

## **Economic, Social and Cultural Rights and the International Monetary Fund**

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### **INTRODUCTION**

1. This paper explores the relationship between the economic, social and cultural human rights and the activities of the International Monetary Fund (the Fund). More specifically, it examines to what extent the provisions of the International Covenant on Economic, Social and Cultural Rights (the Covenant) have legal effect on the Fund, to what extent the Fund is obligated to contribute to the achievement of the objectives of the Covenant, and to what extent it may do so under its Articles of Agreement.

2. The Covenant was adopted by the United Nations General Assembly in 1966 and came into force among the countries that had become party to it in 1976. It is presently in force among 145 States, most of which are Fund members.<sup>1</sup> Under the Covenant, the parties undertake to implement its substantive provisions within their own territories, to cooperate internationally towards the progressive full achievement of the substantive rights contained in the Covenant, and to participate in the reporting mechanism established to monitor the implementation of the Covenant.

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<sup>1</sup> It may be noted, however, that some Fund members, including Indonesia, Malaysia, Pakistan, Saudi Arabia, Turkey and the United States are not parties to the Covenant. China signed the Covenant in 1997 and deposited its instrument of ratification on March 27, 2001; the Covenant entered into force with respect to China on June 27, 2001. The United States signed the Covenant in 1977, but has not ratified it.

3. The Covenant is part of a wide network of international instruments, which includes United Nations General Assembly resolutions and declarations and a number of other treaties. On the one hand, the Covenant is linked to the “obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.”<sup>2</sup> Together with the Universal Declaration of Human Rights and the International Covenant on Political and Civil Rights, it forms the International Bill of Rights. The Universal Declaration of Human Rights states that “every one, as a member of society, is entitled to realization [...] of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”<sup>3</sup> On the other hand, the Covenant is linked to the right to development, proclaimed at the 1993 World Conference on Human Rights in Vienna, as this right is defined as the right by virtue of which “every human person and all peoples are entitled to participate in and contribute to, and enjoy economic, social, cultural and political development.”<sup>4</sup> Thus, the Covenant is integrated in a wide web of other instruments, and it could be argued that it should not be considered by itself. Nevertheless, the Covenant is also the one global instrument in which economic and social rights have been crystallized in a treaty that is legally binding on the parties to it. For this reason, it is the Covenant that will be considered here in its relations to the Fund.

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<sup>2</sup> Covenant, Preamble, fourth paragraph.

<sup>3</sup> Universal Declaration of Human Rights, Article 22.

<sup>4</sup> Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of December 4, 1986, Article 1, paragraph 1.

4. For its part, the Fund was established in 1946 and had been functioning for a number of years when the United Nations' Commission on Human Rights started work on the Covenant. During the elaboration of the Covenant, the Fund was invited to participate and to comment on draft clauses, but it declined the invitation. In its response, the Fund expressed interest in the work of the Commission on Human Rights, but stated that "the limits set on our activities by our Articles of Agreement do not appear to cover this field of work."<sup>5</sup> It is worth noting that the World Bank also declined the invitation to participate in the elaboration of the Covenant. The Bank's response to the invitation was that "since the activities of the International Bank do not bear directly upon the work of the Commission, the Bank does not plan to send a representative to attend the Commission's forthcoming meeting."<sup>6</sup> By contrast to other specialized agencies whose mandates explicitly or implicitly included the promotion of human rights,<sup>7</sup> the Fund took the position that the questions raised in the elaboration of the

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<sup>5</sup> UN Economic and Social Council, *Co-operation Between the Commission on Human Rights and the Specialized Agencies and other Organs of the United Nations in the Consideration of Economic, Social and Cultural Rights*, UN Document E/CN.4/534, March 28, 1951, Annex, p.5.

<sup>6</sup> *Ibid*, p. 4. The United Nations Secretariat seems to have acquiesced to these positions. A report prepared by the Secretary General contained the following statement in connection with the right to work and the question of full employment: "Although the activities of both the [...] Fund and the [World] Bank are aimed at making a contribution to the general economic well-being of the world and so to the achievement of full employment, the basic instruments of these bodies have not been drawn up in such a way as to permit any direct connection between their activities and the effective recognition of human rights." UN Commission on Human Rights, *Activities Of The United Nations And Of The Specialized Agencies In The Field Of Economic, Social And Cultural Rights, Report Submitted By the Secretary General*, UN Doc. E/CN.4/364/Rev.1, January 1952, UN Sales No. 1952.IV.4, para. 30 (1952).

<sup>7</sup> The International Labor Organization (ILO), the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Food

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Covenant were outside its own mandate. Thus in the early 1950s, neither the Fund nor the Bank saw the links between their respective activities and the economic, social and cultural rights that would become part of the Covenant.

5. A number of factors, common to the Fund and the Bank, contributed to this view.
  - First, at the most general level, the Fund and the Bank saw themselves (and continue to see themselves) as international organizations separate from their members, governed by their respective charters. Unlike States, international organizations are established to achieve limited objectives and they are equipped with financial and human resources to achieve only the objectives assigned to them. This division of labor among international organizations is required not only for reasons of efficiency but also because the members of international organizations have agreed to cooperate within the framework of their respective charters without necessarily sharing other objectives or values outside these charters. And, in the event that some or all members of an international organization adhere to a treaty containing such other objectives or values, this in itself does not result in these objectives or values

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and Agriculture Organization (FAO) participated actively in the elaboration of the Covenant. The mandate of the first three contains specific references to the promotion of human rights; the constitution on FAO makes no specific reference to rights, but refers to the promotion of “common welfare” through higher nutrition levels and standards of living. *See Philip Alston, “The United Nations’ Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights”, 18 Colum. J. Transnt’l. Law, 79 at 81, footnote 12 (1979).*

becoming part of the organization's mandate unless and until agreement is reached to amend the organization's charter.<sup>8</sup>

- Second, and more specifically, the Fund and the Bank saw themselves as purely technical and financial organizations, whose Articles of Agreement enjoined them (explicitly in the case of the Bank, implicitly in the case of the Fund) from taking political considerations into account in their decisions. Their role as financial institutions was to provide economic assistance, not to dictate political changes.
- Third, as was the case of the Bank, but unlike the United Nations, decision-making power in the Fund was vested in organs whose decisions were taken by weighted voting, rather than on a one-country, one-vote basis. These factors led to concerns over the possibility of inconsistent decisions between the United Nations and the Fund or the Bank.
- Fourth, the importance of maintaining the independence of the two Bretton Woods organizations was further highlighted by the provisions of their respective Articles of Agreement which required that they cooperate with what became the United Nations.

The Articles made it clear, however, that arrangements for such cooperation could

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<sup>8</sup> For instance, the European Community is not bound by the provisions of the European Convention on Human Rights, although its members are party to the Convention (*see* the advisory opinion of 28 March 1996 of the European Court of Justice on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, reviewed by Giorgio Gaja in *Common Market Law Review*, 1996, p. 973; Jean-François Renucci, *Droit européen des droits de l'homme*, 2nd edition, 2001, p. 339; *see also*, decision of 20 February 2001 of the EC Court of first instance, reviewed by J.C. Fourgoux in *Gazette du Palais*, 25-26 avril 2001).

not indirectly amend the Articles. Any such arrangement that would involve a modification of any provision of the Articles would be effected only after amendment in accordance with the Articles.<sup>9</sup>

- Fifth, the Relationship Agreements that the Fund and the Bank had entered into with the United Nations in 1947 stated clearly the need, based on their respective Articles of Agreement, for the Fund and the Bank to function as independent international organizations.

