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Benoît Mayer, *Development is no excuse for Human Rights Abuses: Framing the Responsibility of International Development Agencies*

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DEVELOPMENT IS NO EXCUSE FOR HUMAN RIGHTS ABUSES:
FRAMING THE RESPONSIBILITY OF INTERNATIONAL
DEVELOPMENT AGENCIES

BENOÎT MAYER

Development projects may be harmful, most obviously in cases of ill-planned or mismanaged projects, resulting in serious and unmitigated consequences for the enjoyment of human rights. There is a strong argument that today's international law compels international development agencies (conveying bilateral or multilateral development aid) to respect certain norms, particularly with regard to human rights protection, wherever they intervene. Reflecting a trend toward "accountability," multilateral development banks have adopted internal rules and review mechanisms. Accountability, however, is "responsibility-lite", stopping short of full-fledged jurisdictional guarantees. Therefore, it is time to establish institutions that would implement the responsibility of development agencies for breaches of international law, thus creating a stronger incentive for development actors to respect the rights of all stakeholders.

*"Power corrupts, absolute power corrupts absolutely."
Montesquieu, 1689-1755*

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I. INTRODUCTION

On September 5, 2002 and March 28, 2003, 8,396 Indonesian villagers filed two successive complaints before the Tokyo District Court. These villagers had been resettled as part of the Koto Panjang dam, a vast hydroelectric project carried out in Sumatra by the Indonesian government, with the financial support of the Japanese government and several Japanese institutions as part of international aid to development. The complainants argued that the Japanese government should

urge its Indonesian counterpart to decommission the dam, while seeking compensation for the harm that they underwent. The four defendants – the Japanese government, Japan International Cooperation Agency, Japan Bank for International Cooperation, and Tokyo Electric Power Services Company Limited – had lent a total of about 31 billion yen (342 million USD) at preferential rates, as official development assistance to the Indonesian government, to allow for the construction of the Koto Panjang dam. The plaintiffs argued that the project had “devastated their subsistence economy, culture and environment.”¹ The interference with their human rights was accordingly disproportionate, and the social mitigation measures were presented as being insufficient. The complainants highlighted that the “Japan-based companies were involved in all stages from the ODA [Official Development Assistance] funding to consulting to construction,” while “[t]he Indonesian side only provided the dam construction site and observed the work in the first place.”² In substance, they submitted that a development agency could be held liable for having funded a project, carried out in another country, at least when such a project had tremendous consequences on the human rights of third parties – in the case at issue, those of the people resettled by a hydroelectric project.

Approaching this argument requires us first to abandon a Manichean conception of official development assistance, as always being beneficial for all. This is not to deny that the act of donation from a wealthy state to a developing one may be a laudable act of generosity. However, beside the compelling general claim against arbitrariness and for the rule of law, there are at least three stringent sociological reasons why official development assistance should not be given a general *carte blanche*, but should remain within the ambit of the rule of law. These three reasons are the possibility of mismanagement, the ulterior motives of donors and the existence of competing ethical narratives.

First, even the best original intentions do not exclude the unintended consequences of clumsiness, negligence or mismanagement. There may be differences of views between what the national or international institutions consider as good for the intended beneficiaries and the actual views of those intended beneficiaries.³ The bureaucratic detachment of the World Bank has

¹ Amanda Suutari, *Sumatran Villagers Sue Japan over ODA Dam*, JAPAN TIMES, Aug. 14, 2004. Primary sources could not be found in English.

² *Statement of Protest: We Strongly Denounce the Tokyo High Court's Unfair Judgment*, THE SUPPORT ACTION CENTER FOR KOTOPANJANG DAM VICTIMS (Jan. 10, 2013), http://www.kotopan.jp/documents/protest_statement.pdf.

³ For a similar argument with regard to non-governmental organizations, see Steve Charnovitz, *Accountability of Non-Governmental Organizations in Global Governance*, in NGO ACCOUNTABILITY: POLITICS, PRINCIPLES AND INNOVATIONS 21, 33 (Lisa Jordan & Peter van Tuijl eds., 2006).

particularly been identified as a potential factor of harmful projects. Thayer Scudder suspects that the majority of the World Bank's managers see human rights and environmental safeguards as obstacles "[s]lowing up the funding for an already too slow project cycle."⁴ Some development projects have certainly had a disproportionate social cost, as is particularly evident in the case of some large hydroelectric projects. Thus, the passage of time allows a dispassionate assessment of the Kariba Dam project, which was completed during the second half of the 1950s, said to have "involved unacceptable environmental and social impacts," in particular the "adverse impacts on 57,000 resettlers and irreversible impacts on the delta and other wetlands of the Zambezi River."⁵ More generally, the World Commission on Dams' report on *Dams and Development* concluded that "[i]n too many cases an unacceptable and often unnecessary price has been paid to secure [development] benefits, especially in social and environmental terms, by people displaced, by communities downstream, by taxpayers and by the natural environment."⁶ A part of the issue comes from the fact that development projects often affect people who are poorer and have less political power than those who, within the same state, benefit from the development project.⁷ For instance, the Kariba dam opposed large mining companies in dire need of cheap energy to a tribe (the Tonga) who lived with no regular contact with the world beyond the Gwembe valley (and, of course, had no use of electricity); it goes without saying that the mining companies had a greater say in the decision than the Tonga.⁸ Absent a stringent normative structure that guarantees fair participation and defends the rights of the least influential, such political asymmetries invariably lead to exploitative policies.⁹

Secondly, aid is not always without ulterior motives, and such ulterior motives may conflict with the rights of some stakeholders. In extreme cases, aid to development

⁴ THAYER SCUDDER, THE FUTURE OF LARGE DAMS: DEALING WITH SOCIAL, ENVIRONMENTAL, INSTITUTIONAL AND POLITICAL COSTS 278 (2005).

⁵ Thayer Scudder, *The Kariba Case Study* (California Institute of Technology, Division of the Humanities and Social Sciences, Social Science Working Paper 1227, 2005).

⁶ WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION MAKING, xxviii (2000).

⁷ It is striking that development projects often do not help the poorer in the countries where they are implemented. The underlying claim of many international development aid programs according to which inequalities are necessary as a first step towards a more equitable development is rarely challenged or qualified.

⁸ For a first-hand report on the resettlement, see DAVID HOWARTH, THE SHADOW OF THE DAM (1961).

⁹ Historical and present examples whereby an asymmetry of political power has led to exploitation include colonialism, apartheid, the persecution of diverse minorities, and the present denial of the rights of undocumented migrants in many countries.

is used as a pretext to conceal grimmer goals such as arms deals.¹⁰ More frequently, aid comes along with a political project through which a state or an international organization unavoidably intrudes within the domestic affairs of another state. Development agencies define priorities, negotiate with possible receiving governments on the modalities of the project and have an influence on the implementation of the project. The aid that is provided often aims at intruding within the state's domestic affairs and despite global consensus that aid should be untied,¹¹ developed states continue to tie about 20% of official development assistance to specific projects.¹² Even when aid is considered as untied and is provided through multilateral development agencies, states may decide between different institutions, either with a specific scope of action (e.g. UNHCR, UNICEF, or UNDP), or simply overlapping geographical scope (e.g. World Bank or Asian/African/Caribbean/Inter-American Development Bank) and some states have a significant influence on the policies of certain international institutions (e.g. the United States on the World Bank). The competition between international development agencies reinforces the power of major Western states, as each international development agency is compelled to define their priorities in order to capture the contributions of these states – even when such contributions are untied. The World Commission on Dams' report noted that “[f]or industrialized countries with a history of dam-building and expertise in related equipment, bilateral overseas aid has often become a vehicle for supporting local industry by exporting this expertise through aid programs tied to the purchase of services or equipment from the donor country.”¹³ In such circumstances, the high willingness of a state to support national entrepreneurs may under the guise of official development assistance, lead to projects that are clearly detrimental to aid recipients. Under the pressure of powerful domestic lobbies, donor states are likely to give less consideration to remote social or environmental “costs.”¹⁴ Paradoxically, this form of “colonization through money” (as it was then qualified) has never been denounced as vehemently as in the few instances when aid was

¹⁰ See for example, TIM LANKESTER, *THE POLITICS AND ECONOMICS OF BRITAIN'S FOREIGN AID: THE PERGAU DAM AFFAIR* (2012).

¹¹ *Paris Declaration on Aid Effectiveness: Ownership, Harmonisation, Alignment, Results and Mutual Accountability*, ORG. FOR ECON. COOPERATION AND DEV. (2005), <http://www.oecd.org/development/effectiveness/34428351.pdf> [hereinafter *Paris Declaration on Aid Effectiveness*].

¹² OECD statistics, *DAC7b: Tying Status of Bilateral ODA*, available at <http://www.oecd.org/dac/stats/> (last visited 22 September 2013).

¹³ WORLD COMMISSION OF DAMS, *supra* note 6, at 173.

¹⁴ The issue of environmental costs is often linked to that of social costs. In the most recent documents, human rights and environmental considerations are dealt with together within the conception of “safeguards.” See *infra* note 110. Yet, the present article focuses specifically on human rights issues, which involve a specific ethical discourse different from environmental justice.

directed through a reverse pattern, from a former British protectorate to a European state: French left-wing and right-wing politicians suddenly united to denounce a 100 million euro aid project that Qatar offered in order to help develop poor French suburbs.¹⁵

Thirdly, a judicial review does not necessarily pursue the same “good” as official development assistance. The concept of “development” is malleable, but development agencies tend to focus solely on *economic* development.¹⁶ Thus, according to Anthony Oliver-Smith,

“[d]evelopment continues to be defined by those with the power to implement their ideas, for whom it is the process through which the productive forces of economies and supporting infrastructures are improved through public and private investment with eventual benefits ensuing for broader sectors of the population through the functioning of labor and commodity markets.”¹⁷

Oliver-Smith further notes that, “[g]enerally, infrastructural and productive development is considered to produce benefits that far outweigh any costs that such processes might entail.”¹⁸ Thus, development is rooted in an ethical language that may substantially differ from the rationale for human rights or environmental protection. Development projects are justified in view of collective interests, mainly in short or medium term. It may affect the environment in the long term. It

¹⁵ “Colonisation par l’argent” (colonization through money) was the expression used by left-wing French politician Jean-Luc Mélenchon; see Alexander Lemarié, *Du FN au Front de Gauche, le fonds du Qatar suscite le scepticisme*, LE MONDE, Sept. 27, 2012, http://www.lemonde.fr/proche-orient/article/2012/09/27/de-le-pen-a-melenchon-le-fonds-du-qatar-attire-les-critiques_1766842_3218.html; Harvey Morris, *Qatar’s latest investment stirs the French*, INT’L HERALD TRIB., Sept. 25, 2012; see also Prabhakar Singh, *International Law as “Intimate Enemy”*, 14 OR. REV. INT’L L. 377, 419 (2012).

¹⁶ For the purpose of this article, “development” must be understood by its reference to its inception by development agencies, which is, most of the time, as “economic development.” This is not to deny that other conceptions of development exist, for instance, recognizing a greater importance to social welfare (beyond economic prosperity) and to human rights. For instance, see, UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT - HUMAN RIGHTS AND HUMAN DEVELOPMENT, 85 (2000), http://hdr.undp.org/en/media/HDR_2000_EN.pdf; AMARTYA SEN, DEVELOPMENT AS FREEDOM 35 (1999).

¹⁷ ANTHONY OLIVER-SMITH, DEFYING DISPLACEMENT: GRASSROOTS RESISTANCE AND THE CRITIQUE OF DEVELOPMENT 7,8 (2010).

¹⁸ *Id.* at 8.

may also negatively affect some individuals while benefiting others.¹⁹ Ironically, there are many instances where the marginal populations resettled as part of hydroelectric projects in developing countries aren't connected to the electricity grid, be it before or after the program of resettlement and rehabilitation. Judicial review does not necessarily oversee the overall balance of the project between its contribution to economic development and its social and environmental costs (which is the object of subtle political compromises that judges are ill-equipped to evaluate), but it should at least assess the sufficiency of the mitigation measures with regard to national or international human rights standards. When judicial review approaches human rights protection, it uses a deontological language which contrasts sharply with the utilitarian approach that, for better or worse, has the greatest impact on international development projects. The importance of litigation on development projects is largely enshrined within the oft-discussed opposition between development and rights – a distinction so essential that it cannot be completely overcome solely by *bona fide* efforts of the development actors by taking human rights into account.

Thus, the U.N. Committee on Economic, Social and Cultural Rights insisted in its second General Comment that “development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights,” highlighting that “[m]any activities undertaken in the name of ‘development’ have subsequently been recognized as ill-conceived and even counter-productive in human rights terms.”²⁰ Admittedly, development goals are certainly an element to take into account at the stage of assessing whether such interference can be justified as being legal, proportional and necessary for goals such as the pursuance of rights and freedoms of others or general interest more generally; however, development goals do not blankly exonerate development activities from human rights considerations or from the demand for an effective remedy for any eventual violation.²¹ The issue is of utmost importance considering the tremendous impact that some development projects have on the enjoyment of human rights by reason of their scale. Thus, our initial example, the Koto Panjang dam, displaced an estimated 23,000 people.²² At an even greater scale, Stiglitz has

¹⁹ See *id.* at 17 (“Reigning development models, promoting large-scale infrastructural projects, transform social and physical environments and espouse the concept of ‘the greatest good for the greatest number’ rather than the rights of the less numerous and the less powerful.”).

²⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 2, International Technical Assistance Measure (Art. 22), ¶ 7 (Feb. 2, 1990).

²¹ On the evolution of obligations relating to human rights in international law on investment, see M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 149 (3d ed., 2010).

²² Kazuo Sumi, Paper Presentation at the 19th IAPS International Conference on Environment, Health and Sustainable Development: Compensation / Rehabilitation Issues

shown that inappropriate policies, where ideology countered scientific knowledge, may devastate entire states and lead to human disasters.²³

Despite these concerns and recent development with regard to contiguous issues, there has hardly been any consideration for the concept of “responsibility” in the dominant development discourse.²⁴ This might reflect a widespread, though misleading, association of development assistance with a scent of goodness, where “responsibility” as an inimical and troublesome notion is seemingly unwelcome. Good intentions appear as a shield against blame – although, we have seen, good intentions might not be real and even when *blame* is too strong, there may be a *remedy* in order.

However, there are some signs of an evolution. Following a similar trend with regard to NGOs “trying to do good well”,²⁵ there have been calls for recognition of the “accountability” of development agencies.²⁶ It is not very clear what accountability means; the term “is still evolving in its meaning and application.”²⁷ Yet, it surely appears as a *lite* form of responsibility. With a lesser legal connotation than responsibility, accountability calls development actors to a rational or efficient use of their funds and to an evaluation of their results, but it does not generally refer to a duty to repair the injuries caused by aid-funded programs. Accountability is framed in the context of the relation between an agency and its constituents or funders, not in its relations with third parties.²⁸ For instance, the Paris Declaration on Aid Effectiveness, Ownership, Harmonisation, Alignment, Results and Mutual Accountability recognized the need of “[e]nhancing donors’ and partner countries’ respective accountability to their citizens and parliaments for their development policies, strategies and performance,”²⁹ but it did not provide any provision regarding the beneficiaries, or those possibly harmed, by a development project.

for People Affected by the Koto Panjang Dam in Indonesia and the Post-Project Legal Battle in Japan's Courts (Sept. 11-16, 2006).

²³ JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003) [hereinafter STIGLITZ].

²⁴ On the lack of consideration for “financial accountability”, see Kunibert Raffer, *International Financial Institutions and Financial Accountability*, 18 *ETHICS & INT’L AFF.* 61 (2004).

²⁵ Juliette Majot, *On Trying to Do Good Well: Practicing Participatory Democracy through International Advocacy Campaigns*, in *NGO ACCOUNTABILITY: POLITICS, PRINCIPLES AND INNOVATIONS*, *supra* note 3, at 211.

²⁶ See, for example, *Paris Declaration on Aid Effectiveness*, *supra* note 11.

²⁷ Suresh Nanwani, *Holding Multilateral Development Banks to Account: Gateways and Barriers*, 10 *INT’L COMMUN. L. REV.* 199, 201 (2008). See also references cited therein.

²⁸ Stiglitz abundantly showed the issue of “taxation without representation” in its critique of the IMF. See STIGLITZ, *supra* note 23, at 20.

