, the World Bank (IBRD and IDA) has continuously developed its functions beyond the narrow limits of the literal

8. INTERNATIONAL DEVELOPMENT ASSOCIATION, ARTICLES OF AGREEMENT sched. A (1960). This association is funded through periodic replenishment of its resources by the more financially able among its members.

9. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ARTICLES OF AGREEMENT art. I (1989).

10. *Id.* The IBRD has two additional purposes: (1) the coordination of loans and guarantees by the IBRD with other sources of international financial assistance to complete the most urgent projects first; and (2) the raising of sensitivity to the effect of international investment on business conditions in post-war economies to bring about a smooth transition from a wartime to a peacetime economy. *Id.*

11. *Id.*

12. *See id.* art. I, §§ i, ii (establishing that some of the purposes for creating the IBRD included the promotion of reconstruction and development and the encouragement of private foreign investment). If private investment is not possible, then the IBRD must provide financial assistance for productive purposes either out of its own capital, from funds raised by the IBRD, or from other resources. *Id.* art. IV, § 1(a)(i)-(iii).

meaning of the provisions of their Articles of Agreement.¹³ These functions, as now envisioned by the institution and its members, have been interpreted broadly with the concurrence of the Board of Executive Directors.¹⁴ As a result, the World Bank is generally viewed by its members as an agency for economic development *par excellence*. The Bank's operations have reached numerous diverse issues including population, education, health, and social security,¹⁵ even though none of these issues are specifically mentioned in the Articles of Agreement.¹⁶

By broadly interpreting the World Bank's Articles of Agreement, the Bank is better able to serve the changing needs of its members. In my view, this model shows a legally sound approach which I have personally supported since I joined the World Bank as its General Counsel in 1983. Difficulty arises when the application of this broad interpretation threatens to violate explicit prohibitions in these Articles, or conflict with the Bank's purpose as stated in its Articles of Agreement. The Articles of Agreement state explicit provisions which prohibit political activity. Included amongst these provisions are the notions that:

[t]he 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 1.¹⁷

13. See SHIHATA, *supra* note 1, at 25-34 (stating that structural adjustment loans and sectoral adjustment loans, introduced in the 1980's, expanded the scope of the Articles of Agreement). These new loans were designed to restructure the economy of a country as a precondition for the sound financing of new investment. *Id.*

14. See DECISIONS OF THE EXECUTIVE DIRECTORS UNDER ARTICLE IX OF THE ARTICLES OF AGREEMENT ON QUESTIONS OF INTERPRETATION OF THE ARTICLES OF AGREEMENT 6-7 (1991) (finding that the Articles of Agreement allow the Bank to make or guarantee loans for programs of economic reconstruction, and the reconstruction of monetary systems, including long-term stabilization loans). The Executive Directors included guaranteed loans, other than for purposes of specific projects, provided that such loans fell within the general purposes of the Bank. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ARTICLES OF AGREEMENT art. I (1989); see also *id.* art. IX; INTERNATIONAL DEVELOPMENT ASSOCIATION, ARTICLES OF AGREEMENT art. X (1991) (stating that the Bank's Executive Directors have the authority to interpret the Articles, however, any member has the power to request that a decision go before the Board of Governors for review).

15. See SHIHATA, *supra* note 1, at 116-20 (finding that the Bank spent one billion dollars on basic education in developing countries in fiscal year 1990 and was preparing to increase funding to one and one-half billion dollars annually over the next three years; and the Bank lent \$340 million between 1970 and 1979 for health care, nutrition and population projects which increased to over three billion dollars between 1980 and 1990).

16. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ARTICLES OF AGREEMENT art. I (1989).

17. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ARTICLES OF AGREEMENT art. IV, § 10 (1989). A similar provision is included for the Interna-

The Articles of Agreement also state that:

[t]he Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.¹⁸

Based upon the above provisions and the teleological, instead of the literal reading accorded to them in practice, the following conclusion may readily be reached. The World Bank's mandate should enable the organization to assist member countries and to improve the economic standards of their peoples. These efforts should be directed toward (1) alleviating poverty; (2) providing universal education; (3) promoting preventive and curative health care along with adequate nutrition; (4) improving the economic and social status of women; (5) ensuring that children and the elderly are cared for; (6) protecting the quality of life for refugees, especially those involuntarily displaced as a result of developmental activities; (7) arresting the degradation of the environment; (8) conserving the environment for present and future generations; and (9) assuring the participation of people affected by development projects in the design and implementation of those projects.¹⁹ These areas all have been viewed as falling within the World Bank's purview.