6. In addition to these common elements, the Fund's own mandate was even more remote than the Bank's from the issues the Commission on Human Rights would debate. The Fund was not a project lender, and was not involved in sectoral activities; it did not finance health or education. It was a monetary agency, not a development agency. Its financial role was limited to providing foreign exchange to help its members overcome temporary balance of payments problems. In a formal interpretation of its Articles of Agreement in 1946, the Fund's Executive Board had interpreted them "to mean that the authority to use the resources of the Fund is limited to use in accordance with its purposes to give temporary assistance in financing balance of payments deficits on current account for monetary stabilization

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<sup>9</sup> Article X of the Articles of Agreement of the Fund, and Article V, Section 8(a) of the Articles of Agreement of the IBRD. As it was finally adopted in 1966, the Covenant contains a 'symmetrical' provision to the effect that "nothing in the present Covenant is to be interpreted as impairing the provisions [...] of the constitutions of the specialized agencies [...] in regard to the matters dealt with in the [...] Covenant."

operations.”<sup>10</sup> The Fund had no authority over its members’ domestic policies, and economic growth was not a recognized factor in the Fund’s decisions. Moreover, the Fund’s Articles did not authorize any distinction among the members of the Fund based on their status as developing or otherwise, and access to the Fund’s resources was a matter of entitlement, subject to conditions specified in the Articles, leaving little scope for introducing differentiation among members based on economic or social rights considerations.

7. Since the 1950s, the purposes of the Fund have not changed, but its practice and its mandate under the Articles of Agreement have evolved to meet the changing needs of its members. The Fund is still a monetary agency, not a development agency. It does not fund projects, but still provides only balance of payments support, although the concept of balance of payments need is now more flexible than in the past for the use of resources earmarked for developing countries. Also, the Fund now exercises surveillance over certain policies of its members, and special needs of developing countries, particularly the poorest of them, have received recognition.

8. This evolution has been gradual, with the Second Amendment of 1978 being the most important milestone. Beginning in the 1960s the principle of uniformity of treatment of members did not prevent the Fund from adopting different policies on its financial assistance, with specified different types of conditions for different types of balance of payments problems, some of which could be specific to developing countries, such as the stabilization

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<sup>10</sup> Decision No. 71-2, September 26, 1946, *Selected Decisions and Selected Documents of the International Monetary Fund* (25<sup>th</sup> Issue, December 31, 2000) (hereafter: *Selected Decisions*), p. 129.

of prices of primary products (Buffer Stock Financing Facility) or export shortfalls due to variations in world market conditions (Compensatory Financing Facility). In 1974, the Fund established the Extended Fund Facility (EFF) as a vehicle for long-term balance of payments assistance (repayable over ten years) to countries whose balance of payments problem required major structural reforms; it was noted in the decision creating the facility that it was “likely to be beneficial for developing countries in particular.” Gradually, as industrial countries have “graduated” from Fund assistance, more and more attention has been given in the design of Fund facilities to the needs of developing countries.

9. Among developing countries, those with low per capita incomes require particular attention. They need either concessional loans or outright grants. Until the second amendment of its Articles of Agreement, the Fund was not allowed to provide this type of assistance. However, the appreciation of its gold holdings made it possible to organize a system of sales of gold at the official price, followed by contributions of capital gains generated by the purchases to a Trust Fund managed by the Fund for concessional loans to developing countries with low per capita incomes. With the second amendment, the Fund was authorized to achieve the same result without going through the complicated procedure of sales followed by contributions. Moreover, it was allowed to use capital gains on gold sales also for grants. The resources generated by sales of gold have been supplemented by various contributions from donor countries. The Poverty Reduction and Growth Facility has benefited from this dual financing (gold sales and contributions) and extends concessional loans. The Facility for Heavily Indebted Poor Countries provides grants to enable recipient

countries to discharge their indebtedness to the Fund; it is an indirect form of debt forgiveness.

10. Not only has the Fund become more receptive to the needs of developing countries but its role as guardian of the international monetary relations has substantially expanded to oversee its members' domestic economic and financial policies. With the second amendment of the Articles of Agreement, Fund members undertook new obligations that go beyond the conduct of their exchange rate policies. Each member is now required, under the amended Article IV, to "endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances."

11. While the Fund remains a monetary institution responsible for maintaining orderly exchange rates and a multilateral system of payments free of restrictions on current payments and whose financial assistance is only for balance of payments purposes, the cumulative effect of changes in its practice and in its Articles of Agreement has introduced new elements to the relationship between the Fund and the Covenant. There are two aspects to this question. The first is whether the Fund is legally bound to give effect to the provisions of the Covenant in its decisions. The second is whether, and to what extent, the Fund's own Articles of Agreement allow or require the Fund to achieve objectives that are similar (even though not identical) to those of the Covenant. These two aspects will be discussed in turn.

## I. APPLICABILITY OF THE COVENANT TO THE FUND

12. There are three reasons for concluding that the Covenant does not apply to the Fund: the Fund is not a party to the Covenant;<sup>11</sup> the obligations imposed by the Covenant apply only to States, not to international organizations; and the Covenant, in its Article 24, explicitly recognizes that “[n]othing in the present Covenant shall be interpreted as impairing the provisions...of the constitutions of the specialized agencies which define the respective responsibilities...of the specialized agencies in regard to the matters dealt with in the present Covenant.”

13. Nevertheless, a number of arguments have been put forward to justify the applicability of the Covenant to the Fund. Two main lines of argument have been advanced. Under one approach, the Fund as a subject of international law and a specialized agency within the UN system would be bound by general norms of international law, particularly those that are adopted pursuant to the UN Charter. The conclusion would be that the Covenant has a direct effect on the Fund, which is bound to implement its provisions. Under a second approach, the Covenant would not apply directly to the Fund but it would have an indirect effect on the Fund through its members. The members of the Fund that are party to the Covenant must, within the Fund, discharge their obligation of cooperation with other States, whether those other States are party to the Covenant or not. Moreover, if these other States are party to the Covenant, there is an additional duty not to induce them to breach their

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<sup>11</sup> Similarly, the European Community, not being a party to the European Convention on Human Rights, is not bound by its provisions (see footnote 8, above).

obligation under the Covenant by adopting measures inconsistent with those obligations. These two, substantially different, approaches will be examined in turn.

#### **A. Direct Effect of the Covenant**

14. Two arguments have been advanced in support of a direct effect of the Covenant on the Fund. One argument is based on the relationship of the Fund with the United Nations. The other is that the obligations set forth in the Covenant are mandatory provisions of general public international law and, thus, binding on all subjects of international law, including international organizations. Both arguments would lead to the conclusion that the Fund's Articles of Agreement should be interpreted in a manner consistent with the objective of promoting the rights contained in the Covenant, or deemed to be amended if this was necessary to achieve these objectives. The implications of a positive view of such a direct effect could be far-reaching. Would it mean that the obligations set out in the Covenant would apply to the Fund as if it were a party to the Covenant? For example, would the Fund be required to finance health and education projects while its mission is only to provide balance of payments assistance? Would the Fund have to disregard the principle of uniform treatment, which still governs its general resources (i.e., resources not generated by capital gains on gold sales), to provide special assistance to developing countries? Would the United Nations Committee on Economic, Social and Cultural Rights exercise jurisdiction over the Fund's activities and the decisions of its organs? Once the principle is admitted that the Covenant takes precedence over the Articles, the whole institutional and legal structure within which the Fund operates can be questioned.

### **The Link with the United Nations**

15. It has been stated that “... there are strong legal arguments to support the position that the IMF is obligated in accordance with international law, to take account of human rights considerations. The first is that the Fund is a United Nations body and must therefore be bound by the principles stated in the U.N. Charter. Among those principles and purposes of the organization is the promotion of respect for human rights. It is not therefore a political objective, but a legally mandated one.”<sup>12</sup> A number of comments may be made on this statement. First, the Covenant itself reserves the position of the constitutions of the specialized agencies. The parties agree that “nothing in the [...] Covenant shall be interpreted as impairing the constitutions of the specialized agencies which define the respective responsibilities of the various organs of [...] the specialized agencies in regard to the matters dealt with in the [...] Covenant.”<sup>13</sup> Thus the Covenant does not affect the Articles of Agreement of the Fund, including its mission and governance structure. Neither does it affect the rights and obligations of its members set out in the Articles of Agreement.