²⁹ *Paris Declaration on Aid Effectiveness*, *supra* note 11, at 3(iii).

The debate on the responsibility of development agencies may sometimes recall discussions on the international law of foreign investment.³⁰ Like development projects, international investments are decisions taken remotely, with a potentially large impact on human rights protection; the asymmetry of powers is often similar. As is the case with development, such interferences have often been framed (rightly or not) as pursuing economic development in the general interest. Investment and development projects likewise call for a balance between a utilitarian approach to development (as investment is supposed to be mutually beneficial in the dominant neoliberal ideology that underpins international investment law) and a deontological posture of protecting the individual. Yet, Sornarajah highlights that “[t]he burgeoning law of human rights ... creates instability in an area of law that was designed solely with the single objective of protecting foreign investment.”³¹ Similar whimsicalities are encountered within domestic systems, as “the responsibility of multinational corporations under the laws of their home state for involvement in human rights abuses is coming increasingly to be recognized.”³²

Litigation is most likely in cases of foreign direct investment because of the high degree of control of the investor over the use of its assets. However, portfolio investment, which is more similar to development aid, might also come under the scrutiny of the judiciary. Tortuous or even criminal responsibility may arise from development aid or portfolio investment when human rights abuses (or significant environmental harms) are at the core of the project (i.e. either its goal, or at least its foreseeable consequence) or when the investor does not fulfil its due diligence obligations. In fact, development aid might bring stronger cases than portfolio investments, for development agencies are not “simply doing business”; their motive *is* the realization of the project, and the mental element is therefore stronger.³³

³⁰ Although official development assistance represents an international transfer of assets, it does not generally constitute an investment for lack of control or even risk (unlike portfolio “investment”). See M. SORNARAJAH, *supra* note 21, at 8.

³¹ *Id.* at 77.

³² *Id.* at 78, 149 et seq. See also TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (O. de Schutter ed., 2006).

³³ The Nuremberg Military Tribunal once declared that “we are not prepared to state that such loans constitute a violation of that law.” United States v. von Weizsaecker (The Ministries Case) (Nuremberg Military Tribunal, 11 April 1949), reproduced in 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUREMBERG, OCTOBER 1946-APRIL 1949, 621-22 (1953). The position is itself controversial, and an extensive interpretation thereof would be inconsistent with the jurisprudence of the same tribunal. See Sabine Michalowski & Juan Pablo Bohoslavsky, *Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts:*

This article aims at analysing the responsibility that maybe invoked by an individual or a group affected by a development program against the development agency that has funded the program. It also suggests possible institutional avenues to facilitate the recognition of the responsibility of development agencies. The notion of “international development agency” is chosen in order to put together institutions that may have different legal statuses (e.g. international organization, state organ or private entity) but are socially recognized as pursuing international development as their main objective. It is a part of the central argument of this article that, although the distinction between international organizations, state organs or private entities working on international development may have some other consequences, it ought to be of little relevance insofar as their international responsibility is concerned.³⁴ Responsibility and remedies can be conceived of in a transnational framework overcoming the traditional divide between national and international institutions.

Prior to further discussions, it must also be noted that human rights are not the only harm that may stem from development projects. In particular, a third parallel ethical discourse relates to the protection of the environment, as a challenge to the common anthropocentric view of development and human rights.³⁵ Some of the reflections and propositions that follow could apply to the responsibility of development agencies with regard to the protection of the environment as well.

A Response to the World Bank Discussion Paper on Odious Debts, 48 COLUM. J. TRANSNAT'L L. 59, 72–73 (2009); see also *infra* note 182 and accompanying text.

³⁴ International development aid may also come from private actors, for instance, NGOs or, perhaps, multinational corporations as part of a corporate social responsibility. On the latter point, see OECD, OFFICIAL DEVELOPMENT ASSISTANCE AND PRIVATE FINANCE: ATTRACTING FINANCE AND INVESTMENT TO DEVELOPING COUNTRIES (2002); SCUDDER, *supra* note 4, at 285. Official development assistance, however, is defined by the OECD as flows from developed to developing countries and to multilateral development institutions, which are: (i) “provided by official agencies, including state and local governments, or by their executive agencies,” and (ii) “each transaction of which (a) is administered with the promotion of the economic development and welfare of developing countries as its main objective; and (b) is concessional in character and conveys a grant element of at least 25 per cent.” *Is It ODA? – Factsheet*, ORG. FOR ECON. COOPERATION & DEV. (Nov. 2008), <http://www.oecd.org/dac/stats/34086975.pdf>. Development funds that do not qualify as ODA can qualify in more general categories such as “official aid” (not directed to developing countries) or as “other official flows” (e.g. not concessional, not primarily aimed at development, or from private firms).

³⁵ For instance, see Stephen Humphreys, *Competing Claims: Human Rights and Climate Harms*, in HUMAN RIGHTS AND CLIMATE CHANGE 37 (Stephen Humphreys ed., 2010).

However, this paper focuses on human rights as a first step as it is the most obvious case for conceiving the responsibility of development agencies.³⁶

This article is structured as follows. Part II develops preliminary reflections on the conceptual relation between development aid and human rights. Part III presents the rules of international law that establish the responsibility of international aid agencies for human rights abuses. Part IV shows the efforts of some multilateral development agencies in developing internal rules to protect people who could be affected by their projects. Part V shows that there is no systematic remedy for human rights abuses by development agencies in today's international law. Finally, Part VI develops some suggestions to promote the responsibility of international development agencies.

II. DEVELOPMENT AID AND HUMAN RIGHTS: IMPLACABLE BROTHERS

The relation between development aid and human rights is two-fold. On the one hand, development aid is an essential element of international cooperation in the realization of human rights (sub-part 1). On the other hand, human rights law may also impose some constraints to aid-funded development projects (sub-part 2).

A. Development Aid as International Cooperation in Realizing Human Rights

Development aid often contributes to furthering the human rights project; it supports developing states in securing the economic, social and cultural rights of their populations. Therefore, a largely incantatory language encouraging states to provide aid to developing states can be found in several international law documents: the UN Charter,³⁷ the Universal Declaration of Human Rights,³⁸ the

³⁶ See James C. N. Paul, *Law and Development into the 90's: Using International Law to Impose Accountability to People on International Development Actors*, 1992 THIRD WORLD LEGAL STUD. 1, 4 (1992) (noting that “[h]uman rights law provides the first and most important source for these legal standards, because it lays down both substantive and procedural standards. Unless this legal obligation to respect and protect human rights can be secured, it is unlikely that accountability to other sources of law, such as environmental standards, can be enforced”). The last two decades have witnessed the rapid development of climate change considerations in the international normative agenda. Yet, the connection between aid-funded projects and climate change is not obvious: environmental issues are generally related to the local environment rather than to greenhouse gas emissions. Therefore, I believe that human rights remain the most promising ethical challenge to most aid-funded projects.

³⁷ The third purpose of the United Nations Organization is “[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or

International Covenant on Economic, Social and Cultural Rights,³⁹ and the Declaration on the Right to Development,⁴⁰ among others.

Arguably, these documents are not without any legal consequence; at the least, they certainly compel states to do *something*, and to refrain from any conduct that could impede the capacity of other states to do that “something.” Yet, because they fall short of defining any precise goals, in practical terms, it is generally difficult to bind states in the binary language of compliance or breach of their obligations by defining a threshold of compliance. Some further normative endeavours have attempted to define such a threshold. In 1970, after years of debate, the General Assembly adopted the International Development Strategy for the Second United Nations Development Decade. This resolution stated that “[e]ach economically advanced country will progressively increase its official development assistance to the developing countries and will exert its best efforts to reach a minimum net amount of 0.7 per cent of its gross national product at market price by the middle of the Decade.”⁴¹ After a series of documents adopted by the General Assembly to recall this objective, the 2000 Millennium Declaration called again on industrialized countries “[t]o grant more generous development assistance, especially to countries that are genuinely making an effort to apply their resources to poverty reduction.”⁴² Notwithstanding constant reiterations to increase development aid, after four decades only a few Northern European states have fulfilled the goal of an official development assistance representing 0.7% of their gross national product. According to the OECD, official development assistance has never

humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” U.N. Charter, art.1, para. 3.

³⁸ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 28 (Dec.10, 1948), stating that “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

³⁹ International Covenant on Economic, Social and Cultural Rights, art.2(1), Dec. 16, 1966, 993 U.N.T.S. 3, calling each party to “undertake ... to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the [economic, social and cultural] rights.”

⁴⁰ Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc.A/RES/41/128 (Dec. 4, 1986), reaffirming that “States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.”

⁴¹ International Development Strategy for the Second United Nations Development Decade, G.A. Res. 2626 (XXV), U.N. Doc.A/RES/25/2626 (Oct. 24, 1970).

⁴² United Nations Millennium Declaration, ¶ 16, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

exceeded 0.4% of the combined GNP of industrialized countries.⁴³ It is therefore untenable that the objective of 0.7% of the gross national product has become part of customary international law: the principle might be “accepted as law” (*opinio juris* element), but there is simply no general state practice.⁴⁴ At best, one may argue that the obligation on industrialized countries to commit to *an unspecified level of* development aid has become part of customary international law, as developed states have indeed generally committed *some* resources to international development.⁴⁵ Yet, here again is a blur obligation, an empty frame, which is unlikely to be enforced. It is not an obligation to engage in a specific development program in a specific country. States may comply *bona fide* with this obligation by providing untied official development assistance, but they may also take advantage of this obligation to justify policies that support the development of domestic industries in foreign countries.

B. *Human Rights as a Constraint over Aid-Funded Development Projects*

As a part of international development aid, states must however respect at least some negative human rights obligations. These obligations are reflected in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, a document adopted in 2011 by a group of eminent jurists reflecting the current state of international human rights law. These principles recall that “states, acting separately or jointly, that are in a position to do so, must provide international assistance to contribute to the fulfilment of economic, social and cultural rights in other States, *in a manner consistent with Principle 32.*”⁴⁶ The positive obligation to do *something* is accompanied by an important reference to principle 32 of the same document, according to which, “[i]n fulfilling economic, social and cultural rights extraterritorially, States must ... (c) observe international human rights standards.”⁴⁷ In other words, the intention of fulfilling economic, social and cultural rights through development aid does not exempt a state from its human rights obligations.

⁴³ OECD, “The 0.7% ODA/GNI target - a history,” OECD website, <http://www.oecd.org/dac/stats/the07odagnitarget-ahistory.htm>

⁴⁴ Statute of the International Court of Justice art. 38(1)(b) (referring to international custom as “a general practice accepted as law”).

⁴⁵ See, for example, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, principle 33 (28 Sept., 2011), reproduced in 34 HUM. RTS. Q. 1084 (2012) [hereinafter Maastricht Principles].

⁴⁶ *Id.* principle 33 (emphasis added).

⁴⁷ *Id.* principle 32.

In principle, all human rights obligations stemming from treaty or customary international human rights law apply to aid-funded development projects.⁴⁸ In practice however, most of the attention has been focused on a few specific types of human rights abuses, related in particular to displacement and resettlement, environmental protection and the rights of indigenous peoples. It is partly because international development agencies have only limited control over development projects that other rights have not been invoked more often. Besides their decision to allow the project, development agencies have generally been involved at the stage of planning and monitoring the development project through oversight and evaluation. They have a say in the broad picture of the project but not necessarily in each and every act of public authorities who are implementing the project. Only violations that are essential to the project, or that are related to its monitoring could be persuasively invoked against international development agencies. Yet, in some extreme cases, projects were supported whose implementation led, and was arguably known to lead, to widespread human rights abuses.⁴⁹

As mentioned before, the single most significant impact of development projects on human rights is through displacement. With regard to displacement, a development project – a hydroelectric dam in particular⁵⁰ – affects three types of persons: those who are resettled directly as part of the project, those who are indirectly displaced due to loss of activity induced by the project, and the host populations.⁵¹ Over the last two decades, specific human rights instruments have been developed to address the situation of internally displaced persons. Yet, the 1994 Guiding Principles on Internal Displacement did not include development projects within the illustrative list of causes for which someone would qualify as an internally displaced person.⁵² By contrast, the Protocol on the Protection and Assistance to Internally Displaced Persons adopted at the International Conference on the Great Lakes Region in 2006 includes “the effect of large scale development projects” among the causes of such displacement. A similar

⁴⁸ The International Bill of Rights is constituted by three instruments: International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights. See John Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527 (1975).

⁴⁹ For instance, on the Chixoy dam case, see *infra* note 180.

⁵⁰ See World Bank, *Resettlement and Development: The Bankwide Review of Projects Involving Involuntary Resettlement 1986-1993*, at 8 (1996), in GRANT DAWSON & SONIA FARBER, *FORCIBLE DISPLACEMENT THROUGHOUT THE AGES: TOWARDS AN INTERNATIONAL CONVENTION FOR THE PREVENTION AND PUNISHMENT OF THE CRIME OF FORCIBLE DISPLACEMENT* 130 (2012) (estimating that 63% of displacement was related to hydroelectric projects and 23% to transport corridors).

⁵¹ See SCUDDER, *supra* note 4, at 18.

⁵² Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2 (1998) [hereinafter Guiding Principles].

extension of the definition of internally displaced persons appeared in a draft of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa. However, the definition in the authoritative version followed the 1994 Guiding Principles.⁵³ Nevertheless, the list of causes of displacement contained in the Guiding Principles and the Kampala Convention are not exhaustive; it might be argued that development projects are similar to other causes of displacement and that similar situations should be treated equally. In fact, it must be remembered that the Guiding Principles are essentially a declination of existing human rights instruments to specific cases and hence, their definition of internally displaced persons should not be considered as limiting the field of application of such human rights.⁵⁴

Besides the protection of internally displaced persons, the prohibition of arbitrary displacement and resettlement is well-established.⁵⁵ In particular, the Guiding Principles specifically prohibit “arbitrary displacement ... (c) in cases of large-scale development projects, which are not justified by compelling and overriding public interests.”⁵⁶ Similarly, the Kampala Convention calls parties, “as much as possible,” to “prevent displacement caused by projects carried out by public or private actors” and, in any case, to “carry out a socio-economic and environmental impact assessment of a proposed development project prior to undertaking such a project.”⁵⁷ In 2006, the Human Rights Council adopted a more specific document, the U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement, clarifying the regime applicable to these circumstances. Accordingly, evictions must “be (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure

⁵³ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa art. 1 (k), Oct. 22, 2009 (entered into force Dec. 6, 2012), available at <http://au.int/en/content/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> [hereinafter Kampala Convention]; see also Allehone Mulugeta Abebe, *The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges*, 29 REFUGEE SURV. Q. 28, 35 (2010).

⁵⁴ See Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, 38 STUD. TRANSNAT'L LEGAL POL'Y [i], 4,5 (2008).

⁵⁵ See generally International Covenant on Civil and Political Rights art. 2(3)(a), Dec. 16, 1966, 999 U.N.T.S. 371, article 12 (1) and (3): “1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. ... 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”

⁵⁶ Guiding Principles, *supra* note 52, principle 6.

⁵⁷ Kampala Convention, *supra* note 53, art. 10.

full and fair compensation and rehabilitation; and (f) carried out in accordance with the present guidelines.”⁵⁸

Another set of norms, which could be considered as part of international human rights law, focuses on the protection of the rights of Indigenous peoples. In 2007, the General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration recalls the general duty of cooperation, calling “[t]he organs and specialized agencies of the United Nations system and other intergovernmental organizations” to “contribute to [its] full realization ... through the mobilization, inter alia, of financial cooperation and technical assistance.”⁵⁹ Yet, the Convention also contains norms that may constrain aid-funded development projects. Regarding displacement, the declaration sets higher demands concerning the agency of resettled communities; resettlement is conditioned on the “free, prior and informed consent of the indigenous peoples concerned” and “agreement on just and fair compensation.”⁶⁰ Another provision emphasizes the right of the Indigenous peoples to “be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.”⁶¹ The ILO has also promoted the rights of indigenous peoples, in particular through the adoption of the Indigenous and Tribal Peoples Convention in 1989. Although poorly ratified, this Convention contains similar provisions relating to free and informed consent to relocation,⁶² maintenance of their traditional activities⁶³ and, decisions of Indigenous peoples on “their own priorities for the process of development.”⁶⁴

III. THE OBLIGATIONS OF INTERNATIONAL DEVELOPMENT AGENCIES IN INTERNATIONAL LAW

The previous part analysed the general standards of international human rights law that are relevant to international development projects. We now need to turn to their applicability to international development agencies. Today’s international

⁵⁸ Basic Principles and Guidelines on Development-Based Evictions and Displacement, ¶ 21, in Annex of Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Comm’n on Hum. Rts., U.N. Doc. E/CN.4/2006/41 (Mar. 14, 2006) (by Miloon Kothari).