However, a two-fold question still remains in any analysis of World Bank authority. First, should the World Bank's already broad mandate be further extended, by interpretation of the constituent agreement, to give the World Bank and similar institutions a role in the advancement of political rights? Some commentators argue that financial assistance should be conditioned on the respect of political rights by recipient governments. Furthermore, some authorities have found that the financial resources of these institutions should be used to achieve a respect for individual rights through financial incentives or sanctions.²⁰ Second, if

tional Development Association. See INTERNATIONAL DEVELOPMENT ASSOCIATION, ARTICLES OF AGREEMENT art. V, § 6 (1991).

18. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ARTICLES OF AGREEMENT art. III, § 5(b) (1989). Again, the Articles of Agreement of the IDA contains a similar provision. See INTERNATIONAL DEVELOPMENT ASSOCIATION, ARTICLES OF AGREEMENT art. V, § 1(g) (1991) (containing similar language).

19. See SHIHATA, *supra* note 1, at 133 (delineating the World Bank's mandate on the appropriate methods for improving the economic standards of member nations); *id.* at 110 (discussing poverty); *id.* at 116 (discussing education); *id.* at 117 (discussing health care); *id.* at 33-34, 117-24 (discussing the role of women in economic development); *id.* at 126-29 (discussing the environment); *id.* at 129-31 (discussing refugees).

20. See PAUL A. MOSELY, AID AND POWER: THE WORLD BANK AND POLICY-BASED LENDING 21-25 (1991) (giving a brief history of the World Bank's changing position on policy based lending). An examination of the World Bank's lending policies

the preceding interpretation proves to be indefensible, the same commentators argue that the charters of these institutions should be amended to give these agencies an explicit role in the promotion and protection of political rights. These areas mark the two key questions which I will address today.

The first question stirred great controversy during the 1960s when the United Nations General Assembly requested that the World Bank refrain from lending funds to South Africa and Portugal because of their poor political human rights records.²¹ The World Bank's policies also created some debate during the 1970s when the United States Congress enacted legislation, which remains in force, to require the United States to use its voice and vote in the World Bank and a host of similar agencies to "advance the cause of human rights, including by seeking to channel assistance toward countries *other than* those whose governments engage in . . . a consistent pattern of gross violations of internationally recognized human rights."²² When the United States introduced this approach by 1977, therefore, the United States Board member would oppose loans to countries which the United States considers to have records of gross violations of internationally recognized human rights.²³

In 1991, I had no difficulty in submitting a formal legal memorandum to the World Bank's executive directors which stated that:

[v]iolation of political rights may . . . reach such proportions as to become a Bank concern, either due to significant direct economic effects or if it results in international obligations relevant to the Bank, such as those mandated by binding decisions of the United Nations Security Council.²⁴

reveals that the World Bank has never made unconditional loans. *Id.* at 27. A broader definition of "human needs," however, has expanded the World Bank's policy objectives. See SHIHATA, *supra* note 1, at 133 (discussing the World Bank's efforts to end poverty and improve human rights).

21. See 14 MARJORIE M. WHITEMAND, DIGEST OF INTERNATIONAL LAW 1004-09 (1970) (providing a chronology of the events leading up to, and following, the World Bank's refusal to lend funds to South Africa and Portugal).

22. 22 U.S.C. § 262d (a) (1988) (emphasis added). The disputed United States legislation provides an exception to the requirement which opposes loans to countries engaged in gross human rights violations in cases where "such assistance is directed specifically to programs which serve the basic human needs of the citizens of such country." 22 U.S.C. § 262d (f) (1988).

23. *Id.*

24. Legal Memorandum of the Vice President and General Counsel of IBRD, Issues of "Governance" in Borrowing Members — The Extent of Their Relevance Under the Bank's Articles of Agreement (Feb. 5, 1991) (on file with author). See also SHIHATA, *supra* note 1, at 79 (discussing the above mentioned memorandum). Clearly, the Bank would not be in a position to extend lending at a normal scale to a country where pervasive violations, or Security Council decisions, create conditions where it

This view remains consistent with the more general view that "the Bank should not allow political factors or events, no matter how appealing they may seem to be, to influence its decisions unless . . . it is established that they have direct and obvious economic effects relevant to the World Bank."²⁵

After recognizing the possible entanglement of economic and political considerations, I noted that the distinction in the Articles of Agreement between these two considerations has been accorded great importance, both in the drafting history of the Articles and in World Bank practice.²⁶ Accordingly, I concluded that the prohibition against political activity within the World Bank must be honored.²⁷ However, this prohibition should not mean that the World Bank cannot take account of the political realities affecting its lending activities.²⁸ For example, certain events may influence the stability and credit worthiness of World Bank members, hinder the ability of its borrowers to service loans and implement financed projects, or effect the World Bank's ability to monitor and supervise the implementation of such projects.²⁹ These economic effects are obviously relevant to the lender, even though they may have political causes or origins.