16. Second, the Fund is not a “United Nations body”, but a specialized agency within the meaning of the Charter of the United Nations, which means that it is an intergovernmental agency, not an agency of the United Nations. In accordance with Article 57 of the Charter, the Fund was brought into relationship with the United Nations by a 1947 agreement in

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<sup>12</sup> Philip Alston, “Symposium: 1986 World Food Day and Law Conference: ‘The Legal Faces of the Hunger Problem: IX Immediate Constraints on Achieving the Right to Food: the International Monetary Fund and the Right to Food’”, 30 *How. L.J.*, 473 at 479 (1987).

<sup>13</sup> Covenant, Article 24.

which the United Nations recognizes that, “by reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Fund is, and is required to function as, an independent organization.”<sup>14</sup> Furthermore, Article X of the Fund’s Articles of Agreement, while requiring the Fund to cooperate with “any general international organization” [*i.e.*, the United Nations], specifies that “Any arrangements for such cooperation which would involve a modification of any provision of [the Articles of Agreement] may be effected only after amendment to [the Articles].” Thus the relationship established by the 1947 Agreement is not one of “agency”<sup>15</sup> but one of “sovereign equals”.<sup>16</sup> It follows that the Fund’s relationship agreement with the United Nations does not require it to give effect to resolutions of the United Nations, such as the resolutions under which the members of the General Assembly adopted the Universal Declaration or the Covenant, or to international agreements, such as the Covenant, entered into by the members of the United Nations.

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<sup>14</sup> Agreement Between the United Nations and the International Monetary Fund, November 15, 1947, Art. I, paragraph 2, reprinted in *Selected Decisions*, p. 651.

<sup>15</sup> In order to avoid any ambiguity on this point, a statement was placed in the record of the negotiations stating that “it was understood . . . that the statement in Article I, paragraph 2, that the Bank (Fund) is a Specialized Agency established by agreement among its member governments carries with it no implication that the relationship between the United Nations and the Bank (Fund) is one of principal and agent.” Committee on Negotiations with Specialized Agencies, *Report on Negotiations with the International Bank for Reconstruction and Development and the International Monetary Fund*, United Nations document E564, at 3 (August 16, 1947), quoted in William E. Holder, “The Relationship Between the International Monetary Fund and the United Nations”, in Robert C. Effros, ed., *Current Legal Issues Affecting Central Banking*, vol. 4, IMF, p. 16, at p. 18. (1997).

<sup>16</sup> Leland M. Goodrich, Edvard Hambro & Anne Patricia Simons, *Charter of the United Nations, Commentary and Documents*, Columbia University Press, New York, p. 421 (1969).

### **General Principles of International Law, Obligations *Erga Omnes* and Jus Cogens**

17. Commentators have mentioned a number of legal bases for the proposition that the Covenant, or the norms included in it, are applicable to the Fund directly as a subject of international law.<sup>17</sup>

18. **Customary International Law** One such basis would be the view that the norms contained in the Covenant are now part of general or customary international law. It has been argued that, even in the absence of any consent on the part of an international organization, its freedom to act in the pursuit of its mandated objectives may be constrained by international law norms. Under this argument, such norms would not operate to change the objectives of the international organization set out in its constituent instrument, but to limit in some way the actions that the organization could legitimately take in pursuit of such objectives.<sup>18</sup> It has been suggested that a similar reasoning should be applied to human rights generally, and that the international financial organizations have in this respect a “duty of

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<sup>17</sup> On this question, *see generally*, Jean-François Flauss, “La Protection des Droits de l’Homme et les Sources du Droit International, Rapport général”, in Société Française pour le Droit International, *Colloque de Strasbourg, La Protection des Droits de l’Homme et l’Évolution du Droit International*, Pédone, Paris, p. 11, specially pages 48-71 (1998).

<sup>18</sup> For example, with respect to the use of force by the United Nations, it has been suggested that: “dès l’instant où l’on admet que l’Organisation, comme telle, a le pouvoir d’utiliser la force [...] il faut nécessairement en déduire que l’Organisation comme telle a la capacité d’être le destinataire des règles de droit destinées à réglementer l’usage de la force, pour autant que ces règles soient compatibles avec les buts et les principes de l’Organisation et ne soient pas contredites par des dispositions spécifiques de la Charte.” Paul De Visscher, “Les conditions d’application des lois de la guerre aux opérations militaires des Nations Unies”, Institut de Droit International, 54-I *Annuaire*, p. 34 (1971) quoted in Pierre Klein, *La Responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Brussels, p. 346 (1998).

vigilance” to ensure that its actions do not have negative effects on the human rights situation in its borrowing members.<sup>19</sup>

19. The applicability of this line of reasoning to the Covenant (or the rights set out in it) would depend initially on a finding that the norms it contains are part of general international law.<sup>20</sup> It has been stated that the Universal Declaration “is now part of the customary international law of nations and therefore binding on all States.”<sup>21</sup> Others have gone only so far as to state that *some* human rights have attained such status, and the examples they give are in the area of political and civil rights.<sup>22</sup> The various pronouncements of the International

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<sup>19</sup> Pierre Klein, “La responsabilité des organisations financières internationales et les droits de la personne”, 1999 *Revue Belge de Droit International*, 97, at 113.

<sup>20</sup> In addition, if the norms of customary law were to have effect on an international organization, it would be necessary to establish that the activities of the organization overlap the content of the norms. Given the conclusion reached in this paper on the first point, it is not necessary to discuss this second point.

<sup>21</sup> Humphrey, “The International Bill of Rights and Implementation”, 17 *Wm. & Mary L. Rev.* 259 (1976), cited in Schachter, “International Law in Theory and Practice”, *Hague Acad. Intnt’l L.*, 178 *Recueil des Cours*, 9, at 340 (1982). Schachter comments: “I would not go that far. [...]” See Judge Schachter’s views in the next footnote. See also, Marc Cogen, “Human rights, prohibition of political activities and the lending policies of Worldbank and International Monetary Fund” in Chowdhury, Denters & de Waart, eds., *The Right to Development in International Law*, 379, at 387 (1988): “the Universal Declaration and the International Covenants represent minimal standards of conduct of all people and all nations. Intergovernmental organizations are inter-state institutions and they too are bound by the generally accepted standards of the world community.”

<sup>22</sup> See, for example, Schachter, *op. cit.*: “[Only] some of the rights recognized in the Declaration and other human rights texts have a strong claim to the status of customary law.” Schachter mentions as examples slavery, genocide, torture, mass murders, prolonged arbitrary imprisonment and systematic racial discrimination. See also Jean-François Flauss, “La Protection des droits de l’homme et les sources du droit international, Rapport général, in Société Française pour le Droit International, *Colloque de Strasbourg, La Protection des droits de l’Homme et l’Évolution du Droit International*, Paris, p. 11 (1998). Professor Flauss

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Court of Justice on human rights would seem to support this second view.<sup>23</sup> The most that can be said in this regard is that it is not generally accepted that the Covenant (or the norms contained in it) form part of general or customary international law.

20. Since the norms contained in the Covenant have not reached the status of norms of general international law, it would be difficult to sustain that they impose themselves to the Fund in some other fashion, either as obligations *erga omnes*, or as part of *jus cogens*. Nevertheless, it may be useful to consider these two points briefly.