⁵⁹ U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art.41, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

⁶⁰ *Id.* art. 10.

⁶¹ *Id.* art. 20.

⁶² Indigenous and Tribal Peoples in Independent Countries Convention art.16, June 25, 1989, 1650 U.N.T.S. 28383 (entered into force Sept. 5, 1991); *see also* Indigenous and Tribal Populations Convention, June 26, 1957, 328 U.N.T.S. 247.

⁶³ Indigenous and Tribal Peoples in Independent Countries Convention art. 14.

⁶⁴ *Id.* art. 7.

human rights law remains a little obscure with regard to the obligations of extraneous donors, because human rights have been developed on the assumption of a single, vertical relation between human rights-holding individuals and the corresponding duty-bearing state. Following the classical theory of social contract, a state must protect “its” subjects.⁶⁵ This classical theoretical framework does not contain room for any extraneous interference. Yet, in a “globalized” world, it has increasingly been recognized that the conduct of a state may affect populations abroad. A trend of international human rights law has therefore attempted to extend states’ human rights obligations beyond the national context.⁶⁶ In particular, the Maastricht Principles reflect an evolution towards the recognition that international cooperation for the realization of economic, social and cultural rights should go hand in hand with certain other human rights obligations.⁶⁷

This part aims at establishing the substantive rules on the responsibility of development agencies for a violation of human rights. Here, it is necessary to distinguish between different forms of international development agencies, as international human rights rules may apply in different ways to them. In particular, development aid may engage the responsibility of either the state (sub-part A) or the international organization (sub-part B) providing such aid.⁶⁸

The responsibility of the development agency (or the state or international organization representing the same) is without prejudice to the responsibility of the recipient state for its own conduct, typically in implementing the project. In reality, however, it is difficult to conceive that the development agency could be responsible, but not the recipient state. Therefore, it is tempting to frame the responsibility of development agencies in connection with the wrongful act committed by the recipient state. In this sense, sub-part C discusses the responsibility of a state or an international organization for aiding or assisting the commission of a wrongful act by the recipient state through development aid.

⁶⁵ See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT: IN THE FORMER, THE FALSE PRINCIPLES AND FOUNDATION OF SIR ROBERT FILMER, AND HIS FOLLOWERS, ARE DETECTED AND OVERTHROWN. THE LATTER IS AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END, OF CIVIL-GOVERNMENT* (1689); JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE* (1762); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁶⁶ See Benoît Mayer, *Universalism v. Magic Circles: Human Rights’ Outsiders*, in *CRITICAL INTERNATIONAL LAW: POST-REALISM, POST COLONIALISM AND TRANSNATIONALISM* (Prabhakar Singh & Benoît Mayer eds., forthcoming).

⁶⁷ See Maastricht Principles, *supra* note 45, (including the accompanying text).

⁶⁸ A third possibility, that is not discussed here, is that aid comes from a private entity, for instance a company, through corporate social responsibility.

A. The Responsibility of States

Bilateral development agencies, such as the United States Agency for International Development (USAID), are state organs. As such, these agencies engage the responsibility of the state if they breach any international obligation of that state.⁶⁹ The major obstacle here is the determination of the scope of obligations applicable when the conduct attributable to a state has extraterritorial effects. A state generally cannot commit violence outside its territory;⁷⁰ extraterritorial human rights obligations are therefore necessarily more limited than territorial ones. Nevertheless, the existence of such limited extraterritorial obligations has been recognized recently by the evolution of the jurisprudence and a progress of international law doctrines.⁷¹ This evolution can hardly be solely attributed to the effects of globalization; state conduct has had significant consequences on the human rights of populations abroad much before the development of international human rights law, for instance, through the process of colonization. Rather, the progressive recognition of extraterritorial human rights obligations follows a slow change in dominant beliefs, which might in particular be propelled by the development of new technologies in information and communication. It is mainly because European citizens received quasi-instantaneous images of the NATO bombings in Belgrade that the rejection of Banković's claims against European states by the European Court of Human Rights became a scandal.⁷² Similarly, it is perhaps in part because Iraq did not appear so "far" any more to the European in the era of Internet and cheap travel that the same Court adopted a much more progressive stance with regard to Iraqi citizens allegedly killed by British troops.⁷³

A consensus has gradually emerged over the last few years as to the scope of extraterritorial human rights obligations. In particular, Marko Milanović's book, *Extraterritorial Application of Human Rights Treaties* (mainly with regard to civil and political rights) and the *Maastricht Principles on Extraterritorial Obligations of States in the*

⁶⁹ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, art. 4, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Dec. 12, 2001) [hereinafter Draft Articles on State Responsibility]

⁷⁰ On the definition of a state as a monopoly of legitimate use of physical force within a given territory, see MAX WEBER, *POLITIK ALS BERUF 1* (1919). A notable exception would be the case of an occupied territory.

⁷¹ See, for example, MARKO MILANOVIĆ, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (2011); *Al Skeini and Others v. United Kingdom*, 53 Eur. Ct. H.R. 18 (2011); Marko Milanović, *Al-Skeini and Al-Jedda in Strasbourg*, 23 E.J.I.L. 121 (2012); Benoît Mayer, *supra* note 66.

⁷² *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333. On the reception of the judgment, see generally MILANOVIĆ, *supra* note 71, at 182-83 et *passim*.

⁷³ *Al Skeini and Others v. United Kingdom*, *supra* note 71.

Area of Economic, Social and Cultural Rights converge to similar conclusions.⁷⁴ Both of them posit a similar distinction between positive obligations to *respect* human rights by refraining from acting in ways that would unduly infringe these rights on one hand, and negative obligations to *ensure* and *secure* (Milanovic, on civil and political rights) or to *protect* and *fulfil* (Maastricht principles, on economic, social and cultural rights) human rights through adopting and enforcing specific norms and policies on the other hand. For both authorities, negative obligations should *limit* extraterritorial conduct, but positive obligations should not generally *impose* conditions on extraterritorial conduct. Thus, Milanovic argues that negative obligations should not be limited territorially as they “require ... the state to have nothing more than control over the conduct of its own agents,” whereas practical reasons justify a limitation of positive obligations to the sole territories under the effective/overall control of the state.⁷⁵ Accordingly, for instance, the United Kingdom is not compelled to secure, say, the freedom of religion in Iraq if it does not have effective or overall control over the territory. Yet, the United Kingdom should refrain from arbitrarily killing random passers-by, to ensure compliance with its extraterritorial negative obligations. Yet, Milanovic brings a nuance to this dichotomy between positive and negative human rights obligations, recognizing that there are “prophylactic and procedural positive obligations” that “exist solely to make the state’s negative obligations truly effective.”⁷⁶ In our instance, the negative obligation of British authorities to refrain from arbitrary killings comes along with a positive, but prophylactic obligation to investigate allegations of such killings by British troops.

The Maastricht Principles substantiate such extraterritorial positive obligations more than Milanovic because positive obligations arguably play a greater role with regard to economic, social and cultural rights than with respect to civil and political rights. Nevertheless, their general approach is very similar and does not posit any positive obligations beyond procedural or prophylactic obligations. The Maastricht

⁷⁴ See also GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW (Malcolm Langford et al. eds., 2013).

⁷⁵ MILANOVIC, *supra* note 71, at 210; see also Al-Skeini and Others v. United Kingdom, *supra* note 71; WALTER KÄLIN, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION 141-2 (2009) (In cases such as “a full-scale trade embargo or blockade of foreign territory that makes it objectively impossible for a third state to supply its population with basic health care facilities or food”: “It is clear that the state remains bound to respect human rights and to refrain from committing human rights violations in all these cases. On the other hand, states are not, in our view, under an obligation to protect and fulfil human rights on behalf of people abroad. ... [T]he right to food is not violated if states are not ready to provide food aid when famine-like conditions prevail in a third state – so long as their conduct is not to blame for the food shortage.”)

⁷⁶ MILANOVIC, *supra* note 71, at 216.

Principles prescribe that states “desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment” of such rights.⁷⁷ It further clarifies that “[t]he responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct.”⁷⁸ Because “[u]ncertainty about potential impacts does not constitute justification for such conduct,”⁷⁹ states should engage in reasonable efforts to foresee the consequences of their conduct and act with precaution. In particular, the Maastricht Principles make clear that states must “conduct prior assessment, with public participation, of the risks and potential extraterritorial impact of their laws, policies and practices on the enjoyment of economic, social and cultural rights.”⁸⁰

This suggests that bilateral development agencies, as state agents, must assess the foreseeable consequences of their policies and projects with regard to the rights of individuals abroad, in particular those in the recipient state and avoid any conduct that may affect the enjoyment of such rights in an unjustified manner. Indeed, this is precisely the position of a more specific document adopted by the Human Rights Council -, the U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement. In an attempt at clarifying the human rights obligations of the donor state, this document applies to development-based evictions linked to projects supported by international development assistance.⁸¹ According to this document, “States should ensure that binding human rights standards are integrated in their international relations, including through trade and investment, development assistance and participation in multilateral forums and organizations.”⁸²

B. *The Responsibility of International Organizations*

Multilateral development agencies may either be organs of international organizations, or self-standing international organizations.⁸³ In either case, their

⁷⁷ Maastricht Principles, *supra* note 45, principle 13.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* principle 14.

⁸¹ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, *supra* note 58, at ¶ 8

⁸² *Id.* ¶ 27.

⁸³ In most cases, multilateral development agencies have an autonomous personality. For the World Bank, *see* International Bank of Reconstruction and Development Articles of Agreement art. VII, section 2, Dec. 27.1945, 2 U.N.T.S. 13; Convention on the Privileges and Immunities of the Specialized Agencies, art.II, section 3, Nov.21, 1947, 33 U.N.T.S. 261. The present article does not address the possibility of invoking the responsibility of the member states instead of that of the international organization, as this does not seem to

responsibility is well established under international law. The personality of an international organization was recognized by the ICJ in its advisory opinion of 1949 in the *Reparation for Injuries Suffered in the Service of the United Nations* case, where the states parties to the United Nations Organization were said to have “entrust[ed] certain functions to it ... with the attendant duties and responsibilities.”⁸⁴ A later Advisory Opinion of the ICJ, in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* case, reiterated 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.”⁸⁵ In a third Advisory Opinion in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the ICJ stated that “the United Nations may be required to bear responsibility for the damage arising from” acts performed by the United Nations or by its agents acting in their official capacity.⁸⁶

While the personality of international organizations is well established, they do not have similar human rights obligations as states. Unlike states, international organizations can generally not be parties to human rights treaties.⁸⁷ Therefore, sources of international human rights norms applicable to international organizations may be sought in their constituting treaties, their internal rules, and most importantly, in customary international law.

Some treaties constituting international organizations contain some human rights provisions. However, there is generally no reference to human rights in the

raise issues specific to the circumstances of international development agencies. For instance, see PHILIPPE SANDS Q.C. & PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* 526-31 (2009).

⁸⁴ *Reparation for Injuries Suffered in Service of United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11).

⁸⁵ *Interpretation of Agreement of Mar. 25, 1951 between World Health Organization and Egypt*, Advisory Opinion, 1980 I.C.J. 73, 89–90 (Dec. 20).

⁸⁶ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of Commission on Human Rights*, Advisory Opinion, 1999 I.C.J. 62, 89 (Apr. 29).

⁸⁷ See, for instance, the first recital common to the International Covenant on Civil and Political Rights and to the International Covenant on Economic, Social and Cultural Rights (referring to “[t]he States Parties to the present Covenant”). The exception is the European Union accession to the European Convention on Human Rights, which required the modification of two treaties and years of bilateral negotiations that are still ongoing in February 2013. See Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 17 (1), June 13, 2004, E.T.S. No. 174 (modifying article 59 of the European Convention on Human Rights); Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Communities, Dec. 13, 2007, O.J. (C 306) (modifying article 6 of the Treaty on European Union).

constituting treaties of multilateral development banks.⁸⁸ Indeed, these treaties even contain provisions that may even *impede* human rights considerations to permeate within the activities of such organizations, as they generally demand that arrangements be made “without regard to political or other non-economic influences or considerations.”⁸⁹ The primary law of multilateral development banks contrasts sharply with that applicable to organs of the United Nations such as UNICEF and UNDP.⁹⁰ The latter are bound by the UN Charter and, in particular, by the third purpose of the United Nations: to “promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”⁹¹

In addition to their constituting instrument, multilateral development agencies have also developed internal rules, in particular human rights standards, which will be discussed in the next part. The Draft Articles on the Responsibility of International Organizations recognize that a breach of “an international obligation ... may arise for an international organization towards its members under the rules of the organization.”⁹² Yet, neither the Draft Articles, nor its commentary take a position as to *which* rule of an international organization may create such an international obligation towards its members and under what conditions.⁹³ The Draft Articles are limited to a mere assessment that internal rules of an international organization *might*, under certain undetermined circumstances, create obligations for such an organization. Internal rules could however be used as evidence of international custom.

⁸⁸ See, for example, International Bank of Reconstruction and Development Articles of Agreement, *supra* note 83; Agreement establishing the African Development Bank, Aug. 4, 1963, 510 U.N.T.S. 3; Agreement establishing the Asian Development Bank, Dec. 4, 1965, 571 U.N.T.S. 123.

⁸⁹ International Bank for Reconstruction and Development Articles for Agreement, art.IV section 10 and art. III section 5 (b), *supra* note 83; see also ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 137 (2006); Victoria E. Marmorstein, *World Bank Power to Consider Human Rights in Loan Decisions*, 13 J.INT’L L. ECON. 113 (1978-79).

⁹⁰ See Establishment of an International Children’s Emergency Fund, G.A. Res. 57 (I), U.N. Doc. A/RES/57(I) (Dec.11, 1946); Consolidation of the Special Fund and the Expanded Programme of Technical Assistance in a United Nations Development Programme, G.A. Res. 2029(XX), U.N. Doc. A/RES/2029(XX) (Nov. 22, 1965). Another example would be the European Development Fund, which is an institution part of the European Union.

⁹¹ U.N. Charter art.1, para. 3.

⁹² Int’l Law Comm’n, Draft Articles on the Responsibility of International Organizations, with Commentaries, art.10, U.N. GAOR, 66th Sess., Supp. No. 10, U.N. Doc.A/66/10 (2011) [hereinafter Draft Articles on the Responsibility of International Organizations].

⁹³ *Id.* art.10, para. 7.

Customary international law is therefore the main source of human rights obligations of multilateral development agencies. An apparent issue is that most of the practice relating to the protection of human rights has been derived from states and not international organizations. However, Tomuschat has argued convincingly that international organizations should nevertheless be bound by custom constituted by the general practice *of states*, that *states* accept as law: “if states acting individually have been subjected to certain rules thought to be indispensable for maintaining orderly relations within the international community, there is no justification for exempting international organizations from the scope *ratione personae* of such rules.”⁹⁴ Clapham concludes accordingly that international organizations have a “duty to protect the customary international human rights of everyone in their control to the extent that their functions allow them to fulfil such a duty.”⁹⁵ Like in the case of extraterritorial human rights obligations, Clapham considers that “[s]uch responsibility includes not only the duty to respect human rights (the negative obligations) but also the duty to protect human rights (the positive obligations),”⁹⁶ but seems to recognize that positive obligations may be more limited than negative obligations.

International organizations cannot be held responsible for all human rights issues occurring anywhere in the world. With regard to positive human rights obligations, there needs to be a limitation similar to the territorial limitation of states’ positive human rights obligations. In applying the principle of ‘specialty’, international organizations may only have positive obligations within the scope of their mandate i.e. they can only be held responsible for not doing what they were supposed to do. Moreover, the positive human rights obligations of international organizations also need to be limited by the capacity of these organizations to act, particularly in view of their limited resources.