The World Bank's overall concern with economic development should also enable the organization to address good governance of its member countries, and of borrowing countries whose economic developments are directly related to the Bank's work.³⁰ From this perspective, governance implies the appropriate management of a country's resources, based upon rules, implemented by institutions, to ensure accountability. Proper governance also implies predictability, and legal due process which, in turn, assumes a government of laws and not a government of men.³¹

In my judgment, this conclusion has significant long-term implications. These World Bank activities serve the cause of human development without entangling the World Bank in political issues that typically extend beyond its mandate as described in the Articles of

becomes unrealistic for such lending to receive support by the required majority in the Bank's Board of Executive Directors.

25. SHIHATA, *supra* note 1, at 83.

26. SHIHATA, *supra* note 1, at 70-75.

27. SHIHATA, *supra* note 1, at 95-96.

28. SHIHATA, *supra* note 1, at 84-93.

29. See SHIHATA, *supra* note 1, at 88-93 (explaining that the types of projects effected may include civil service reform, legal reform, accountability for public funds, and budget discipline).

30. SHIHATA, *supra* note 1, at 53-96.

31. SHIHATA, *supra* note 1, at 85 n.96.

Agreement. Of course, there are commentators who would like the World Bank to take an even broader view in interpreting the Articles of Agreement. Some revisionists would practically turn the interpretation process, which requires a simple majority in the Board of Executive Directors, into a more elaborate amendment process, in disregard of the special majority required for amendments to the Articles of Agreement.³²

Although the real motivation behind the new liberal approach is ethical in character, basically two legal arguments have been advanced in its support. The first view is based on an extremely flexible approach to interpretation, in which even explicit provisions in the constituent agreement may be ignored for the sake of presumably overriding values and policies. This approach is best articulated by one of the main characters of Professor Tom Farer's drama on "Human Rights and Foreign Policy."³³ As his argument goes,

rules are only one element in the legal process. They express in summary form expectations about the behavior which will ordinarily promote certain values and policies. Those values and policies are themselves relevant legal materials. The rules . . . help guide us to the factors relevant to deciding in a particular case what behavior should be applauded and what should be condemned.³⁴

While I support a purposive, teleological interpretation of the provisions of the charters of multilateral institutions, especially those which take full account of the underlying objectives of the institutions and the changing circumstances in which they operate, I cannot subscribe to the view that such an interpretation may correctly reach the point of contradicting the text — that is, of amending it — when the power of amendment requires the approval of higher organs, and a much greater majority, than does the power of interpretation.³⁵ One may be able to argue that, in certain contexts, the word "colored" includes "whites" because, after all, white is a color. To credibly argue, however, that "white" really means black seems absurd. Including the economic factors and consequences that happen to have political origins or are associated with political factors in a definition of the phrase "only economic considerations" appears reasonable.³⁶ I do not find it credible, however,

32. See INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ARTICLES OF AGREEMENT art. 8(a) (1989) (requiring the approval of three-fifths of the members).

33. Tom Farer, *Human Rights and Foreign Policy: What the Kurds Learned (A Drama in One Act)*, 14 HUM. RTS. Q. 62 (1992).

34. *Id.* at 70.

35. See *supra* note 35 and accompanying text (discussing the amendment process).

36. SHIHATA, *supra* note 1, at 75-79, 95.

to conclude that "only economic considerations" would ordinarily mean non-economic considerations.

The second argument in defense of the politicization of the World Bank's work through the re-interpretation of its Articles of Agreement seems to be based on the contention that human rights violations constitute a violation of *jus cogens* rules of international law.³⁷ Therefore, as the argument goes, the World Bank may properly ignore provisions in its Articles of Agreement and be permitted to redress human rights violations because of the higher order accorded to human rights law.³⁸ Regardless of the controversy surrounding the contention that at least some basic human rights constitute *jus cogens*, that contention means only that international agreements should not derogate from peremptory norms which mandate respect for basic human rights. It does not imply that the World Bank or a similar institution should not lend to a country where a violation of human rights occurs. A loan agreement to a country which violates such rights does not in itself violate any human rights rules, or for that matter, condone violation of such rights. On the contrary, such assistance, if properly targeted, can alleviate the suffering of the people by improving their standard of living.