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concludes his survey of positive law of human rights by stating that: “on ne peut pas ne pas être frappé par la très large correspondance de substance existant entre les normes de protection des droits de l’homme reconnues avec certitude par le droit international général et les règles de protection résultant de l’article 3 commun aux quatre Conventions de Genève applicables aux conflits armés internationaux. En d’autres termes, le droit international des droits de l’homme coïncide matériellement, pour l’essentiel, voire pour sa presque totalité, avec les ‘principes généraux de base du droit humanitaire’” (id, p. 59). Under Article 3 of each of these Conventions, “[civilians and other non-participants in the hostilities] shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

<sup>23</sup> Professor Flauss writes that read together, the advisory opinions and cases in which the ICJ has considered human rights as part of general international law would lead to the conclusion that the ICJ explicitly identifies four human rights: the right not to be held in slavery, the right to be protected from racial discrimination, the right not to be subject to inhuman treatment in case of deprivation of liberty, and the right not to be abusively deprived of liberty. To which Professor Flauss adds, in view of the Advisory Opinion on the Genocide Convention, the right to life, and that the interdiction of inhuman treatment includes acts of torture. Flauss, *Rapport Introductif, op. cit.*, p. 57, footnote 266.

21. **Obligations *Erga Omnes*** Under this heading, the view would be taken that certain obligations, including certain human rights obligations, would be owed “to the entire international community.”<sup>24</sup> The origin of this theory is to be found in the *Barcelona Traction* case and the distinction the International Court of Justice drew, *obiter dictum*, between the obligations a State owes to the international community as a whole and those arising vis-à-vis another State.<sup>25</sup> A discussion of this complex topic would be well beyond the scope of this paper. Suffice it to state that the scholarly opinion does not seem to have reached a consensus around the idea that human rights other than those enumerated by the International Court of Justice have attained the status of obligations *erga omnes*.<sup>26</sup> The reservation in Article 24 of the Covenant concerning the charters of the specialized agencies would support this conclusion.

22. ***Jus cogens*** “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”<sup>27</sup> As in the case of obligations *erga omnes*,

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<sup>24</sup> John C. Ciorciari, “The Lawful Scope of Human Rights Criteria in World Bank Decisions: An Interpretative Analysis of the IBRD and IDA Articles of Agreement”, 33 *Cornell Int’l L. J.* 331 at 357 (2000).

<sup>25</sup> *Barcelona Traction, Light & Power Co. Ltd (Belg. V. Spain)*, 1970 *I.C.J.* 3. “Such obligations derive, for example, in the contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”

<sup>26</sup> Maurizio Ragazzi, *The Concept of Obligations Erga Omnes*, Oxford, p. 144 (1997).

<sup>27</sup> Vienna Convention on the Law of Treaties, Article 53.

there is no evidence that economic and social rights have reached the status of norms of *jus cogens*.<sup>28</sup> Article 24 of the Covenant leads to the same conclusion.

23. In any event, Article 24 of the Covenant shows that the Covenant was not intended to supersede the charters of the specialized agencies. In order for any norm of the Covenant to become binding on an international organization, the organization would in effect need to modify its constituent instrument. To the extent the international organization could not give effect to the norm without doing violence to its constituent instrument, the norm would not prevail over the constituent instrument. With respect to the Fund, the social rights to health or education, for example, lie outside its mandate. Finally, questions would also arise concerning the contents of such an obligation. This issue is discussed below in the context of the discussion of the possible obligation of the Fund not to hinder the implementation of its members' own international obligations. It may thus be concluded that the Covenant is not a treaty that is binding on the Fund, and thus it has no direct effect on the Fund.

### **B. Indirect Effect of the Covenant**

24. Under this view, the members of the Fund that are party to the Covenant would have an obligation to seek the implementation of the Covenant not only in their bilateral relations with other parties, but also through their actions in international organizations. The terms of

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<sup>28</sup> See Schachter, "International Law in Theory and Practice", Hague Acad. Int'l L., 178 *Recueil des Cours*, 9, at 340 (1982); for a more recent discussion, see Maurizio Ragazzi, *The Concept of Obligations Erga Omnes*, Oxford, p. 144 (1997) who writes: "Except for the general acceptance of the peremptory character of the prohibition of aggression and the protection of some, but not all, human rights, the definition of the precise content of *jus cogens* is still uncertain." The author adds (p. 50) that the examples given of norms of *jus cogens* "largely coincide with those of obligations erga omnes given in the *Barcelona Traction* case."

the Covenant do not limit the duty to cooperate internationally to cooperation with other States parties or with States in general. The duty is general and, if the interpretation made of it by the Committee on Economic, Social and Cultural Rights is shared by the States parties, the duty would include cooperation with international organizations and cooperation within international organizations. The Committee appears to have recently taken the view that States parties to the Covenant have a duty to ensure that the policies and decisions of the international financial organizations of which they are members are in conformity with the obligations of States parties to the Covenant.

25. The manner in which this indirect effect would affect an international organization may vary depending on the country involved. First, all States parties would be under a general obligation to seek, in the international organizations in which they are members, the adoption of policies conducive to the achievement of the rights set out in the Covenant in the territories of all States parties. Such a duty would fall particularly on the States parties that are thought to have some influence on the policies of the international organizations.<sup>29</sup> Second, a State party receiving technical or financial assistance from an international organization would be under a separate duty to ensure that the program it undertakes with

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<sup>29</sup> See for example, the Committee's Concluding Observations on Belgium: "The Committee encourages the Government of Belgium, as a member of international organizations, in particular the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in article 2.1 concerning international assistance and cooperation." (E/C.12/1/Add.54 , 1 December 2000, para. 31). Similar observations have been made with respect to Italy (E/C.12/1/Add.43, 23 May 2000, para. 20). Since these countries do not make use of the Fund's resources, there is no conditionality to which questions related to human rights could be attached.

such assistance is consistent with its obligations under the Covenant. Conversely, the international organization would have a duty to ensure that it did not hinder the State party's ability to implement the Covenant. In a few recent instances, the Committee has commented on the need to ensure that a country's obligations under the Covenant "be taken into account" in all aspects of the country's negotiations with international financial institutions "to ensure that economic, social and cultural rights, particularly of the most vulnerable groups of society, are not undermined."<sup>30</sup> These two aspects of the question will be examined in turn.

***States Parties' Actions Through the Decision-Making Organs of the Fund***

26. It is of course for States parties to ascertain the extent of their obligations of international cooperation, and to decide what action they need to take as members of international organizations to discharge them. Nevertheless, two general comments may be made in this respect. First, a State party's obligation with respect to international cooperation within international organizations is no greater than its obligation to cooperate on a bilateral basis with other States parties. As the State party's obligation under the Covenant is stated in general terms, without any quantified or other criteria,<sup>31</sup> its obligation to cooperate within

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<sup>30</sup> See for example the Committee's Concluding Observations on Morocco: "The Committee strongly recommends that Morocco's obligations under the Covenant be taken into account in all aspects of its negotiations with international financial institutions, like the International Monetary Fund, the World Bank and the World Trade Organization, to ensure that economic, social and cultural rights, particularly of the most vulnerable groups of society, are not undermined." E/C.12/1/Add.55, 1 December 2000, para. 38.

<sup>31</sup> See, for example, Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights", 9 *Hum. Rts. Q.* 156, at (1987): "... on the basis of the preparatory work it is difficult, if not impossible, to sustain the argument that the commitment to international cooperation contained in the Covenant can accurately be characterized as a legally binding obligation

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international organizations and in their relations with international organizations is also a general one, not one that is defined in terms of quantitative or other criteria.<sup>32</sup> Second, the fact that the parties have undertaken certain obligations under the Covenant does not authorize them to disregard their other treaty obligations, including the obligations they have undertaken as members of the relevant international organizations. In their participation in international organizations, the parties must abide by the rules of the organization with regard

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upon any particular State to provide any particular form of assistance.” See also, Mathew C. R. Craven, *The International Covenant On Economic, Social And Cultural Rights, A Perspective On Its Development*, Oxford, p. 149 (1995): “[During the drafting of the Covenant,] the general consensus was that developing States were entitled to ask for assistance but not claim it as a legal right. The text of article 11 bears out this conclusion. In recognizing the role of international co-operation in the realization of the rights, it stipulates that it should be based on ‘free consent’”. The Committee on Economic, Social and Cultural Rights has also stopped short of finding a specific content to the obligation to cooperate. In its General Comment No. 3, the Committee stated: “The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment 2 (1990)”. (UN Committee on Economic, Social and Cultural Rights, *The nature of States parties obligations (Art. 2, par.1)*, General Comment No. 3, Fifth session, 1990).