On the other hand, negative human rights obligations (and prophylactic and procedural positive obligations) are also of great importance for international organizations. The U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement in this context state that international organizations must “desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment”⁹⁷ of any human right. More specifically, this may include a duty to “conduct prior assessment, with public participation, of the risks and potential extraterritorial impact of their laws, policies and practices on the

⁹⁴ Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, 281 RECUEIL DES COURS (1999), cited by CLAPHAM, *supra* note 89, at 83.

⁹⁵ *Id.* at 68.

⁹⁶ *Id.*

⁹⁷ Maastricht Principles, *supra* note 45, principles 11 & 13.

enjoyment of economic, social and cultural rights.”⁹⁸ The similarity between the extraterritorial responsibility of states and such responsibility of international organizations is hardly surprising: after all, international organizations are essentially a veil behind which states act extraterritorially.⁹⁹

C. *The Responsibility of a State or International Organization for Aiding or Assisting*

The two previous sub-parts approached the responsibility of states and international organizations without reference to the conduct of the recipient state. In practice, this would set the standards of evidence relatively high, demanding that the injury be attributed to the sole conduct of a state or an international organization. An international development agency, whether bilateral or multilateral, is likely to respond to such claims by arguing that the recipient state alone should be held responsible for eventual human rights abuses that occurred during the implementation of the project.

Therefore, the argument for the responsibility of development agencies can be more convincingly conceived as a responsibility of the state or the international organization *in connection with* the act of the aid-receiving state.¹⁰⁰ In particular, an international development agency may incur such a responsibility for aiding or assisting in the implementation of a development project. The Draft Articles on the Responsibility of States for Internationally Wrongful Acts assess that “[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with the knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”¹⁰¹ The same provision, *mutatis mutandis*, is included in the Draft Articles on the Responsibility of International Organizations.¹⁰² This rule is also recalled in the Maastricht Principles, under the same condition that the aiding or assisting states “do so with knowledge of the circumstances of the act.”¹⁰³ In accordance with the

⁹⁸ *Id.* principle 14.

⁹⁹ See for instance *Maclaine Watson & Co Ltd v. International Tin Council*, [1990] 2 AC 418, [1989] 3 All ER 523, 81 I.L.R. 670 (1989) (House of Lords); and Ralph Wilde, *Enhancing Accountability at the International Level: The Tension between International Organizations and Member State Responsibility and the Underlying Issues at Stake*, 12 ILSA J. INT'L & COMP. L. 395 (2005-2006).

¹⁰⁰ This approach might face significant practical hurdles if the court refuses to take position as to the lawfulness of the conduct of a state not party to the dispute. This is a problem of adjudication, not of substance. See discussion below, section 5.3.

¹⁰¹ Draft Articles on State Responsibility, *supra* note 69, art. 16.

¹⁰² Draft Articles on the Responsibility of International Organizations, *supra* note 92, art. 14.

¹⁰³ Maastricht Principles, *supra* note 45, principle 21 (b).

commentaries accompanying the Draft Articles, “[t]here is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.”¹⁰⁴ This suggests that the responsibility of an international development agency could be engaged even though its participation is neither necessary nor sufficient for the violation to occur. Yet, the aiding or assisting state or international organization is only responsible for the injury caused by its aid or assistance, which may not necessarily be the full injury caused by the wrongful conduct of the recipient state.¹⁰⁵

There are some soft law documents which suggest a responsibility of states in aiding or assisting international development agencies. In particular, the second General Comment on International Technical Assistance Measures of the U.N. Committee on Economic, Social and Cultural Rights submits that “the international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant [on Economic, Social and Cultural Rights], or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation.”¹⁰⁶ This suggests that the responsibility of an international development agency could be engaged following its “involvement” in a project that unduly infringes human rights.

Similarly, the U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacements recall that, whereas “States bear the principle obligation for applying human rights ... norms,” “[t]his does not ... absolve other parties, including project managers and personnel, international financial and other institutions or organizations, transnational and other corporations, and individual

¹⁰⁴ Draft Articles on State Responsibility, *supra* note 69, commentary art. 16, para. 5; Draft Articles on the Responsibility of International Organizations, *supra* note 92, commentary under article 14, ¶ 4.

¹⁰⁵ Draft Articles on State Responsibility, *supra* note 69, commentary para. 10 under article 16 (“By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which ... flow from its own conduct”).

¹⁰⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 2, International Technical Assistance Measures (Art. 22), ¶ 6, U.N. Doc. E/1990/23 (Feb. 2, 1990); *see also* Committee on Economic, Social and Cultural Rights, General Comment No. 7, The Right to Adequate Housing (Art. 11.1): Forced Evictions, ¶¶ 17-18, U.N. Doc. E/1998/22 (May 20, 1997).

parties, including private landlords and landowners, of all responsibilities.”¹⁰⁷ This double negation reflects the vagueness of the responsibility of international development agencies in such circumstances, as there is no settled principle to define how much knowledge, how much likelihood that human rights abuses occur, how much monitoring and how much insistence on human rights safeguards are necessary for a development agency to fulfil its human rights obligations. Here again, the duty is essentially a negative one; the development agency – or the responding state or international organization – must refrain from aiding or assisting a state in the commission of a breach of human rights.¹⁰⁸ This naturally comes with prophylactic and procedural positive obligations, such as the obligation for the agency to monitor the project it facilitates. In practice, there seems to be no obvious difference between the approach of an independent responsibility or a bilateral or multilateral development agency, or its responsibility for aiding or assisting violations attributed to the recipient state.

IV. THE ACCOUNTABILITY OF INTERNATIONAL DEVELOPMENT AGENCIES

The previous parts have defined the rules of treaty and customary international law and the standards of responsibility applicable to international development organizations. This part reflects on the internalization of such norms by international development agencies; in particular, the initiative of multilateral development banks. Accountability, as an internal and minimalist implementation of international legal standards, contributes to create an aura of normativity around the delivery of international development aid. The first sub-part deals with the development of substantive internal rules, whereas the second sub-part recounts the development of internal review mechanisms.

A. Internal Standard

Over the last quarter of a century, multilateral development banks have adopted some internal standards constraining their own action. These standards extended to resettlement,¹⁰⁹ indigenous peoples,¹¹⁰ gender dimensions¹¹¹ and cultural

¹⁰⁷ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, *supra* note 58, ¶ 11.

¹⁰⁸ See Maastricht Principles, *supra* note 45, principle 21(b).

¹⁰⁹ See, for example, *OP 4.12: Involuntary Resettlement*, WORLD BANK (Dec. 2001), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064610~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> and *BP 4.12: Involuntary Resettlement*, WORLD BANK (Dec. 2001),

property.¹¹² Other multilateral and bilateral development agencies have also developed internal regulations on human rights-related issues, but those documents remain generally vague and perhaps less publicized than the policies of multilateral agencies.¹¹³

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:22941226~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184~isCURL:Y,00.html> (replacing OD 4.30, Involuntary Resettlement, June 1990); *Safeguard Policy Statement*, ASIAN DEV. BANK (June 2009), <http://www.adb.org/sites/default/files/pub/2009/Safeguard-Policy-StatementJune2009.pdf> (superseding Policy on Involuntary Resettlement, Aug. 1995); *Involuntary Resettlement Policy*, AFR. DEV. BANK (Nov. 2003), <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000009-EN-BANK-GROUP-INVOLUNTARY-RESETTLEMENT-POLICY.PDF>; and Draft Integrated Safeguard System: Policy Statement and Operational Standards, AFR. DEV. BANK (Sept. 2012).

¹¹⁰See, for example, *OP 4.10 Indigenous Peoples*, WORLD BANK (July 2010) <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (replacing OD 4.20, Indigenous Peoples, Sept. 1991); *Safeguard Policy Statement*, ASIAN DEV. BANK (June 2009) (superseding Policy on Indigenous Peoples, Apr. 1998). The African Development Bank has no policy to date, despite a commitment to develop one. See *Indigenous Peoples call on the African Development Bank to develop a specific policy to protect their rights*, FOREST PEOPLES PROGRAMME (Dec. 10, 2012), <http://www.forestpeoples.org/topics/african-development-bank> [afdb/news/2012/12/indigenous-peoples-call-african-development-bank-d](http://www.afdb/news/2012/12/indigenous-peoples-call-african-development-bank-d).

¹¹¹See, for example, *OP 4.20: Gender Development*, WORLD BANK (Mar. 2003), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064559~pagePK:64141683~piPK:64141620~theSitePK:502184,00.html> and *BP: 4.20: Gender Development*, WORLD BANK (March 2003), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20140815~pagePK:64141683~piPK:64141620~theSitePK:502184,00.html> (replacing OP 4.20); Asian Development Bank: OM Section C2/BP, Gender and Development in ADB Operations, Dec.6, 2010 (superseding Policy on Gender and Development, June 1998).

¹¹²See, for example, *OP 4.11: Physical Culture Resources*, WORLD BANK (July 2006), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20970737~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> and *BP 4.11: Physical Culture Resources*, WORLD BANK (July 2006), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20970738~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (replacing OPN 11.03, Management of Cultural Property in Bank-Financed Projects, Sept. 1986).

¹¹³See, for example, The Netherlands' Entrepreneurial Development Bank (FMO), Human Rights Policy, 2012; *Government of Canada Policy for CIDA on Human Rights, Democratization and Good Governance*, CANADIAN INT'L DEV. AGENCY (Dec. 1996), <http://www.acdi->

Under the pressure of civil society organizations, two trends can be discerned in the evolution of the rules of multilateral development banks over the last two decades. The first trend is a convergence: rules became standardized, forming a set of generalized practices that often confirmed and detailed customary human rights norms applicable to these organizations. A second trend is a constructive shift towards more precise and more demanding standards applicable at all stages of the development projects.

The evolution of provisions on the “responsibility” of banks with regard to development-induced displacement and resettlement illustrates these two trends – a dialogue between multilateral banks and growing demands for accountability. Back in 1990, the World Bank’s first Operation Directive (OD) on Involuntary Resettlement stated squarely that “[t]he responsibility for resettlement rests with the borrower.”¹¹⁴ This rule has however progressively been eroded through a constructive dialogue between multilateral banks. The Asian Development Bank’s first policy on Involuntary Resettlement, adopted in 1995, added a nuance when detailing the responsibility of the recipient state. It provided that “[a]s is common with all projects, the responsibility for planning and implementing resettlement rests with the government and other project sponsors.”¹¹⁵ This provision seemed to imply that the Asian Development Bank, being one of the sponsors, would be responsible along with other sponsors. This was presented as a “common” practice, despite the World Bank’s opposite policy.

In 2001, the World Bank’s reform of its policy on resettlement abandoned the blank provision on the responsibility of the borrower and detailed its different responsibilities for “preparing, implementing, and monitoring” resettlement.¹¹⁶ This covers most of the projects, but at least the wording leaves more room for arguments in favour of the responsibility of the World Bank. Two years later, the African Development Bank went a step further, stating in its first policy on resettlement that “[t]he borrowing agency has the *primary* responsibility for planning, implementing and monitoring resettlement issues.”¹¹⁷ By contrast, this

cida.gc.ca/INET/IMAGES.NSF/vLUIImages/HRDG2/\$file/HRDG-Policy-e.pdf; *Gender Equality - Policy and Tools: CIDA’s Policy on Gender Equality*, CANADIAN INT’L DEV. AGENCY (1999).

¹¹⁴ OD 4.30: *Involuntary Resettlement*, WORLD BANK, ¶ 6 (June 1990).

¹¹⁵ *Policy on Involuntary Resettlement*, ASIAN DEV. BANK, 12 (Aug. 1995), http://www.adb.org/sites/default/files/pub/1995/involuntary_resettlement.pdf (emphasis added).

¹¹⁶ OP 4.12 *Involuntary Resettlement*, WORLD BANK, ¶ 18 (Dec. 2001), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064610~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

¹¹⁷ *Involuntary Resettlement Policy*, AFR. DEV. BANK & AFR. DEV. FUND, ¶ 3 (Nov. 2003),

suggests that the funding agency may have a secondary responsibility, rather than no obligation at all.¹¹⁸ Indeed, the African Development Bank's policy document identified systemic issues that should be addressed through resettlement plans, relating specifically to a lack of implementation of existing laws. Thus, rather than leaving the whole task of planning and implementing resettlement to the recipient states, the African Development Bank announced that it "intent[ed] to play an increasingly important role in conceiving resettlement as an opportunity to develop and improve living standards of affected communities"¹¹⁹ and recognized the "Bank's role and *responsibility*" in supervising the recipients.¹²⁰

In turn, the Asian Development Bank adopted a Safeguard Policy Statement in 2009, which superseded its 1995 Policy on Involuntary Resettlement (as well as previous Policies on Indigenous Peoples and Environmental Policy). Unlike the 1995 Policy, the Safeguard Policy Statement refrained from any general statement on the responsibility of the borrower. Moreover, this document established an obligation of the recipient states to establish *ad hoc* mechanisms to receive and address grievances relating to the resettlement project and at the same time a commitment of the bank to monitor the creation of such a mechanism.¹²¹ Here again, other international development banks are likely to follow this evolution in the coming years. Thus, in September 2012, the African Development Bank circulated a draft "Integrated Safeguard System," which follows the Asian Development Bank's approach of addressing human rights, environmental and indigenous rights protection in a unique document. This draft document requires similar *ad hoc* grievance mechanisms, but with a greater involvement of the African Development Bank: "[t]he Bank and borrowers or clients shall be cooperating in undertaking the design and establishment of the grievance and redress mechanism to ensure that it is legitimate, accessible, predictable, equitable and transparent."¹²²

<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000009-EN-BANK-GROUP-INVOLUNTARY-RESETTLEMENT-POLICY.PDF> (emphasis added).

¹¹⁸ The same notion of a "primary responsibility" of the recipient state was developed earlier in the OECD Guidelines for Aid Agencies on Involuntary Displacement and Resettlement Projects, which the OECD developed to guide bilateral development agencies. See OECD Development Assistance Committee's Guidelines on Aid and Environment No. 3, Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects (1992).

¹¹⁹ *Supra* note 117, at ¶ 16.

¹²⁰ *Id.* part 4.3 (emphasis added).

¹²¹ *Supra* note 113, at ¶ 29. Unlike the grievance mechanisms discussed in the next sub-part, the grievance mechanisms suggested by the Policy Statement are linked to a specific resettlement project. However, the two evolutions are obviously linked.

¹²² *Integrated Safeguard System: Policy Statement and Operational Standards (Draft)*, AFR. DEV. BANK, 36 (Sept. 2012), <http://www.forestpeoples.org/topics/african-development-bank->

B. Review Mechanisms

The development of review mechanisms also reflects a trend towards the recognition of the responsibility of development agencies. In less than two decades, all major multilateral development banks have adopted such mechanisms, although the modalities are still significantly different.¹²³ The first of these mechanisms was the Inspection Panel of the World Bank.¹²⁴ It was founded in 1993, after the report of the Morse Commission evidenced that the World Bank staff had knowingly breached the World Bank social and environmental guidelines as a part of the Sardar Sarovar dam project on the Narmada River in India.¹²⁵ In turn, other multilateral development banks followed the example of the World Bank. The Inter-American Development Bank established an Independent Investigation Mechanism in 1994.¹²⁶ Similarly, the Asian Development Bank founded an Inspection Function in 1995.¹²⁷ In 1999, the International Financial Corporation and the Multilateral Investment Guarantee Agency established a Compliance Advisor/Ombudsman Office that would handle the requests related to private sector operations. In 2003, the Asian Development Bank's Inspection Function was replaced by an Accountability Mechanism. The same year, the European Bank for Reconstruction and Development created an Independent Recourse Mechanism.¹²⁸ The African Development Bank established an Independent Review Mechanism in 2004,¹²⁹ which was revised in 2010.¹³⁰ In 2009,

afdb/publication/2012/african-development-bank-s-integrated-safeguar (last visited Sept. 22, 2013).

¹²³ For a general discussion, *see, for example*, Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177 (2005); Richard E. Bissell & Suresh Nanwani, *Multilateral Development Bank Accountability Mechanisms: Developments and Challenges*, 6 MANCHESTER J. INT'L ECON. L. 2 (2009).

¹²⁴ Resolution IBRD 93-10 and IDA 93-6, The World Bank Inspection Panel, Sept. 22, 1993, 34 ILM 520 (1995).