Relevant to this discussion are the wise words of Professor Michael Reisman of Yale Law School who stated that:

there is a limit to 'institutional elasticity', *i.e.*, the extent to which institutions created and still used for other purposes can be 'stretched' in order to get them to perform human rights functions, especially when these functions are accomplished *at the expense* of their manifest functions. Institutions simply cannot do everything we think they are capable of, if this requires them to move too far from their manifest mandate.³⁹

If it is true, as I believe it is, that the World Bank's Articles of Agreement cannot be appropriately interpreted to allow the World Bank to use its lending power as an instrument for ensuring respect for political human rights, except in circumstances where pervasive violations have obvious economics effects, or where compliance with U.N. Security Council decisions requires that a specific course of action be taken, amendment of the Articles of Agreement remains to be tackled. Clearly, opinions widely differ on this matter of policy. I personally

37. See Antonio Gomez Robledo, *Le Ius Cogens International: Sa Genese, Sa Nature, Ses Fonctions*, 172 RECUEIL DES COURS 17, 179 (1981) (stating that certain principles of human rights are a fundamental part of *jus cogens*).

38. See generally Ibrahim F.I. Shihata, *supra* note 1, chapter 3 (elaborating the question whether the World Bank must consider human rights violations in its lending decisions).

39. Michael Reisman, *Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs*, 72 IOWA L. REV. 391, 395 (1987).

believe in the value of specialization of international organizations. Presently, there exist international fora which are not financial in nature and which are mandated to ensure protection of political human rights.⁴⁰ Such organizations each have mechanisms for monitoring compliance with human rights norms, such as the United Nations Human Rights Committee, the regional commissions and courts of human rights,⁴¹ and the various non-governmental organizations active in this field.⁴²

There is obviously a need to strengthen these institutions, as well as their enforcement and monitoring mechanisms, in the context of the new world order. Any future review of the United Nations Charter should seriously address this concern. Bilateral donors also can condition their financial assistance on full respect for all human rights, including political rights in the recipient countries.

The implication of this conclusion, however, does not mean that we should require international financial institutions, with their specialized mandate and competence, and with their reliance in many cases on borrowing from financial markets, to be involved in such a politically charged field. After all, double standards are easily found in this area. Political manipulation of the institutions by members in pursuit of their perceived national interests may be unavoidable once political considerations are allowed to be freely taken into account.

Experience has proven the value of the insight of these institutions' founders who insisted on their insulation from political considerations which had no direct relevance to their mandate of promoting economic development. Present practice also shows that depriving the unfortunate people of countries under predatory and despotic regimes of financial assistance might only add further injury to the insult imposed by their governments. In my view, the continuance of assistance to such countries will be more humanitarian so long as such funds are used only to improve the lot of the people. Improvement in the plight of individuals may be accomplished by ensuring that economic and social

40. See generally JOHN P. HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* (1984) (describing the establishment of many of the U.N. committees and sub-committees on human rights).

41. See generally LOUIS HENKIN, *INTERNATIONAL LAW* 1026-39 (1991) (illustrating the mandate and the structure of the regional human rights courts and commissions in Europe, Latin America, and Africa).

42. David Weissbrodt, *The Contribution of International Nongovernmental Organizations to the Protection of Human Rights*, in *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* (Theodor Meron ed., 1984) (describing the mandate of several nongovernmental organizations and their effectiveness in the field of human rights).

adjustment programs will always be accompanied by social safety nets and other measures to minimize their negative effect on the poor. Education projects, which should receive priority in such circumstances may also include an emphasis on human rights promotion. In this way, the activities of such institutions will alleviate present suffering while paving the way for future improvements, without falling into the risky trap of politicizing financial institutions. As Sir Joseph Gold, the past General Counsel of the International Monetary Fund, has eloquently asserted in defense of preserving the non-political character of that institution:

[t]he swimmer who goes out too far may seem to be waving, but is drowning. The fund that swims out too far, even in a moral cause, will risk drowning. It will have lost the full confidence of its members. It will be less able to promote universal prosperity. That task is the Fund's moral cause.⁴³

Thank you.

43. SIR JOSEPH GOLD, I.M.F. SURV., POLITICAL CONSIDERATIONS ARE PROHIBITED BY ARTICLES OF AGREEMENT WHEN THE FUND CONSIDERS REQUESTS FOR THE USE OF RESOURCES 146, 148 (1983).