<sup>32</sup> It has been suggested, however, that States parties whose own resources are insufficient to implement the rights set out in the Covenant in their territories have a duty to request international assistance. See Eric M. G. Denkers, “IMF Conditionality: Economic, Social and Cultural Rights, and the Evolving Principle of Solidarity”, in Paul de Waart, Paul Peters & Erik Denters, ed., *International Law and Development*, Nijhoff, p. 238 (1988).

to its decision-making processes, the limits on the use it may make of its resources, and the factors it may take into account in deciding on the uses of its resources.

27. This principle has a number of consequences with respect to the Fund.

- First and foremost, the governing organs of the Fund are not free to impose conditions on the members' access to the Fund's resources if these conditions exceed the Fund's powers. Under the Fund's Articles of Agreement, its members are entitled to have access to its general resources, provided that their use of these resources is in accordance with the Articles of Agreement and the policies adopted under them.<sup>33</sup>

The Fund is not free to deny access to its general resources on the part of a member if the member meets the conditions stated in the Articles of Agreement and the policies adopted under them.

- Second, in the formulation of its policies on the use of its general resources, the Fund must be guided by the criteria set forth in the Articles of Agreement. The relevant provision is Article V, Section 3(a), which requires the Fund to “adopt policies on the use of its general resources . . . that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources

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<sup>33</sup> Article V, Section 3 (b)(i). Although the entitlement ceases when the Fund's holdings of the member's currency reach 200 percent of the member's quota, access beyond that limit may be permitted by the Fund under its policies. This access remains subject to the other rules of the Articles, including Article V, Section 3(a) quoted in the text.

of the Fund.” These are the only considerations that may be taken into account by the Fund in the design of its policies on the use of its general resources.

- Third, the key condition of access of members to the Fund’s general resources is that the member represents that it has a “balance of payments need” for such resources, which means that the member has a need for the resources because of its balance of payments, its reserve position, or developments in its reserves. Other resources administered by the Fund are also subject to a similar limitation.<sup>34</sup> The members of the Fund are not free to give access to its resources for uses not permitted by the Fund’s Articles of Agreement, or to divert resources entrusted to the Fund by some of its members to uses other than those stipulated by the donors.
- Fourth, members of the Fund must take into account the requirement that the members’ temporary use of the Fund’s general resources is granted “under adequate safeguards”, to protect the Fund from misuse of those resources and to ensure that they are repaid.<sup>35</sup>

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<sup>34</sup> Resources under the Fund’s Extended Structural Adjustment Facility (ESAF) and now the Poverty Reduction and Growth Facility (PGRF) are separate from the Fund’s general resources and access to them is conditioned on the member experiencing “protracted balance of payments problem”, which is defined in a more flexible way than the “balance of payments need” of the Articles of Agreement, but shares with the latter the fact that it is a macroeconomic test, not one that considers the needs of particular sectors of the economy.

<sup>35</sup> Article V, Section 3 (a) of the Articles of Agreement. This requirement does not apply to resources other than the general resources; for instance, grants for debt reduction are made to heavily indebted poor countries under the HIPC Initiative (cf. paragraphs 52-55 below).

- Fifth, States parties must take into account that the Fund plays a catalytic role in the flow of funds to its developing and transition-economy member countries, and that this requires that the Fund consider the effect of the programs it supports on other member countries. In particular, this requires that the programs that the Fund supports are credible, *i.e.* capable of being successfully implemented, and likely to be implemented, so as to generate the confidence of other sources of funds on which the economy is dependent.

Thus, in their actions in the governing organs of the Fund, the officials selected by the States parties to the Covenant are not free to disregard the provisions of the Articles of Agreement of the Fund, and, in particular, may not divert its resources to uses that are not provided for in the Articles.

***Obligations of States Receiving Fund Assistance, and Indirect Obligations of the Fund***

28. If the obligations of the Covenant rest on the parties to it, and these obligations include a duty to ensure that the economic programs they undertake with international financial assistance are consistent with their undertakings under the Covenant, there remains to discuss whether there exists any concomitant obligation on the part of the organizations. The duty in question would not be a direct one, stemming from the Covenant, but would be derived from the State party's obligation to implement the Covenant in its territory. Under the terms of the Covenant itself, such a duty would not affect the constituent instrument of the specialized agencies. It would thus leave intact the rights and obligations of the organization and its members as stated in the constituent instrument. It is therefore within the

framework of these rights and obligations that the Covenant could have an indirect impact on a specialized agency.

29. For the Fund, these considerations would limit the possible obligation to one that would not do violence to its mandate and to the respective rights and obligations of the Fund and its members as stated in its Articles of Agreement. It would also exclude a positive duty to engage in a specific action or activity, or to provide a specific amount of financial resources to any member or group of members. What then would be the remaining contents of such an obligation? Commentators have suggested various definitions of such a duty. For example, it has been suggested that they have a “duty of vigilance” to ensure that their actions do not produce negative human rights effects,<sup>36</sup> or a duty to “pay due regard” to the Covenant.<sup>37</sup> Others have put the obligation in negative terms, as a duty “not to undermine” the borrowing country’s efforts to abide by the human rights conventions to which they are parties.<sup>38</sup> However, there are serious impediments to defining a specific duty of the Fund

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<sup>36</sup> Pierre Klein, “Les Institutions Financières Internationales et les Droits de la Personne”, 1999 *Revue Belge de Droit International*, p. 97 at 111-114. The author finds the source of this obligation in the Corfu Channel case, and, extending the principle to international organization, suggests that they “impose on international financial institutions the duty to ensure that their decisions do not produce negative consequences on the human rights situation in the borrowing States.”

<sup>37</sup> Michael Lucas, “The International Monetary Fund’s Conditionality and the International Covenant on Economic, Social and Cultural Rights: An Attempt To Define The Relations”, 1992 *Revue Belge de Droit International*, p. 104 at 122. The obligation is based on the author’s views of the ‘general prosperity’ clause of Article I, paragraph (v) of the Fund’s Articles of Agreement and the relationship between the Fund and the United Nations.

<sup>38</sup> With respect to the World Bank, Bradlow has written: “... at least in those countries that are signatories to human rights conventions, the Bank may have an obligation to ensure that its operations do not undermine the country’s efforts to abide by these conventions.” He

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with regard to the Covenant. These impediments can be seen from the perspective of the country involved, and from that of the Fund.