¹²⁵ B. MORSE & T. BERGER, SARDAR SAROVAR: REPORT OF THE INDEPENDENT REVIEW (1992); *see also* T. R. Berger, *The World Bank's Independent Review of India's Sardar Sarovar Projects*, 9 AM. U. INT'L L. REV. 33 (1993).

¹²⁶ Inter-American Development Bank, *The IDB Independent Investigation Mechanism*, <http://www.iadb.org/cont/poli/investig/brochure.htm>.

¹²⁷ *See, for example*, Eugenia McGill, *The Inspection Policy of the Asian Development Bank*, in THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE 191 (2001).

¹²⁸ EBRD, *Independent Recourse Mechanism*, decision of the Board of Directors, Apr. 29, 2003.

¹²⁹ Bissell & Nanwani, *supra* note 123, at 15.

¹³⁰ African Development Bank, Resolution B/BD/2004/9-F/BD/2004/7, Independent Review Mechanism, June 30, 2004.

the European Bank for Reconstruction and Development replaced its Independent Recourse Mechanism by a Project Complaint Mechanism.¹³¹ The Inter-American Development Bank adopted an enhanced mechanism, the Independent Consultation and Investigation Mechanism, in 2010.¹³²

The development of these mechanisms reflects the constant interaction between multilateral development banks. Banks have often compared their review mechanism with those of other banks and this has inspired reforms.¹³³ Informal cooperation was also channelled through the creation of a Network of Accountability Mechanism of International Financial Institutions, meeting each year with delegates of most of the major institutions. In turn, this mostly international practice has inspired bilateral development agencies, some of which have participated in the Network of Accountability Mechanism of International Financial Institutions.¹³⁴ The Japan Bank for International Cooperation, the Japan International Cooperation Agency and the Netherlands Development Finance Company (FMO), among others, have created internal review mechanisms comparable to those of multilateral development banks.¹³⁵

These different review mechanisms have generally enjoyed only limited success, although the experiences of different international development agencies differ markedly. Among the most successful according to the number of applications, the Inspection Panel of the World Bank received 82 requests, 14 of which from India alone, from 1994 to 2012,¹³⁶ while the Compliance Advisor/Ombudsman Office of the International Financial Corporation and the Multilateral Investment Guarantee Agency registered 70 requests between 1999 and 2009.¹³⁷ By contrast,

¹³¹ Approved by a decision of the EBRD Board of Directors in May 2009.

¹³² Inter-American Development Bank, Policy Establishing the Independent Consultation and Investigation Mechanism, Feb.17, 2010.

¹³³ This is, for instance, the objective of the author in Daniel D. Bradlow, *Private Complaints and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403 (2004). Bradlow's article was developed on the basis of a research carried out for the African Development Bank. See also *The ICIM Story*, INTER-AMERICAN DEV. BANK, <http://www.iadb.org/en/mici/the-icim-story,1786.html> (last visited on Sept. 22, 2013) (acknowledging that "the IDB's Board of Executive Directors requested an enhanced mechanism to incorporate the lessons learned from the complaints received as well as lessons learned from the accountability mechanisms of other institutions.")

¹³⁴ For instance, see *Project Complaint Mechanism: Annual Report for 2011*, EUR. BANK FOR RECONSTRUCTION AND DEV. 12 (2011), http://www.ebrd.com/downloads/integrity/pcm_annual_report_2011.pdf.

¹³⁵ See, for example, Bissell & Nanwani, *supra* note 123, at 3.

¹³⁶ The decisions of the inspection panel can be found on the World Bank's website, <http://www.worldbank.org>.

¹³⁷ See Bissell & Nanwani, *supra* note 123, at 24.

the Inter-American Independent Investigation Mechanism received only five complaints between 1994 and 2010 and four reports were authorized; the Asian Development Bank's Inspection Function received eight requests, only one of which led to a full inspection process between 1995 and 2003;¹³⁸ and the African Development Bank received eight cases from 2006 to 2012.¹³⁹ A promising latecomer, the European Bank for Reconstruction and Development's Project Complaint Mechanism registered 11 requests between 2010 and 2012.

The limited number of cases can sometimes be attributed to specific factors, such as the lack of awareness regarding the availability of these new mechanisms.¹⁴⁰ However, there seem to be more of structural issues that explain the limited attraction of these mechanisms for possible complainants. Firstly, these mechanisms consist essentially in assessing whether the rules of the agency have been complied with, but "[t]hey are not generally designed to consider the adequacy of the policies and procedures themselves."¹⁴¹ This was, for instance, explicitly highlighted in a clarification that the Executive Directors of the World Bank issued in 1996 on the Resolution Establishing the Inspection Panel: "The Panel's mandate does not extend to reviewing the consistency of the Bank's practice with *any* of its policies and procedures, but ... is limited to cases of alleged failure by the Bank to follow its operational policies and procedures *with respect to the design, appraisal and/or implementation of projects*."¹⁴² Accordingly, review mechanisms do not allow challenges based directly on international human rights law. Moreover, they do not generally recognize the *stare decisis* principle¹⁴³ and have not genuinely contributed to the development of any substantive case law that could promote human rights guarantees in development activities. By contrast to

¹³⁸ *Review of the Inspection Function: Establishment of a New Accountability Mechanism* (Asian Dev. Bank, Working Paper, 2003).

¹³⁹ See *Requests Register*, AFR. DEV. BANK GRP, <http://www.afdb.org/en/about-us/structure/independent-review-mechanism/requests-register/> (last visited on Feb. 23, 2013).

¹⁴⁰ For instance, see *Review of the Resolution Establishing the Inspection Panel: Clarification of Certain Aspects of the Resolution*, WORLD BANK (Oct. 17, 1996), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20065323~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> [hereinafter 1996 Review of the Inspection Panel] ("Management will make significant efforts to make the Inspection Panel better known in borrowing countries").

¹⁴¹ RUTH MACKENZIE, CESARE ROMANO, YUVAL SHANY, WITH PHILIPPE SANDS, *THE MANUAL ON*

INTERNATIONAL COURTS AND TRIBUNALS 461 (2d ed. 2010).

¹⁴² 1996 Review of the Inspection Panel, *supra* note 140.

¹⁴³ Dana Clark, *The World Bank Inspection Panel*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 628, 634 (Malcolm Langford ed., 2009).

human rights courts' conception of human rights law as a "living instrument,"¹⁴⁴ such mechanisms have fossilized the human rights standards recognized in the policies of their respective institutions, in a strict positivist attitude. When the bank's policies are not sufficiently protective or specific, such mechanisms might therefore be insufficient.

Secondly, these institutions often have restricted functions and limited autonomy. The Inspection Panel of the World Bank, for instance, "is essentially a fact-finding mechanism."¹⁴⁵ Thus, the 1993 Resolution Establishing the Inspection Panel provides that it "shall seek the advice of the Bank's Legal Department on matters related to the Bank's rights and obligations with respect to the request under consideration."¹⁴⁶ Moreover, the same resolution provides that it belongs to the Management and the Executive Directors, after receiving the report, to decide whether or not to adopt any remedy.¹⁴⁷ Lastly, the Panel does not monitor the implementation of the remedy it proposes, if any. As a consequence, Dana Clark notes that, "with a few exceptions, oversight of their implementation has not been a high priority for the Bank."¹⁴⁸ She concludes that "there are many 'lost cases – cases where the Inspection Panel finds violations of Bank policies resulting in harm to claimants, but where no effective remedy is provided."¹⁴⁹ This is quite troubling, and one may wonder whether such mechanisms are established to genuinely safeguard the populations or only to display good management to the bank's donors.

Thirdly, these mechanisms do not reach the standards of independence that define jurisdictions. They are established within the premises of the financial institution to which they "belong." The procedure does not always guarantee the equality of arms between the claimants and the administration. The procedure of the World Bank, for instance, allows the Management to take position on the Panel's report before a recommendation is made by the Executive Directors, whereas the claimants do not have any opportunity to see the report.¹⁵⁰ These procedures are fundamentally conceived as accountability mechanisms that aim at satisfying the contributors and perhaps the recipient states, but not as responsibility mechanisms

¹⁴⁴ *Tyrer v. United Kingdom*, 2 Eur. Ct. H. R. (ser. A) at 1 (1978); *see generally* Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 HUMAN RTS. L. REV.57 (2005).

¹⁴⁵ MACKENZIE, ROMANO, SHANY, *supra* note 141, at 476.

¹⁴⁶ The World Bank Inspection Panel, *supra* note 124, ¶15.

¹⁴⁷ *Id.* ¶23.

¹⁴⁸ Clark, *supra* note 143, at 632.

¹⁴⁹ Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205, 220 (2002).

¹⁵⁰ The World Bank Inspection Panel, *supra* note 124, para. 21; *see also* Clark, *supra* note 143, at 632.

for the benefit of third parties, such as the affected population. Thus, if affected individuals are allowed to raise issues of conformity between a project and the policy of the institution, it is in order to promote the good management of the organization and not for the sake of the third parties.

Overall, these mechanisms often do not provide effective remedies, even when they are *allowed* to find violations. They are designed at best to rectify flawed projects, not to repair damages caused to populations.¹⁵¹ Clark argues that “[t]his lack of capacity to rectify the harm done and develop effective remedial measures has turned out to be a fundamental flaw in the effectiveness of the World Bank Inspection Panel as a tool for true accountability.”¹⁵² Beside ethical issues, this flaw limits the incentive for potential claimants to seize such review mechanisms. The ensuing impunity also reduces the deterrence effects of the mechanism for the managers of these institutions, as violations are not sanctioned in any way but perhaps through the purely symbolic satisfaction of their finding.

Yet, the greatest achievement of these review mechanisms has been the affirmation of responsibility of multilateral development agencies for the human rights consequences of aid-funded projects. Through raising awareness more than deterrence, the existence of such mechanisms might have triggered a greater compliance amongst managers of international financial institutions with their internal rules, although there is no concrete measure of such an outcome.¹⁵³ At least, it has contributed to “a shift in the balance of power” between these institutions and affected people, thus “diminish[ing] the culture of impunity.”¹⁵⁴ It has also reinforced the normative authority of the rules of the agencies, confirming (if necessary) that these rules formed general practices accepted as law. The very existence of an internal review mechanism (beyond the different forms that such a mechanism can take) has become a common standard for multilateral development banks and has arguably come to form a part of customary international law. Reflecting a growing *opinio juris* that international development agencies should establish a review mechanism, the U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement contend that international

¹⁵¹ Thus, for instance, the Inspection Panel of the World Bank cannot hear a request filed after more than 95% of the loan proceeds have been disbursed. See: The World Bank Inspection Panel, para. 14(c) and accompanying footnote.

¹⁵² Clark, *supra* note 143, at 640; see also Leonardo A. Crippa, *Multilateral Development Banks and Human Rights Responsibility*, 25 AM. U. INT’L L. REV. 531, 568 (2010); Barbara Rose Johnston, *Chixoy Dam Legacies: The Struggle to Secure Reparation and the Right to Remedy in Guatemala*, 3 WATER ALTERNATIVES 341–361, 357 (2010).

¹⁵³ MACKENZIE, ROMANO, SHANY, *supra* note 141, at 476.

¹⁵⁴ Clark, *supra* note 143, at 629.

organizations “should establish or accede to complaint mechanisms for cases of forced evictions that result from their own practices and policies.”¹⁵⁵

V. POSSIBLE JURISDICTIONAL AVENUES FOR THE RESPONSIBILITY OF INTERNATIONAL DEVELOPMENT AGENCIES

Internal standards and internal review mechanisms implement a notion of accountability, or “*responsibility lite*.” They certainly play a role in bringing international development agencies in line with international law, particularly international human rights law. Yet, the internal standards may stop short of a full-fledged recognition of international human rights standards, as the internal review mechanisms are neither fully independent nor really effective. The “right to an effective remedy by the competent national tribunals for acts violating the fundamental rights”¹⁵⁶ should apply, *mutadis mutandis*, to international institutions which are also in a position to violate fundamental rights – for not applying the right to an effective remedy internationally would allow states, who create international organizations, to circumvent their obligation to provide an effective remedy internally. Therefore, internal review mechanisms do not fulfil the right to an effective remedy.

This part considers a series of possible forums where a right to remedy may be implemented against the development agency when an international development agencies aids a project that violates human rights. It deals successively with

¹⁵⁵ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, *supra* note 58, at ¶ 72.

¹⁵⁶ Universal Declaration of Human Rights, *supra* note 38, art. 8. *See* International Covenant on Civil and Political Rights, *supra* note 55, art. 2(3)(a); Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, *supra* note 58, ¶ 59 (demanding more specifically that “All persons threatened with or subject to forced evictions have the right of access to timely remedy. Appropriate remedies include a fair hearing, access to legal counsel, legal aid, return, restitution, resettlement, rehabilitation and compensation, and should comply, as applicable, with the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”). If this seems to impose a duty on the recipient states, it also allows a solid argument by analogy once it is accepted that international development agencies are also, partly, responsible for some eventual human rights abuses: if an effective remedy is imposed onto the recipient state to ensure compliance with human rights standards and repair eventual violations, international development agencies should have a similar duty to provide an effective remedy.

administrative remedies (sub-part A), jurisdictions within the agency (sub-part B), the International Court of Justice (sub-part C), human rights bodies (sub-part D), international criminal law jurisdictions (sub-part E), domestic jurisdictions in the recipient state (sub-part F) or the donor state (sub-part G), and arbitration (sub-part H).

A. *Administrative Remedies*

Compensation has rarely been granted for the role played by international development agencies in violations of international human rights standards. In some cases however, administrative procedures were established on a case-by-case basis under the pressure of powerful civil society movements. This compensation was often paid only decades after the human rights abuses occurred.¹⁵⁷ Since the second half of the 1990s, the World Bank has supported at least three plans of rehabilitation, either financially or at least politically through an influence on the recipient states to engage in specific policies to support negatively affected populations. The first one related to the Kariba dam, following reports showing that the conditions of life of the displaced Tongas had significantly worsened. The Gwembe Tonga Rehabilitation and Development Program, initiated in 1998 (more than four decades after the completion of the project) offered some infrastructural investments (roads, water, irrigation, etc.) to improve the conditions of life of the displaced.¹⁵⁸ In the second case, the World Bank conditioned its funding of the Ghazy Barotha hydroelectric project in Pakistan to the compensation of people displaced two decades earlier in the same country as part of the Tarbela dam project.¹⁵⁹ Lastly, in the late 2000s, the World Bank recognized its responsibility in conjunction with the construction of the Chixoy dam, completed in 1982. The Chixoy dam project had involved the resettlement of about 17,000 people in precarious conditions and had included massacres and about 5,000 casualties. The World Bank has not yet agreed on any reparation.¹⁶⁰

In an ideal world, administrative remedies would suffice to repair the harm caused by human rights abuses – but in an ideal world, there would be no human rights abuses to repair. In the real world, human rights abuses occur and most of them remain unrepaired, absent a significant public outcry triggered by powerful social movements. The examples mentioned above are limited to some of the grossest human rights abuses, widely covered by the media in major donor countries, and yet remedies were only granted decades after the events took place (or, in the

¹⁵⁷ For instance, see Johnston, *supra* note 152; see also Scudder, *supra* note 5, at 51.

¹⁵⁸ SCUDDER, *supra* note 4, at 276.

¹⁵⁹ WORLD COMMISSION ON DAMS, *supra* note 6, at 128.

¹⁶⁰ See generally Johnston, *supra* note 152; see also Nick Dearden, *Guatemala's Chixoy dam: where development and terror intersect*, THE GUARDIAN, Dec. 10, 2012.

Chixoy dam case, have not been granted yet). Regarding hydroelectric projects specifically, Scudder writes that he “believe[s] that the attention paid by the [World] Bank is more a reactive response to NGO and other criticism than a proactive response based on realization of the adverse effect of the large majority of Bank-financed dams on project-affected people.”¹⁶¹ He adds that, in most cases, “the Bank has avoided providing funding for dam-induced resettlement,”¹⁶² as a way to avoid any further claim relating to this aspect of the development projects.

Despite its shortcomings, administrative procedures may have a role to play if they are combined with an effective remedy mechanism. Since the cases involved are often very complex, a jurisdiction alone may not have the capacity or the know-how to decide complex reparation mechanisms and implement them. Thus, Clark proposes the creation of a problem-solving unit within the World Bank.¹⁶³ Yet, a purely administrative procedure will likely be unable to provide an adequate remedy, if only for lack of independence in the assessment of the institution’s responsibility. Johnston convincingly argues that “some sort of independent advocate mechanism is needed to clarify histories and facilitate a negotiated remedy.”¹⁶⁴ Therefore, while administrative support may be indispensable to implement reparation, an independent body is necessary to answer fundamental questions such as interpreting the relevant norms and determining the rights and the wrongs.

B. *Jurisdiction within the Agency*

Suzuki and Nanwani propose the establishment of a jurisdictional appeal within the international development agency, particularly in the case of multilateral development banks. They note that each of these organizations possess an administrative tribunal: “[o]ne possibility,” they argue, “is to devise an appropriate passage for private parties’ claims from an MDB’s [Multilateral Development Bank] compliance review phase to its administrative tribunal, which could be metamorphosed as a special tribunal established at the request and consent of the parties.”¹⁶⁵

The idea is interesting, but it may be stretching the competence of administrative tribunals too far, which is currently only in limited to disputes relating to contracts

¹⁶¹ SCUDDER, *supra* note 4, at 278.

¹⁶² *Id.* at 284.

¹⁶³ Clark, *supra* note 149, at 224.

¹⁶⁴ Johnston, *supra* note 152, at 357–58.

¹⁶⁵ Suzuki & Nanwani, *supra* note 123, at 224.

of employment or terms of appointment.¹⁶⁶ It is difficult to conceive how a jurisdiction originally conceived to decide of individual labour disputes could be appropriately equipped to assess the validity of complex development projects displacing tens or hundreds of thousands of people. If, as Suzuki and Nanwani recognize, this requires a complete “metamorphose” of the jurisdiction, a fully new institution might simply be more appropriate.

More fundamentally, there is no obvious reason why this jurisdiction should be situated within the agency; on the contrary, an internal body, even of a jurisdictional nature, could lack independence, or at least appear as such to potential complainants. Moreover, a tribunal whose jurisdiction would extend beyond a single international development agency could develop a greater expertise and a more authoritative jurisprudence.

C. International Court of Justice

If a jurisdiction is to be found outside the agency, the International Court of Justice is an obvious option to consider. Yet, a preliminary hurdle stems from the fact that only states can be parties to a case before the ICJ,¹⁶⁷ although the ICJ could come to assess the responsibility of an international organization through the procedure of an advisory opinion.¹⁶⁸ Moreover, there are three major practical obstacles to the jurisdiction of the ICJ to assess the responsibility of an international development agency: the limits of diplomatic protection, state’s consent, and the *Monetary Gold* principle.

First, it is unlikely that the persons affected by a development project could trigger a procedure before the ICJ. In principle, states may file an application on behalf of individuals, through the mechanism of diplomatic protection.¹⁶⁹ Yet, a state is not

¹⁶⁶ For instance, see Statutes of the Administrative Tribunal of the Asian Development Bank, article II (1). See also *Barez*, Decision No. 5, Administrative Tribunal of the Asian Development Bank ¶17 (31 March 1995), reprinted in ASIAN DEV. BANK ADMIN. TRIBUNAL REP. 53 (1997).

¹⁶⁷ Statute of the International Court of Justice art.34(1).

¹⁶⁸ U.N. Charter art.96, para. 1. Advisory opinions may be requested by the General Assembly, the Security Council, or “[o]ther organs of the United Nations and specialized agencies ... so authorized by the General Assembly ... within the scope of their activities.” See also Statute of the International Court of Justice, art. 65(1).

¹⁶⁹ See, for example, Int’l Law Comm’n, Draft Articles on Diplomatic Protection, art.1, U.N. GAOR 61st Sess., Supp. No. 10, U.N. Doc. A/61/10 (2006) [hereinafter Draft Articles on Diplomatic Protection] (referring only to the responsibility of a state); Draft Articles on the Responsibility of International Organizations, *supra* note 92, commentary para. 2 under art. 45 (assessing that “diplomatic protection could be exercised by a State also towards an international organization”).

compelled to exercise diplomatic protection in any case. The ICJ in the *Barcelona Traction* case established that “[t]he State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease.”¹⁷⁰ Given that the state territorially competent to protect the individuals affected by a development project has generally not only agreed, but also sought for the financial support of a development agency, it is unlikely that this state will decide to seek the responsibility of the international development agency before the ICJ – all the more if such a step includes at least an implicit determination by the court of a joint responsibility of the recipient state. Here again, however, there is of course a possibility that a U.N. organ requests an advisory opinion against the state in question. Even though they are not formally binding, advisory opinions could put pressure on a state to conform to its pre-existing international obligations.

Secondly, if such a case came before the ICJ, perhaps as an advisory opinion, the international development agency could generally invoke the consent of the recipient state. It is an established principle that “[v]alid consent by a State ... to the commission of a given act by [a state or an] international organization precludes the wrongfulness of that act in relation to that State ... to the extent that the act remains within the limits of that consent.”¹⁷¹ Receiving international development aid generally supposes at least a form of consent.¹⁷²

Thirdly, assessing the responsibility of the aiding state seems to imply an assessment of the legality of the conduct of the recipient state. Yet, the ICJ has repeatedly stated that it would “decline to exercise the jurisdiction conferred upon

¹⁷⁰ *Barcelona Traction Light and Power Company Limited (Belg. v. Spain)*, 1970 I.C.J. 3, 44 (Feb. 5) [hereinafter *Barcelona Traction*]; *see also* Draft Articles on Diplomatic Protection, art. 2. It should, however, be noted that article 19 of the Draft Articles on Diplomatic Protection provides, as “recommended practice,” that “State entitled to exercise diplomatic protection according to the present draft articles, should (a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred.”

¹⁷¹ Draft Articles on the Responsibility of International Organizations, *supra* note 92, art. 20.

¹⁷² There are at least two possible arguments to counter consent. Constrain from the donor state or international organization, on the one hand, could only apply in very hypothetical circumstances. Peremptory norms of general international law vitiating the consent, on the other hand, would assume that human rights protection forms part of such peremptory norms, which is far from evident. It might be the case that *some* norms of international human rights law are peremptory norms of general international law, but those norms – tentatively, prohibition of torture, of racist discrimination, of slavery – are not generally at stake in the actual cases where international development agencies mingle in human rights abuses. See generally: Draft Articles on the Responsibility of International Organizations, *supra* note 92, art. 26; *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 102 (June 30).

it where the legal interests of a State not party to the proceeding would not only be affected by a decision, but would form the very subject-matter of the decision.”¹⁷³ This principle, called the *Monetary Gold* principle, could hinder a contentious procedure against a bilateral development agency.

Therefore, the role of the International Court of Justice is limited to very specific circumstances that circumvent these obstacles, in particular in the case of a newly independent state.¹⁷⁴ In the *Certain Phosphate Lands in Nauru* case, Nauru sought the responsibility of Australia for the environmental consequences of the exploitation of phosphate in Nauru that Australia undertook during its trust over Nauru. As a trustee, Australia was in particular under a duty “to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the concerned.”¹⁷⁵ The case was declared admissible and was then discontinued when the parties reached a settlement.¹⁷⁶ Similar cases may come from decolonized states, although the ICJ

¹⁷³ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. 392, 431 (Nov. 26) (references omitted); *see also* Monetary Gold Removed from Rome in 1943 (It. v. Fr.), Preliminary Questions, 1954 I.C.J. 19, 32 (June 15); *see also* Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, 1992 I.C.J. 240, 261 (June 26). *See* general Draft Articles on State Responsibility, *supra* note 69, commentary ¶ 11 under article 16.

¹⁷⁴ Another solution to this first obstacle would rely on the notion of a breach of an obligations “owed to the international community as a whole,” allowing a third state to seek the responsibility of the donor state without invoking any specific injury. *See* Draft Articles on the Responsibility of International Organizations, *supra* note 92, art. 49(2) (“A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.”); Draft Articles on State Responsibility, *supra* note 69, art. 48 (1) (b); Barcelona Traction, *supra* note 170, p. 32 (assessing that such obligations include “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” This does not mean, however, that each individual human rights obligation constitutes a peremptory norm of international law.)

¹⁷⁵ U.N. Charter, art. 76 (b); *see also* Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on Nov. 1, 1947, art. 5 (2) (b), U.N. Doc. A/402/Rev.1 (according to which the administering authority shall “promote, as may be appropriate to the circumstances of the Territory, the economic, social, educational and cultural advancement of the inhabitants”).

¹⁷⁶ Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, 1992 I.C.J. 240 (June 26); Order, 1993 I.C.J. 322 (Sept. 13); *see generally* Gil Marvel Tabucanon & Brian Opeskin, *The Resettlement of Naurians in Australia: An Early Case of Failed Environmental Migration*, 46 J.PAC. HIST. 337 (2011).

made clear that the case of Nauru was admissible only because Nauru had continuously claimed reparation since its creation.¹⁷⁷

D. *International Human Rights Bodies*

Regional human rights courts or human rights treaty bodies might offer an interesting alternative to the ICJ.¹⁷⁸ Unlike the ICJ, such courts do allow individuals or groups to initiate proceedings against a state. However, they do not generally allow proceedings against an international organization. The Human Rights Committee, for instance, has declined its jurisdiction in a case relating to the employment policy of the European Patent Office, stating that “it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant.”¹⁷⁹ It is probably the same consideration that led the Inter-American Commission on Human Rights to summarily reject the admissibility of the Chixoy Dam case, where petitioners highlighted “the complicity of international financial institutions ... , including the World Bank and the IDB [Inter-American development Bank], in the brutal removal of indigenous communities from their lands in Guatemala.”¹⁸⁰ Such a summary dismissal is unfortunate as it creates a risk that states hide themselves behind the veil of an international organization. It must be noted that other jurisdictions have sometimes taken a different position.¹⁸¹ In any case, it is generally accepted that international human rights bodies have a purely subsidiary function and do not

¹⁷⁷ See *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, 1992 I.C.J. 240, 253-55 (June 26).

¹⁷⁸ I do not discuss the possibility of debate within the confines of the United Nations Human Rights Council, which is a political institution (not a jurisdictional one) and is not equipped to provide equitable remedy. See, *mutadis mutandis*, the discussions on the former U.N. Human Rights Commission in SIGRUN I SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND*, 2001, at 186.

¹⁷⁹ *H. v. The Netherlands*, Communication No. 217/1986, U.N. Doc. CCPR/C/OP/2 at 70, ¶ 3.2 (1990).

¹⁸⁰ Appeal submitted by The Global Initiative for Economic, Social and Cultural Rights, Rights Action and the International Human Rights Clinic at Western New England University School of Law, on behalf of the Survivors of the Río Negro community and similar Chixoy Dam harmed communities in the Chixoy river basin, Guatemala (Petitioners), Dec. 7, 2011, case P -894-04, Guatemala, ¶ 22, available at <http://209.240.139.114/wp-content/uploads/2012/01/120119ChixoyPetition.pdf> (last visited Sept. 22, 2013); see also *Sobrevivientes de la Comunidad de Río Negro y otras comunidades similares en Guatemala*, Brief in Support of the Appeal Petition filed on Dec. 7, 2011 (May 8, 2012), available at <http://globalinitiative-escr.org/wp-content/uploads/2012/05/Chixoy-Brief-Final-May-8.pdf> (last visited Sept. 22, 2013).

¹⁸¹ For instance, see *Banković v. Belgium*, *supra* note 72.

override the primary obligation of a state to provide effective remedies domestically. Therefore, international human rights bodies could supplement specific mechanisms, but they should not replace them.

E. International Criminal Law Jurisdictions

A more radical option, limited to certain cases of gross human rights abuses, would rely on international criminal law. There are a few precedents of individuals engaged in business being held criminally responsible for having supported the commission of gross crimes. For instance, the Nuremberg Military Tribunal indicted two entrepreneurs in the case of *Flick and others*, holding that “[o]ne who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.”¹⁸² It must be emphasized that the condemnation was based solely on the knowledge of the use that would be made of such financial support, even though – the Tribunal noted – “[d]efendants did not approve nor do they now condone the atrocities of the SS,” and even “helped a number of Jewish friends.”¹⁸³

The same approach was generally followed in the development of international criminal law after the end of the Cold War. The International Criminal Tribunals for the Former Yugoslavia and for Rwanda recognized “aiding and abetting” as “a form of accessory liability”¹⁸⁴ and they developed an extensive jurisprudence on this. Their common Appeals Chamber considered that the *actus reus* requirement was constituted by “acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime [if] this support has a substantial effect upon the perpetration of the crime.”¹⁸⁵ The Tribunals held that

¹⁸² United States v. Flick, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1217 (1952) ; *see also* Michalowski & Bohoslavsky, *supra* note 33, at 74.

¹⁸³ *Id.* at 1222 (1952).

¹⁸⁴ Prosecutor v. Kunarac, Kovac, and Vukovic, Case No. T-96-23-T IT-96-23/1-T, Judgment, ¶ 391 (Int’l Crim. Trib. for the Former Yugoslavia, Feb. 22, 2001); *see also* The Prosecutor v. Joseph Nzabirinda, Case No. ICTR-2001-77-T, Judgment, ¶ 16 (Feb. 23 2007); The Prosecutor v. Paul Bisengimana, Case No. ICTR-00-60-T, Judgment, ¶ 33 (Apr. 13, 2006).

¹⁸⁵ Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-A, Appeal Judgment, ¶ 45 (Int’l Crim. Trib. for the Former Yugoslavia, July 29, 2004); *see also* The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Appeal Judgment, ¶ 79 (Aug. 29, 2008); The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Appeal Judgment, ¶ 44 (Mar. 12, 2008); *see generally* HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A TOPICAL DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 372 (2006); HUMAN RIGHTS

“[a]n accused may be convicted of aiding and abetting when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.”¹⁸⁶ Aiding and abetting could be perpetrated not only through action, but also through omission.¹⁸⁷ In this regard, a particularly strong judgment of the ICTR’s Trial Chamber held that “[v]iolence to physical well-being suffered by thousands of people ... affects the very fundamental interests of Humanity as a whole, and the protection of such interests cannot be counterbalanced by the mere personal risk that may have been faced by any person in a position of authority who failed to act in order to assist people whose lives were in danger.”¹⁸⁸

As for the *mens rea* requirement, the Appeals Chamber held that “the requisite mental element is knowledge that the acts performed by the aider and abettor assist[ing] the commission of the specific crime of the principal.”¹⁸⁹ *A contrario*, it indicated that “[i]t is not necessary to show that the aider and abettor shared the *mens rea* of the principal.”¹⁹⁰ The trial chamber of the ICTR further developed a “theory of ‘approving spectator,’” according to which “the mere presence of the accused at the scene of the crime” may involve his responsibility if he “know[s] that his presence would be seen by the perpetrator of the crime as encouragement or support.”¹⁹¹ Yet, the Rome Statute of the International Criminal Court suggests a more restrictive definition of the moral element for aiding or abetting. Its article 25 on individual criminal responsibility states that “a person shall be criminally

WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: A DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 202 (2010) (citing additional cases).

¹⁸⁶ The Prosecutor v. Tharcisse Muvunyi, *supra* note 185, ¶ 80; *see also* The Prosecutor v. Blagoje Simic, Miroslav Tadic and Simo Zaric, Case No. IT-95-9-T, Judgment, ¶ 162 (Int’l Crim. Trib. for the Former Yugoslavia, Oct. 17, 2003).

¹⁸⁷ *See* The Prosecutor v. Tihomir Blaskic, *supra* note 185, ¶ 47; The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Appeal Judgment, ¶ 370 (July 7, 2006).

¹⁸⁸ The Prosecutor v. Vincent Rutaganira, Case No. ICTR-95-1C-T, Judgment, ¶ 81 (Mar. 14, 2005).

¹⁸⁹ The Prosecutor v. Tihomir Blaskic, *supra* note 185, ¶ 45; The Prosecutor v. Tharcisse Muvunyi, *supra* note 185, ¶ 79.

¹⁹⁰ Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, ¶ 162 (Int’l Crim. Trib. for the Former Yugoslavia, Mar. 24, 2000); *see also* The Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-I, Judgment, ¶ 309 (Dec. 13, 2006).