30. With respect to the country itself, it must first be acknowledged that it is the responsibility of each country to make sure that its policies are consistent with its international commitments and, for this purpose, to ascertain the extent of those commitments and the manner in which it will discharge them. This is particularly the case with respect to undertakings that are progressive in nature and broad in scope, such as much

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added in a footnote: "Applying this standard will not be easy given the differing interpretations States may have about how to implement their human rights obligations. A satisfactory outcome to this problem would be facilitated by an explicit Bank human rights policy." Bradlow recognizes that the Fund's influence over human rights is more limited than the Bank's, because (i) it is a monetary, not a development institution; (ii) it operates in a much shorter time horizon. But he adds that the Fund has "some" responsibility to help protect the citizens of its member countries from human rights abuses. "It cannot be indifferent to situations in which human rights abuses have become so serious as to cause monetary consequences." But he acknowledges that there are limits to the Fund's ability to act in this respect: "It should be noted that the Fund faces a more difficult situation in this regard than the Bank. There are three reasons for this. First, as the manager of the international monetary system, the IMF must balance its responsibilities to the citizens of the violating State against its responsibilities to the other stakeholders in the international monetary system. Consequently, it cannot easily impose sanctions on a State that violates human rights if this would have substantial adverse effect on the international monetary system. Second, the IMF has fewer options than the Bank for dealing with human rights abuses. Because the IMF provides financing for general balance of payments support rather than for specific projects, it cannot easily direct the flow of the financing. Consequently, its only option when faced with a serious human rights problem is to either deal with the State purely on the basis of its monetary situation or to impose sanctions on the State. Third, the Articles of Agreement constrain the IMF's ability to use sanctions. The Articles require the IMF to make its financing facilities available to any Member State in "good standing" who is suffering from the type of balance of payments problem that the facility was established to help correct. A member is in "good standing" if it is performing all the obligations of membership in the IMF. These obligations, as stipulated in the Articles of Agreement, do not include human rights performance." Daniel D. Bradlow, "Symposium: Social Justice and Development: Critical Issues Facing the Bretton Woods System: the World Bank, the IMF and Human Rights", 6 *Transnt'l. Law and Contemp. Probs.*, 47, at 72-73 (1996).

of the undertakings set out in the Covenant. Given the considerable discretion States parties have in assessing the efforts they can make at any point in time in gradually achieving economic and social rights under the Covenant, it is the responsibility of the authorities in the country to decide how to include considerations related to the implementation of such rights in the design of the country's economic plans and policies. It follows that it is up to the member to bring up such considerations in its relations with the Fund.

31. It may be noted that the ability of many countries which desire to make progress in this field may be constrained. First, if one considers only the question of the budgetary allocations that can be made in a crisis situation, it quickly becomes apparent that the choices of the government may be extremely limited. In the face of a shortfall in income, a government may face a number of conflicting claims on what little resources are available, and may not be in a position, in spite of its best efforts and with all the external assistance available, to insulate the poorest segments of its population from the effects of the crisis. Thus there may be significant limits to the ability of a State party to devote resources to the promotion of the social rights set out in the Covenant, and some temporary regression in the achievement of these rights may be unavoidable.

32. Second, the achievement of improvements in the social conditions called for in the Covenant is not exclusively a matter of increasing government social expenditures. Economic growth, or growth-oriented adjustment, is an indispensable precondition to the redistribution of wealth implied in the Covenant. In turn, economic growth needs to be fostered by a judicious mix of policies involving many different facets of the economy, including, in particular, fostering private investment, both domestic and foreign. In this

sense, to judge a country's performance under the Covenant exclusively from the perspective of its spending on social programs would be inappropriate.

33. Third, in assessing the effects of a particular program or policy adopted by a State party against the State's international commitments, it is important to compare the outcome of the program or policy with the alternative of the lack of a program and the lack of external support to the country. Even allowing for the difficulty of making such comparisons, it is possible that, in many cases, lack of a Fund-supported program would have resulted in worse outcomes for the poorest segments of the population than the Fund-supported program provided. While no claim is made that all Fund-supported programs are necessarily the best ones that could be devised under the circumstances, it must be acknowledged that a number of constraints limit the ability of member countries to develop programs that respond adequately to the crisis situation in which the program is developed while at the same time fully protecting the poorest segments of the population.

34. With respect to the Fund, first and foremost, it must be emphasized that the Fund has no general mandate to ensure that its members abide by their international obligations. The extent to which the Fund may consider the international undertakings of its members is defined by the Fund's own purposes. The Fund may view the discharge by its members of certain international obligations as particularly significant. This is the case of the member's financial obligations to the Fund itself, and the Fund has adopted detailed policies to deal with its members' arrears to it.<sup>39</sup> The Fund also considers a member's arrears to other lenders

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<sup>39</sup> See *Selected Decisions*, pp. 140-146 and pp. 548-567.

as relevant, and has adopted policies in this regard.<sup>40</sup> Beyond such financial obligations, however, the Fund has neither the mandate nor the capacity to consider all of a member's international commitments. As was mentioned above, it is up to each member to decide for itself which of its international commitments are significant in the design of its programs of adjustment, and how these international commitments are to be interpreted and applied. In particular, it is up to each member to decide how its international commitments regarding economic and social rights, as well as constitutional or other legal requirements, may affect its adjustment program. The Fund cannot substitute itself to the member for this purpose.

35. Moreover, the Fund must also take other considerations into account. In its own decisions to support its member countries' adjustment programs, the Fund must act in conformity to its Articles of Agreements. In its surveillance activities, the policies it adopts must "respect the domestic social and political policies of members,"<sup>41</sup> which constrains the Fund's ability to raise social development issues in this context. While this constraint does not apply to the Fund's policies with respect to the use of its resources, other provisions of the Articles must be taken into account. In particular, in its decisions on the use of its resources, the Fund must take into account a number of factors that are not covered as such by the Covenant, and indeed, that are not related directly to human rights, but which are required to be taken into consideration by its Articles of Agreement. For example, the Fund must be mindful of the effects of a crisis in a particular country not only on the country itself,

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<sup>40</sup> Decision No. 3153-(70/95) dated October 26, 1970, *Selected Decisions*, p. 197, and Chairman's summings up at pp. 198 and 199.

<sup>41</sup> Article IV, Section 3 (b).

but also on its neighbors in the region and possibly beyond the region. A sudden devaluation of a currency may produce an artificial advantage in terms of price of the concerned country's exports that is not welcomed by other Fund members. It may also render a country's imports more expensive, and reduce the export opportunities of its trading partners. Also, a sudden flight of capital from one country may trigger a similar outflow from other countries unless it is remedied early. Similarly, the Fund must bear in mind that it acts as a catalyst in the transfer of resources to the members making use of its resources. To enhance the flow of funds to its members, the Fund must ensure that the programs it supports are realistic and can reasonably be expected to be completed successfully. Also, the Fund must, under its Articles of Agreement, make its resources available to its members under "appropriate safeguards", intended to provide assurance that the funds will be used as intended, and that they will be repaid on schedule.

36. While the States parties to the Covenant have undertaken certain obligations, and in particular the obligation to achieve progressively certain social rights for their population, the practical implementation of these obligations is subject to a number of constraints that are particularly difficult to overcome for developing countries. For its part, within its mandate and resources, the Fund provides technical assistance and financial resources intended to help its members overcome the balance of payment difficulties that hamper their development efforts. It does so on the basis of its own Articles of Agreement.

### **Conclusion to Part I**

37. The Fund is a specialized agency. The *raison d'être* of a specialized agency is to enable countries that may have different political systems and do not necessarily share all the

same economic, social and cultural values to cooperate together in well-defined areas. The question is whether it is better for the international community to allow this kind of cooperation to continue or whether adherence to common political, economic, social and cultural values should be a condition for membership in specialized agencies. Until now, the former approach has prevailed and it may be expected to prevail as long as the benefits of cooperation outweigh those of exclusion.

## **II. CONSIDERATIONS RELATED TO ECONOMIC AND SOCIAL HUMAN RIGHTS UNDER THE FUND'S ARTICLES OF AGREEMENT**

38. While the Covenant has no legal effect on the Fund, it does not follow that the Fund may not, on the basis of its Articles of Agreement, take into account the relationship between its activities and the achievement of the social rights contained in the Covenant. The contribution of the Fund to the economic preconditions for the achievement of the rights contained in the Covenant is discussed in this part. However, before discussing this topic, it may be useful to consider more fully the broader context in which the rights contained in the Covenant may be achieved. This broader context includes a wider set of economic rights than those contained in the Covenant, and it involves economic considerations as well as legal ones.