¹⁹¹ The Prosecutor v. Athanase Seromba, *supra* note 190, ¶ 307, 310 (Dec. 13, 2006). This theory was not reviewed by the Appeals Chamber. For other cases before the Trial Chamber, *see* Human Rights Watch (2010), *supra* note 185, at 209; *cf.* The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-T, Judgment, ¶ 517 (Nov. 30, 2005); *see generally* Antonio Cassese, *Aiding and Abetting*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 239 (Antonio Cassese ed., 2009).

responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: ... (c) *For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.*¹⁹² This requirement, decided during the final round of negotiations, might have been a concession to some powerful states.¹⁹³ This language however remains contested by the doctrine. Cassel, for instance, argues that “‘purpose’ ... need not mean the exclusive or even primary purpose” and boils down to nothing more than knowledge and acceptance of the consequences.¹⁹⁴ Cassel further submits that “one can make a responsible argument that customary international law, as reflected in the majority of the post-World War II case law, the case law of the ICTY and ICTR, the ILC Draft Code, and group crimes under article 25(3)(d) of the ICC Statute, requires that those who aid and abet merely have *knowledge* that they are assisting criminal activity.”¹⁹⁵

In extreme and somewhat exceptional cases, interests groups may seek the criminal responsibility of administrators of international development agencies for aiding and abetting crimes, in cases where development projects lead to the perpetration of gross human rights abuses and where the support of international development agencies contribute to give a certain aura of legitimacy to illiberal governments and their projects. To fall within the jurisdiction of the International Criminal Court, the crime in question should be qualified as genocide, crime against humanity, war crime, or possibly crime of aggression,¹⁹⁶ but it cannot be totally excluded that the conduct of development agencies may in certain circumstances aid the commission of such crimes. This could for instance be the case if the evacuation of an area for

¹⁹² Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90 (emphasis added); *cf.* Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(1), U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda art. 6 (1), U.N. Doc. S/RES/955 (1994); *see also* Albin Eser, *Individual Criminal Responsibility*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 767, 801 (Antonio Cassese, Paola Gaeta and John R.W.D. Jones eds., 2002).

¹⁹³ *See* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, 310 (2007).

¹⁹⁴ *Id.* at 312; *see also* Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L.F. 291, 319 (2001); *Cf.* Andrea Reggiov, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for Trading with the Enemy of Mankind*, 5 INT'L CRIM. L. REV. 623, 647 (2005).

¹⁹⁵ Cassel, *supra* note 193, at 314 (emphasis in original; references omitted).

¹⁹⁶ *See* Rome Statute of the International Criminal Court, *supra* note 192, art. 5(1).

the construction of a dam is implemented in a very violent manner, so as to fit in the definition of a crime against humanity.¹⁹⁷

In addition to the definitional obstacles, the nature of the proceedings before the International Criminal Court makes such cases particularly unlikely.¹⁹⁸ The prosecutor of the International Criminal Court has the prerogative to decide whether or not to prosecute allegations of such crimes.¹⁹⁹ Prosecuting international development agencies is not the priority of the International Criminal Court. In any case, in spite of institutional responsibility of the agency, it might be difficult to prove the personal responsibility of any specific individual given that many decisions are taken in committees. The emphasis on individual responsibility is at odds with the complex ways international development agencies take decisions. Lastly, in practical terms, criminal responsibility might be an interesting option to explore in terms of deterrence in extreme cases, but it does not offer credible options as to the reparation of gross human rights abuses.

F. *Domestic Jurisdictions in the Recipient State*

Yet another potential forum for an effective remedy against international development agencies could be found before the courts of the recipient state. There are relatively few examples of domestic litigation against development agencies in the recipient country. Arguably, it is generally easier for litigants to seek the responsibility of municipal authorities rather than that of their extraneous “accomplices.” Invoking the responsibility of multilateral or bilateral development agencies would not necessarily bring any comparative advantage that would account for overcoming the significant procedural obstacles that the litigants would encounter. Two sorts of obstacles can be mentioned: the nature of the lender’s liability in domestic law and the issue of immunity.

¹⁹⁷ One could, for instance, think of the case of the Chixoy dam, funded by the World Bank and the Inter-American Development Bank, leading to gross human rights abuses (including the Rio Negro massacre) that could arguably qualify as genocide or crime against humanity, although any prosecution will force significant difficulties at the stage of recognizing individual criminal responsibility within international development agencies. See Comisión para el Esclarecimiento Histórico, Guatemala: Memoria Del Silencio (1999) (Report of the Guatemalan Truth Commission); J. Colajacomo & C. Chen, *The Chixoy Dam: The Maya Achi Genocide: The Story of Forced Resettlement*, INDIGENOUS AFF.3 (1999).

¹⁹⁸ International criminal law may also be implemented through domestic courts implementing universal jurisdiction. Here also, however, a difficulty relates to isolating an individual’s criminal responsibility for decisions made by international development agencies.

¹⁹⁹ See Rome Statute of the International Criminal Court, *supra* note 192, art. 15(1) (“The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.”)

Some domestic jurisdictions have recognized that an international lender can be held responsible for the anticipated consequences of the loan, or that the loan could be cancelled on similar grounds. Joseph Hanlon had argued that “illegitimate” loans, which were loans to oppressive dictators, would not have to be reimbursed.²⁰⁰ In international investment law, arguments have been made for the responsibility of lenders in case of environmental damage²⁰¹ as well as human rights abuses.²⁰² In 1992, Christopher Murgatroyd, applying the jurisprudence on the lender liability to the World Bank, suggested the same, particularly in cases of environmental damages. He argued that “[u]ltimately, ... MDBs [Multilateral Development Banks] are lending institutions just like any other, and should not expect to avoid liability for remedying environmental harm.”²⁰³ In Murgatroyd’s view, “[t]he degree of involvement of the World Bank in a project during its implementation and its ability to maintain ultimate power over the availability of funding means that the Bank can influence, if not control, the environmental performance of its borrower.”²⁰⁴

Yet, the immunity of states and international organizations may present a significant obstacle. With regard to states, the 2004 U.N. Convention on Jurisdictional Immunities of States and their Property confirmed a well-established principle according to which “[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.”²⁰⁵ Similarly, international organizations are in principle immune from domestic judicial proceedings.²⁰⁶ In both cases, however,

²⁰⁰ Joseph Halon, “*Illegitimate Loans: Lenders, Not Borrowers, Are Responsible*,” 2006 27 THIRD WORLD Q. 211-226.

²⁰¹ Richard Hooley, *Lender Liability for Environmental Damage*, THE CAMBRIDGE L. J. 60 405-418.

²⁰² Doug Cassel, *supra* note 193; Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT’L L. 801 (2002).

²⁰³ *Id.* at 441.

²⁰⁴ *Id.* at 438.

²⁰⁵ United Nations Convention on Jurisdictional Immunities of States and their Property art. 5, G.A. Res. 59/38, U.N. Doc. A/59/49 (Dec.2, 2004). *See also id.*, art. 6(1) (“A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.”). *See generally* Gerhard Hafner & Ulrike Köhler, *The United Nations Convention on Jurisdictional Immunities of States and their Property*, 35 NETH.Y.B. INT’L L. 3 (2004). Bankas argues that the rule has become part of customary international law; *see* ERNEST K. BANKAS, *THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW* 31 (2005).

²⁰⁶ *See* U.N. Charter art. 105(1) (“The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.”); Convention on the Privileges and Immunities of the United Nations, art. II,

this immunity is limited, and some of the limitations are of great importance to the case of international development agencies.

However, state immunity stops when the state acts as a private person and engages in commercial transactions with private parties.²⁰⁷ Nonetheless, there remains a high degree of uncertainty as to the definition of a “commercial” transaction,²⁰⁸ and nothing seems to exclude that even official development assistance could be considered as commercial in nature given its similarity with other official flows that could come from private actors.²⁰⁹ It has also been argued that state immunity should not apply in cases involving human rights abuses.²¹⁰ As a result, whether or not immunity applies to bilateral development agencies depends upon a multitude of variables: the domestic law of the country of prosecution, the status of the agency in the domestic law of the donor country, the domestic status of the aid

sect. 2, Dec. 13, 1946, 1 U.N.T.S. 15 (“The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity.”); Convention on the Privileges and Immunities of the Specialized Agencies, *supra* note 83, art. III, sec. 4 (“The specialized agencies, their property and assets, wherever located and whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”)

²⁰⁷ United Nations Convention on Jurisdictional Immunities of States and their Property, *supra* note 205, art. 10(1) (“If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction”), art. 10(2)(a) (excluding the application of the previous paragraph to the case of “commercial transaction between States”).

²⁰⁸ See HAZEL FOX QC, *THE LAW OF STATE IMMUNITY* 272 (2002).

²⁰⁹ United Nations Convention on Jurisdictional Immunities of States and their Property, *supra* note 205, art. 2(1)(c)(ii) states that “commercial transactions means ... any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction.” This does not suggest that the purpose of profitability should be a requirement for commerciality.

²¹⁰ For a discussion, see FOX, *supra* note 208, at 317; see also JÜRGEN BRÖHMER, *STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS* (1997). The 2004 U.N. Convention on Jurisdiction Immunities of States and their Property does not contain a blank exclusion of human rights matters, but provides that “a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission” (art. 12).

recipient, and perhaps even the modalities of the aid or the nature of the human rights abuses at issue.

On the other hand, the immunity of multilateral development banks is generally limited, allowing for proceedings in certain circumstances, although the rules here again are not always clearly established.²¹¹ Domestic judicial proceedings are permitted against the World Bank “in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.”²¹² The immunity of other multilateral banks is also limited, although more prudently.²¹³

Yet, provisions on immunity do not aim at providing impunity; immunity comes along with a duty of the international organization or the state to provide alternative forums for dispute settlement.²¹⁴ For instance, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, which applies in particular to the World Bank, provides that agencies “shall make provision for appropriate modes of settlement of ... [d]isputes arising out of contracts or other disputes of private character to which the specialized agency is a party.”²¹⁵

With regard to human rights in particular, Singer highlights the importance of this duty of the international organization to provide alternative dispute settlement mechanisms.²¹⁶ Singer submits the argument that immunity vis-à-vis human rights abuses holds only inasmuch as an international organization (but this could similarly apply to a state) complies, at least broadly, with its duty to provide an alternative, effective remedy. Singer argues that “[t]he fact that the violator is an international organization does not excuse the state from its international responsibilities to protect and uphold human rights within its territory.”²¹⁷

²¹¹ C. F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* 321 (2005).

²¹² International Bank for Reconstruction and Development Articles for Agreement, *supra* note 83, art. VII section 3; *see also* Convention on the Privileges and Immunities of the Specialized Agencies, *supra* note 83, annex VI, ¶ 1, “International Bank for Reconstruction and Development.”

²¹³ *See, for example*, Agreement establishing the African Development Bank, *supra* note 88, art. 52; Agreement establishing the Asian Development Bank, *supra* note 88, art. 50.

²¹⁴ AMERASINGHE, *supra* note 211, at 505.

²¹⁵ Convention on the Privileges and Immunities of the Specialized Agencies, *supra* note 83, art. IX, sec. 31.

²¹⁶ Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT’L L. 53, 162 (1995).

²¹⁷ *Id.*

Accordingly, with regard to claims of human rights abuses, the immunity of international organizations from judicial proceedings should apply only inasmuch as the organization “implements its own adequate and independent procedures for redressing its own violations of human rights.”²¹⁸

Some domestic courts have implemented this argument. In particular, the French *Cour de Cassation* set aside the immunity of the African Development Bank, in a dispute opposing the bank to a former employee, on the ground that the bank had not established an internal jurisdiction in charge of employment disputes. It held that “the impossibility for a party to access to a judge competent for its claim and to exercise a right which is part of the public international order constitutes a denial of justice and justifies the jurisdiction of the French jurisdiction when there exists a connection with France.”²¹⁹ Other European courts have also departed from the principle of immunity when the international organization did not provide sufficient guarantees to an effective remedy.²²⁰

G. Domestic Jurisdictions in the Donor State

Alternatively, complainants may seek the responsibility of a bilateral development agency before the domestic courts of the donor state. In practice, it is often the case that litigation in the donor state allows for greater procedural guarantees and access to higher human rights standards.²²¹ At least, it may provide a second chance when domestic litigation in the recipient state is unsuccessful, or is barred by state immunity. Yet, it is also a tortuous way. A common challenge comes from taxpayers and with regard to the economic soundness of the aid project, as for instance in the case of the Pergau dam.²²² Taxpayers’ litigation, however, protects

²¹⁸*Id.* at 163.

²¹⁹ African Development Bank v. Haas, Court of Cassation (soc), 25 January 2005, Case No. 04-41012 (France). Comp. with Agreement establishing the African Development Bank, *supra* note 88, art. 52 (1), establishing the immunity of the bank with regard to employment matters.

²²⁰ See Alberto Drago v. International Plant Genetic Resources Institute (IPGRI), Court of Cassation, all civil sections, Feb. 19 2007, No. 3718, ILDC 827 (IT 2007); Siedler v. Western European Union, Brussels Labour Court of Appeal (4th chamber), Sept. 17, 2003, (2004) JOURNAL DES TRIBUNAUX 617, ILDC 53 (BE 2003); see also A. Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals* (2008) 7 CHINESE J. INT’L L. 285; AUGUST REINISCH, CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 148 (fn 61) (2010); A.N. VORKINK, M.C. HAKUTA, LAWSUITS AGAINST INTERNATIONAL ORGANIZATIONS: CASES IN NATIONAL COURTS INVOLVING STAFF AND EMPLOYMENT (1985).

²²¹ Johnston, *supra* note 152, at 356.

²²² See R. v. Secretary of State for Foreign and Commonwealth Affairs Ex p. World Development Movement Ltd., [1995] 1 W.L.R. 386(Q.B., U.K.) at 402 (“where, as here, the

the human rights of those affected by the development project only accidentally and indirectly.

By contrast, the persons affected by the development project often raise tort-related challenges which are successful less frequently. Before the courts of the United States, the Aliens Tort Statute gives jurisdiction to district courts for “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²²³ Although the statute was adopted in 1789, its potential was revealed only recently as the responsibility of corporations was sought on the basis of aiding and abetting the commission of human rights abuses, taking stock of the contemporary jurisprudence of international criminal tribunals. However, up to date American jurisprudence remains largely incoherent.

Regarding the material element, several judgments agree that the aider or abettor must contribute substantially to the commission of the wrongful act,²²⁴ but they disagree as to what “substantial” means, and in particular as to whether financial support can constitute a “substantial” contribution. In contradiction with the established jurisprudence of international criminal tribunals noted above, the Court in *In re South African Apartheid Litigation* stated that “supplying a violator of the law of nations with funds – even funds that could not have been obtained otherwise – is not sufficiently connected to the primary violation to fulfil the *actus reus* requirement of aiding and abetting a violation of the law of nations.”²²⁵ Accordingly, aiding and abetting would require, for instance, “[t]he provision of goods specifically designed to kill, inflict pain, or to cause other injuries resulting from violations of customary international law.”²²⁶

In other cases, however, American courts seemed to admit that financial support could fulfil the *actus reus* requirement of aiding and abetting human rights abuses. The court in *Talisman I*, among others, held that “the *actus reus* for aiding and abetting in international criminal law requires practical assistance, encouragement,

contemplated development is, on the evidence, so economically unsound that there is no economic argument in favour of the case, it is not, in my judgment, possible to draw any material distinction between questions of propriety and regularity on the one hand and questions of economy and efficiency of public expenditure on the other”).

²²³ Alien Tort Claims Act, 28 U.S.C. § 1350. The US Judiciary has repeatedly held that this provision must be interpreted with the utmost restraint; see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, U.S., 2004, June 29, 2004.

²²⁴ For instance, see *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 257-58 (S.D.N.Y. 2009), and cases cited, and following footnotes.

²²⁵ *Id.*; see also Michalowski & Bohoslavsky, *supra* note 33, at 78–79 (noting that the court’s analysis “does not make any sense” and “ignores all developments in international law with regard to accomplice liability of corporations, including of financing *ius cogens* violations.”)

²²⁶ *Id.* at 258.

or moral support which has a substantial effect on the perpetration of the crime”²²⁷ – there is no reason why financial support would not fall within this definition. Thus, the court in *Almog v. Arab Bank* condemned a bank for providing “routine banking services,” considering that “acts which in themselves may be benign, if done for a benign purpose, may be actionable if done with the knowledge that they are supporting unlawful acts,” such as supporting a terrorist organization.²²⁸

The case-law relating to the Alien Tort Statute is also incoherent with regard to the mental element. Inconsistent judgments were passed as to whether aiding and abetting requires solely knowledge, or also requires sharing the specific intent of the perpetrator. The court in *Talisman-II* held that “the *mens rea* standard for aiding and abetting liability in ATS [Alien Tort Statute] actions is purpose rather than knowledge alone,” noting that “no ... consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law.”²²⁹ By contrast, the court in *Almog v. Arab Bank* was satisfied with just knowledge and unspecific intent. It stated that

“[t]he standards for aiding and abetting liability discussed above do not require that Arab Bank had the specific intent to cause the specific acts which injured plaintiffs; under both the Conventions and the general standards of aiding and abetting liability it is sufficient that Arab Bank acted intentionally and with knowledge that its conduct would, as described below, facilitate the underlying violations when it engaged in the acts alleged.”²³⁰

The American jurisprudence on aiding and abetting human rights abuses which are committed abroad, as implemented in *Almog v. Arab Bank*, could be invoked to seek the responsibility of international development agencies. A difficulty could however arise from state immunity, in the likely cases where the responsibility of an American development agency (or a multilateral development agency whose immunity has been waived) cannot be assessed without assessing the conduct of the recipient state, which might be immune from jurisdiction. Such issues were raised before American judges when litigants sought the responsibility of multinational corporations who did business in apartheid South Africa.²³¹ During the proceedings, South African president Mbeki stated that it was “unacceptable

²²⁷ *Presbyterian Church of Sudan v. Talisman Energy Inc*, 244 F.Supp.2d 289, 323 (S.D.N.Y. 2003).

²²⁸ *Almog v. Arab Bank, PLC*, 471 F.Supp.2d 257, 291 (E.D.N.Y. 2007).

²²⁹ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 C.A.2 (N.Y.) 2009.

²³⁰ *Almog v. Arab Bank*, *supra* note 228, at 291.

²³¹ *See In re S. Afr. Apartheid Litig.*, *supra* note 224.

that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our Constitution of the promotion of national reconciliation.”²³² The South African government submitted that in substance such a case involved interferences with South Africa’s domestic affairs.²³³ The court in *In Re S. Afr. Apartheid Litig.* rejected such arguments on the basis of domestic legal doctrines: the political question doctrine and international comity,²³⁴ rather than directly on the basis of international law.²³⁵ The Supreme Court in *Sosa* had previously highlighted that in such circumstances, “federal courts should give serious weight to the Executive Branch’s view on the case’s impact on foreign policy.”²³⁶

Therefore, for those affected by development projects, litigation before the courts of the donor states is a very difficult endeavour. The jurisdiction may appear as biased in favour of its own agency. Further, the proceedings can be very expensive for litigants from a developing country. Such litigants may have more difficulty to defend their claims before a foreign court. Overall, the domestic jurisdictions of the donor state may be reluctant to allow interferences with the development choices made by the recipient state in conjunction with the international development agency. In the *Koto Panjang* case described in the introduction, relating to claims before Japanese courts regarding a Japanese aid project carried out in Indonesia, the Tokyo District Court and the Tokyo High Court agreed that such a claim was inadmissible, for the development project in question was essentially “an internal matter for the Indonesian government to deal with.”²³⁷

²³² Statement of Thabo Mbeki on Apr 15, 2003, reproduced in 1 DEF. APP. 396, cited in *In re S. Afr. Apartheid Litig.*, *supra* note 224, at 278.

²³³ *In re S. Afr. Apartheid Litig.*, *supra* note 224, at 278 (citing Minister of Justice Maduna, insisting that the “court should “abstain from adjudicating” the case to avoid ‘interfer[ing] with [a] foreign sovereign’s effort to address matters in which it has the predominant interest’”).

²³⁴ *Id.* at 286.

²³⁵ It could in particular have referred to the Monetary Gold principle and its limits. See *supra* note 173, and accompanying text.

²³⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 2766 U.S., 2004.

²³⁷ Yasushi Nakamura, the presiding judge, cited in Anna Kitanaka & Eijiro Ueno, *Indonesian Villagers Lose Lawsuit for Japan Dam Aid*, BLOOMBERG, Sept. 10, 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=asuF17HIGBM4>. On the High Court’s judgment, see The Support Action Center for Kotopanjang Dam Victims, *supra* note 2. The original documents do not seem to be available in English.

H. Arbitration

Lastly, several authors suggest that an arbitral procedure could be established to settle disputes between a development agency and individuals or groups affected by the aid-funded project. Thus, Suzuki and Nanwani argue that “the most appropriate mode of settlement for MDBs [Multilateral Development Banks] (for claims that cannot be settled by negotiations) is arbitration.”²³⁸ Similarly, Carrasco and Guernsey propose that, when administrative procedures fail to solve such disputes, claimants be allowed to institute arbitration proceedings against the agency.²³⁹ The argument is provocative inasmuch as it suggests that a tool developed to protect investors could be reverted to protect populations. A difficulty, that Carrasco and Guernsey duly recognize, is that such a proposal “rests on a political decision: the World Bank [or any other development agency]’s willingness to waive its immunity.”²⁴⁰ Arbitration is based on consent and international development agencies – whether multilateral or bilateral – may not be ready for such a concession.

The success of international arbitration today, lies in the independence of both parties and the possibility of enforcement of the arbitral award in both countries.²⁴¹ Whether these advantages would apply similarly to a dispute between a development agency and people affected by an aid-funded project, needs to be assessed. The accusatorial procedure of arbitration may be at odds with the asymmetrical situations that are characteristic of human rights claims, which arguably require a more inquisitorial procedure. If proper guarantees are not offered, the costs involved could be a significant hurdle for potential complainants. At least, arbitration should substantially be reshuffled to accommodate claims of a nature that largely differ from the usual investment disputes.

²³⁸ Suzuki & Nanwani, *supra* note 123, at 224.

²³⁹ Enrique R. Carrasco & Alison K. Guernsey, *World Bank’s Inspection Panel: Promoting True Accountability through Arbitration*, 41 CORNELL INT’L L. J. 577 (2008).

²⁴⁰ *Id.* at 629 (emphasis added). The Articles for Agreement of the World Bank allow only “a court of competent jurisdiction in the territories of a member” to hear certain cases. See International Bank for Reconstruction and Development Articles for Agreement, *supra* note 83.

²⁴¹ N. BLACKABY ET AL., REDFERN & HUNTER ON INTERNATIONAL ARBITRATION 31–32 (2009). For instance, with regard to enforcement; see also, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

VI. TOWARDS A FRAMEWORK FOR THE RESPONSIBILITY OF DEVELOPMENT AGENCIES

This last part argues for a new framework that would protect the rights of the persons affected by development projects. The first sub-part argues that a change is needed: a remedy is necessary, yet it is not provided by international development agencies. Then, the second sub-part discusses two possible ways forward.

A. *The need for change*

Human rights are universal by vocation.²⁴² While human rights obligations are *primarily* territorial, but there is no reason to exonerate a state from responsibility when its conduct violates the human rights of populations abroad, or to exonerate international organizations from any responsibility in this regard. The laudable effort to promote international development should not excuse irresponsible conduct and human rights should constrain international development.

Existing institutions do not suffice in guaranteeing an effective remedy to violations of human rights in aid-funded development projects. Things might go well most of the time, but there is no solution for when things go bad. International development agencies do not offer, to date, any effective remedy. This is a violation of states' "general obligation to provide effective remedy" for human rights abuses.²⁴³ Reform is therefore needed to implement this obligation.

A remedy for possible human rights abuses in decisions taken by international development agencies would pursue three goals. First, it would aim at avoiding irremediable harms through a preliminary review of aid-funded development projects, or through *in vivo* review of the implementation of human rights safeguards in on-going projects. This arguably calls for a mechanism that could take precautionary measures, including – in extreme cases – suspending the

²⁴² For instance, *see* U.N. Charter art. 55(c) (according to which the United Nations should promote, *inter alia*, "universal respect for, and observance of, human rights and fundamental freedoms for all.")

²⁴³ Maastricht Principles, *supra* note 45, principle 37 ("States must ensure the enjoyment of the right to a prompt, accessible and effective remedy before an independent authority, including, where necessary, recourse to a judicial authority, for violations of economic, social and cultural rights. Where the harm resulting from an alleged violation has occurred on the territory of a State other than a State in which the harmful conduct took place, any State concerned must provide remedies to the victim"). I see no reason why the customary international law obligations of international organizations should differ from those of states: *see supra* note 92 and accompanying text.

implementation of the project, with possibly significant economic consequences for large-scale projects. This mechanism should be able to deal quickly with abusive appeals, but thoroughly with more preoccupying cases, and it should lead quickly to a decision.

Second, a remedy should allow reparation for the harms that have already occurred. It is no mystery that the safeguards of some development projects have not been properly conceived or implemented.²⁴⁴ Practical concerns may call for a limitation of claims *ratione temporis*, possibly providing that a new framework would not provide any compensation with regard to projects completed prior to its creation, but may nonetheless recognize violations of international law. Thus, even without prompting additional expenses for international development agencies, declaratory decisions could contribute to a historical process of transitional justice. It may contribute to a greater understanding of what is allowed and what is not.

Lastly, and perhaps most importantly, a remedy could possibly influence future conduct. By incentivizing development agencies to duly take human rights into account in forthcoming projects, it could play a role in re-framing institutional cultures – a trend initiated during the last two decades with the establishment of internal review mechanisms. Yet, there is certainly a risk that too much, or too arbitrary an overview may hinder the objective of development aid. As Christopher Murgatroyd noted, “[t]he benefit of the threat of potential liability would be entirely lost if lending institutions were forced to refrain from backing projects which may be environmentally benign or restorative for fear of potentially limitless and arbitrarily imposed liability.”²⁴⁵ This calls for a prudent review that would allow a certain level of deference to the international development agencies.

Such a reform is realistic because it conforms to more general trends. Accountability – the development of internal rules and internal review mechanisms within international development agencies – has tied a rope between arbitrariness and responsibility. It can be analysed as part of an expansion of “global administrative law,” reflecting “a demand for accountability in decision-making”: in Simon Chesterman’s words, “accountability is on the march.”²⁴⁶ In a world where complex global interdependence is increasingly being recognized,

²⁴⁴ For instance, regarding the Kariba Dam, *see* Scudder, *supra* note 5.

²⁴⁵ Christopher Murgatroyd, *The World Bank: A Case for Lender Liability?*, 1 REV. EUR. COMMUN. INT’L ENVTL. L. 436, 438 (1992).

²⁴⁶ Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 GLOBAL GOVERNANCE 39, 39 (2008). Chesterman defines global administrative law as “procedures and normative standards for regulatory decision-making that falls outside domestic legal structures and yet is not properly covered by existing international law, which traditionally governs state-to-state relations rather than the exercise of regulatory authority with direct or indirect effects on individuals.”

development agencies too need to be responsible for the human rights abuses that their decisions sometimes cause or allow. There is no back-stepping and there is no staying in place; the movement will inevitably continue towards the responsibility of international development agencies.

B. A Possible Way Forward?

In an ideal world, the remedy against human rights abuses by international development agencies would certainly consist in the constitution of some sort of a world court with jurisdiction to receive individual applications. Yet, granting jurisdiction to such a court would require significant political support to modify the constituting treaties of multilateral development agencies and reform the statutes of bilateral ones in domestic law. This would require an immediate global political unanimity for reform. Such an agreement has not arisen (yet).

Therefore, this article suggests, as a second best option (a “realistic utopia”, as some have called them²⁴⁷), that a committee could be established to address such cases of human rights abuses in aid-funded development projects. This committee could be called the “Safeguards Committee.” Like the United Nations Human Rights Committee, such an institution could be composed of personalities of high moral character and recognized competence in the field of development and human rights.²⁴⁸ Such a committee would not need to be established by a new convention, nor would it actually need to be related to the United Nations at all. It would ideally be created by the General Assembly as a subsidiary body, which would give it legitimacy and institutional support, but it could alternatively be established by an initiative of a civil society organization, as a private entity on an economic model similar to that of arbitral tribunals. In other words, this committee could be created without the consent of international development agencies, even though, at a later stage, the support of such agencies would contribute greatly to its work. More than institutional affiliation or origin, what matters is that the independence and expertise of this committee should be beyond any doubt. The status and the funding of this committee should ensure its unquestionable impartiality.

Absent any prior and general agreement, this committee could be seized by development agencies themselves, as an impartial third party able to assess claims brought to it by claimants. Such claims forwarded by development agencies could relate to any decision of the agency that affects, or is likely to affect, the interests of the claimants. Claimants would be groups of individuals, of a sufficient size in

²⁴⁷ ANTONIO CASSESE, *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* (2011).

²⁴⁸ *Cf.* International Covenant on Civil and Political Rights, *supra* note 55, art. 28(2).

order to reduce the likelihood of unfounded claims, while not creating a significant procedural obstacle for valid claims. Yet, to make sure that all claims are investigated by the committee, development agencies would be encouraged to adopt a unilateral statement or to agree to a memorandum of understanding allowing the committee to be seized directly by claimants and to address such claims.

If the committee deems the claim to be *prima facie* admissible, it would invite the agency to submit its view. In particular, the committee could decide to conduct fact-finding missions in the country where the project is implemented, or to order any other form of expertise that it deems useful. Visits of the recipient states would have to be authorized by the concerned states, until new loan agreements include a standard clause allowing for the conduct of future fact-finding missions with the full cooperation of the authorities of the recipient state.

The procedure would lead to the release of an assessment of the claims. This assessment would establish the facts and the law applicable, and it would conclude on the lawfulness of the conduct of the international development agency. It would in particular establish whether the international development agency has breached its obligations under international human rights law. The committee would be competent to determine the sources of law applicable and to review the compliance of the agency with its human rights obligations. The assessment could also include broad suggestions as to how eventual human rights abuses could be repaired.

Although this assessment would not properly be a binding decision, it would be made public and widely available. International development agencies would be encouraged to take these assessments into consideration in a systematic manner. The committee would monitor the response that the agencies give to its assessments. With the passage of time, the unquestionable impartiality and expertise of the committee and its growing moral authority would be a significant incentive for international development agencies to comply with its decisions and to inflect their policies. Thus, the jurisprudence of the committee would progressively contribute to clarifying the legal standards applicable to the activities of development agencies.

VII. CONCLUSION

Although development should ideally aim at furthering international human rights endeavours, development projects often affect the rights of many, as Part II showed. Part III then presented the primary and secondary rules of international law that establish the responsibility of international aid agencies. Part IV noted the

development of internal safeguard rules and mechanisms within international development agencies. Part V discussed several possible avenues for seeking the responsibility of international development agencies and revealed that today's institutions do not offer sufficient guarantees to protect the right to an effective remedy. Lastly, Part VI suggested an institutional framework that could help to further implement the responsibility of international development agencies.

This human rights approach of development activities contributes to a broader purpose in affirming states' extra-territorial obligations. Whenever a state acts abroad, there are strong moral grounds to hold it responsible for what it does (i.e. for breaches of negative human rights obligations and prophylactic and procedural positive obligations). Calling for the responsibility of international development agencies does not exonerate the primary responsibility of the recipient state. In principle, litigation against the aiding agency is only an alternative avenue to challenge a project, but in practice it is often the only effective remedy open to litigants where the fragile judicial system of a developing state is influenced by the tremendous stakes of multimillion-dollar projects.

The mechanism that this article suggested is not a panacea, and yet it might be a difficult step to make for international development agencies. Institutional inertia must not be underestimated. The responsibility of international development agencies is an expensive project, in particular with regard to possible reparations that it could trigger and more fundamentally, the requisite amendments to the deep-rooted understanding of international development aid as voluntary and hence, often arbitrary.

Yet, the responsibility of international development agencies is only one of the many steps necessary to implement the international rule of law in the relations between states. Displaying the best charitable intentions or acting in remote areas far abroad should not allow an exception to the general principle of responsibility. To the contrary, the detachment of the decision-making process from the main stakeholders is a situation conducive to human rights abuses, which calls for stringent scrutiny. There should be no particular leeway for the extra-territorial action by development agencies, foreign investors, NGOs or blue helmets. Beyond accountability, *responsibility* now needs to be put on the march.