39. It may be noted first that the Covenant does not contain all the important rights that need to be exercised in order for individuals to enjoy the social progress that is the objective of the Covenant. There are a number of rights that are essential for the achievement of the social rights set out in the Covenant but are not stated in the Covenant. For example, the right to own property is stated in the Universal Declaration, but it is not included in any of the two

Covenants, and thus has remained outside the scope of the human rights monitoring system. Similarly, workers' rights are expressed in the Covenant in terms reflecting the situation of wage-earners who work in their own country and do not have family abroad. Other rights, such as the rights to engage in economic activity and to trade are as important to the realization of the rights specified in the Covenant. These rights provide the very basic tools that all people, including the poor, can use to engage in economic activity and to improve their economic condition. Also, in today's open economy, the right to work in other countries (incomplete as it is), and to remit one's earnings to one's family at home are equally important to a large number of workers. While the provisions of the Covenant may represent a common ground around which members of the United Nations found agreement at a certain point in time, they now appear somewhat removed from the realities of today's internally and externally open economy.

40. Moreover, the social rights set out in the Covenant will not be realized unless certain economic preconditions are met. These preconditions include economic growth, without which no significant redistribution of wealth can take place. Also, the structural reforms and policies that need to be put in place are not limited to spending on social services. As the Fund's contribution to the 1995 World Summit for Social Development stated,

“Social development requires a strategy of high-quality economic growth, macroeconomic stability, which generates low inflation, and promotion of the agricultural sector, where many of the poor work. A strategy of high-quality growth comprises a comprehensive package of policies encompassing four elements: (i) macroeconomic policies aimed at a stable and sustainable macroeconomic

environment; (ii) structural policies aimed at a market-based environment for trade and investment; (iii) sound social policies, including social safety nets to protect the poor during periods of economic reform, cost-effective basic social expenditures, and employment-generating labor market policies; and (iv) good governance through accountable institutions and a transparent legal framework.”<sup>42</sup>

41. Within this broad framework, however, the appropriate mix of policy to be applied at any given time by any given government is an elusive matter. Continuous adjustment of policies is an inescapable requirement, and results are never assured. In this context, what the international financial institutions can provide is advice and financial assistance intended to help countries establish (or re-establish, as the case may be) and maintain the economic basis without which the States parties to the Covenant are not in a position to fulfill their undertakings. For its part, the Fund is contributing to the objective of maintaining an international monetary system which provides a framework that facilitates economic growth. It is also pursuing certain economic rights which have a bearing on the achievement of social rights in an open economy, such as unrestricted payments for current international transactions, including family remittances. In providing financial assistance, the Fund has increasingly taken into account the special needs of developing countries, which are the States parties to the Covenant that need international assistance to achieve their commitments under the Covenant.

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<sup>42</sup> International Monetary Fund, *Social Dimensions of the IMF's Policy Dialogue, prepared by the Staff of the International Monetary Fund for the World Summit for Social Development, Copenhagen, March 6-12, 1995*, IMF Pamphlet Series No. 47, p. 1.

42. Within this broader framework, certain aspects of the Fund's Articles of Agreement and activities are of special importance to the achievement of the rights set out in the Covenant. These appear under the Fund's responsibilities towards the international monetary system and its surveillance function (A), as well as under the financial assistance it provides to its members (B).<sup>43</sup>

**A. Economic Growth as an Objective of Fund Surveillance**

43. Economic growth is a necessary precondition for raising the standards of living of peoples, as States parties to the Covenant have undertaken to gradually achieve.<sup>44</sup> Without growth, the right to health, food, or education cannot be further achieved. In this context, the inclusion of references to economic growth in the provisions of the Fund's Articles dealing with the objectives of the international monetary system and the Fund's surveillance responsibilities is significant.

44. Under the second amendment of the Fund's Articles of Agreement, the par value system was abandoned, and, under Article IV, Fund members were authorized to establish the exchange arrangements of their choice but undertook to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates. More specific obligations with respect to economic, financial and exchange rate policies were set forth in the same provision. For its part, the Fund was given the

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<sup>43</sup> Another aspect, not discussed here, is the Fund's technical assistance to its members.

<sup>44</sup> Good governance may be seen as another precondition, or even as a condition of growth itself. Poor governance (including corruption) may lead to the capture of the fruits of growth by those in power, and it may act as an obstacle to growth itself, in particular by stifling investment.

responsibility to oversee both the international monetary system in order to ensure its effective operation and the compliance of each member with its obligations under Article IV. In particular, the Fund was given the obligation to exercise “firm surveillance” over the exchange rate policies of members. Also with the second amendment, growth appears in the Articles of Agreement, both as a purpose of the international monetary system, and as an objective of each member’s economic and financial policies.

45. Article IV contains an introductory paragraph in which the objectives of the international monetary system are set out, as follows:

“Recognizing that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, *and that sustains sound economic growth*, and that a principal objective is the continuing development of the orderly underlying conditions that are necessary for financial and economic stability, each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates. In particular,”[...].  
(emphasis added)

It is at the request of Executive Directors of the Fund elected by developing countries (supported by others) that the expression “sustains sound economic growth” was added to Section 1. As one commentator has noted, by the introduction of this expression in Article

IV, the Articles “explicitly recognized economic growth as one of the criteria for judging the successful functioning of the international monetary system.”<sup>45</sup>

46. Each Fund member undertakes to “endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances.”<sup>46</sup> In exercising its surveillance over the members’ exchange rate policies, the Fund’s appraisal “shall take into account the extent to which the policies of the member, including its exchange rate policies, serve the objectives of the continuing development of the orderly underlying conditions that are necessary for financial stability, the promotion of sustained sound economic growth, and reasonable levels of employment.”<sup>47</sup> Thus, the Fund’s surveillance covers the policies of its members to serve sustained sound economic growth and, in that context, the Fund assesses not only specific policies of its members but also, more generally, their observance of certain standards of “good governance”.<sup>48</sup> However, the scope of the Fund’s surveillance is limited by the Articles, which provide that the principles adopted by the Fund for the guidance of its members “shall respect the domestic social and political policies of members.”<sup>49</sup> Although

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<sup>45</sup> Margaret Garritsen de Vries, *The International Monetary Fund 1972-1978, Cooperation on Trial, Volume II, Narrative and Analysis*, IMF, p. 754 (1985).

<sup>46</sup> Article IV, Section 1(i).

<sup>47</sup> Surveillance Over Exchange Rate Policies, Fund Executive Board Decision No. 5392-(77-63), April 29, 1977, as amended, *Selected Decisions*, p. 10.

<sup>48</sup> Guidance Note of July 2, 1997 (EBS/97/125), *Selected Decisions*, p. 31.

<sup>49</sup> Article IV, Section 3 (b).

issues of social policy often come up in discussions of budget equilibrium, this provision restricts the ability of the Fund to extend its surveillance to deal directly with issues of social policy.

## **B. Financial Assistance**

47. The Fund may provide financial assistance to its members either directly out of its general resources (held in the Fund's General Resources Account), or from other resources.

### **From the Fund's General Resources**

48. The financial assistance the Fund provides through its general resources is rooted in the provision of the Articles of Agreement which states that a purpose of the Fund is "to give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity."<sup>50</sup> In addition, Article V, Section 3 requires the Fund to adopt policies on the use of its general resources, including policies on stand-by arrangements, and authorizes it to adopt special policies for special balance of payments problems "that will assist members to solve their balance of payments problems *in a manner consistent with the provisions of this Agreement...*" (emphasis added).<sup>51</sup>

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<sup>50</sup> Article I (v).

<sup>51</sup> Article V, Section 3. By contrast, Article V, Section 12 (f), which applies to the Special Disbursement Account resources, and Article V, Section 2 (b), which is applicable to the administered accounts (ESAF, PRGF) only require that the use of these resources be "consistent with the purposes of the Fund".

49. Conditionality is the “explicit link between the approval or continuation of the Fund’s financing and the implementation of certain specified aspects of the government’s policy program.”<sup>52</sup> The conditionality attached to the use of the Fund’s resources has to be consistent with the provisions of the Articles of Agreement. This limits the types of conditions that may be included to those that can be accommodated under the Articles. A recent survey shows that, while the scope of structural conditionality has been expanded, the majority of structural conditions are concentrated in a relatively small number of sectors that are at the very core of the Fund’s involvement in its member countries: exchange and trade systems, and fiscal and financial sectors.<sup>53</sup> Even within this range, there is often tension between ‘ownership’ of the program and policies that make up the reform program the Fund supports, and the sovereignty of the Fund members. The 1979 Guidelines on Conditionality underscored the principle of parsimony and the need to limit the performance criteria to the minimum number needed to evaluate policy implementation. They also stressed that the Fund should pay due regard to the country’s social and political objectives, economic priorities, and circumstances.<sup>54</sup>

50. Within this broad framework, what is the possible linkage between Fund conditionality and economic, social and cultural rights? Two legal bases can be found. The

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<sup>52</sup> International Monetary Fund, *Conditionality in Fund-supported Programs—Policy Issues*, February 16, 2001, paragraph 10 (available through the Fund’s Internet site).

<sup>53</sup> *Ibid*, paragraph 50.

<sup>54</sup> *See*, International Monetary Fund, *Conditionality in Fund-Supported Programs, Overview*, February 20, 2001, paragraph 3 (Available through the Fund’s Internet site).

first one is in the purposes of the Fund, which apply to its financial assistance: one of the Fund's purposes is "(v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments *without resorting to measures destructive of national or international prosperity*" (emphasis added). Under this provision, the Fund has taken the view that its conditionality could include the removal of exchange and trade restrictions, but also the avoidance of measures that may be damaging to the environment or to the welfare of the population. For instance, attention may be given to health and education budgets, safety nets and good governance, including avoidance of corruption. However, this does not mean that the Fund sees itself as trying to substitute itself for the national authorities in determining national priorities. In particular, military expenditures are outside the scope of Fund conditionality pursuant to a decision of the Executive Board.<sup>55</sup> More recently, there has been a discernible trend toward a reduction in the Fund's involvement in domestic policies through conditionality. The general criteria would be that the Fund should limit its conditionality to macroeconomic variables and to those structural elements that are critical to macroeconomic stability. The World Bank would be expected to strengthen its role in the other areas where structural adjustment is needed.<sup>56</sup>

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<sup>55</sup> Concluding Remarks by the Acting Chairman, October 2, 1991, *Selected Decisions*, p. 447, at p. 448.

<sup>56</sup> Erik Denters has suggested that the Fund has a duty to "heed requests by members to avoid, as far as possible, 'measures destructive of national prosperity' and to safeguard socioeconomic standards as long as balance of payments support is provided under adequate safeguards." Erik Denters, *Law and Policy of IMF Conditionality*, Kluwer, p. 183 (1996). The author, while recognizing that the Fund is not bound by the Covenant, suggests that

(continued)

51. Another basis for Fund involvement is its assessment, as a condition for its assistance, that the member's program is viable and likely to be implemented. This means that, if a program is so strict that it is likely to generate strong popular opposition, it may not be implemented, and the Fund should not support it. It also means that, if egregious or systematic violations of human rights lead foreign governments or creditors to suspend their financial assistance or other forms of external financing, the program may not be implemented, and the Fund should not support it. Clearly this does not establish a direct link with the objectives of the Covenant. However, to the extent that major violations of economic and social human rights would trigger civil unrest or a lack of foreign financing, there would be at least an indirect link. Whether or not a program may create such problems is a matter of judgment for the Managing Director when transmitting the member's request to the Executive Board and for the Executive Board when deciding on the request.

### **Special Facilities for Developing Countries**

52. Because of the principle of uniform treatment among members, the Fund's general resources must be made available to all members, whether developed or developing, for balance of payments assistance. Other resources of the Fund, however, may be earmarked for balance of payments assistance to developing countries. There are two categories of such resources: (a) capital gains on sales of the Fund's gold, once transferred to the Special Disbursement Account, may be used for "balance of payments assistance...on special terms

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Article I, paragraph (v) and its reference to the correction of maladjustments of balance of payments "without resorting to measures destructive of national or international prosperity" provides the legal basis for this duty.

to developing members in difficult circumstances” taking into account “the level of per capita income” (Article V, Section 12(f)(ii)); (b) contributions may be made to the Fund, in the form of loans or grants, for financial or technical assistance consistent with the purposes of the Fund to specified countries or groups of countries (Article V, Section 2(b)). On the basis of these provisions, certain resources have been generated or contributed for financial assistance to developing countries. This financial assistance is provided by the Fund through concessional lending under the Poverty Reduction and Growth Facility (PRGF) and through debt relief under the Heavily Indebted Poor Countries (HIPC) Initiative.

53. The Fund supports the economic adjustment and reform efforts of its low-income members through the PRGF, which provides loans at an annual interest rate of  $\frac{1}{2}$  of 1 percent with repayment periods of  $5\frac{1}{2}$  - 10 years. The PRGF—which incorporates recommendations from past evaluations of the Fund’s concessional lending facility—is designed to make poverty-reduction programs a key element of a growth-oriented strategy. Programs supported by the PRGF are framed around a comprehensive, nationally-owned poverty reduction strategy, the costs of which are fully incorporated into the macroeconomic framework. In the case of HIPC-eligible members, this tightens the link between resources made available by debt relief and additional poverty reduction efforts.

54. The HIPC Initiative is designed to reduce the external debt burden of eligible countries to sustainable levels, enabling them to service their external debts without the need for further debt relief and without compromising growth. Launched in 1996, the Initiative marked the first time that multilateral, Paris Club, and other official and bilateral creditors united to take this kind of comprehensive approach to debt relief. Assistance under the HIPC

Initiative is limited to countries that are eligible for PRGF and International Development Association (IDA) loans and that have established strong track records of policy performance under PRGF- and IDA-supported programs but are not expected to achieve a sustainable debt situation after full use of traditional debt-relief mechanisms.

55. A strong track record of policy implementation is intended to ensure that debt relief is put to effective use. Currently, 77 members of the Fund are eligible to receive PRGF loans. While the qualification of these members for the HIPC Initiative is determined on a case-by-case basis, the enhancements to the Initiative could allow as many as 41 Fund members to qualify for assistance.<sup>57</sup>

## CONCLUSIONS

56. This paper has considered the relationship between the Fund and the Covenant. The following points have been made regarding the nature and role of the Fund:

- The Fund is a monetary agency, not a development agency. While its mandate and policies have evolved over time, it remains a monetary agency, charged with the responsibility to maintain orderly exchange rates and a multilateral system of payments free of restrictions on current payments.

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<sup>57</sup> See, International Monetary Fund, *Financial Assistance for the IMF's Poorest Members—An Update*, May 2, 2001, paragraph 3.

- The Fund functions essentially at the macroeconomic level, not at the level of individual sectors; its responsibilities in this respect are different from those of the development banks.
- The Fund's resources (including those entrusted to it by donors) can be used for balance of payments purposes, not for project financing.

For its part, the Covenant is a treaty among States which contains obligations addressed to States. Neither by its terms nor by the terms of the Fund's relationship agreement with the United Nations is it possible to conclude that the Covenant is applicable to the Fund.

Moreover, the norms contained in the Covenant have not attained a status under general international law that would make them applicable to the Fund independently of the Covenant.

57. The fact that the Covenant does not apply to the Fund does not mean that the Fund does not contribute to the objectives of the Covenant. The Fund's contribution to economic and social human rights is essential but indirect: by promoting a stable system of exchange rates and a system of current payments free of restrictions, and by including growth as an objective of the framework of the international monetary system, as well as providing financial support for balance of payment problems, the Fund contributes to providing the economic conditions that are a precondition for the achievement of the rights set out in the Covenant.

58. Should the Fund do more to assist its member countries in achieving the objectives of the Covenant? The participation of the Fund in the HIPC initiative and in the PRSP process

clearly shows that the Fund has adapted its activities to the needs of its poorest member countries. However, in the final analysis, what it can do is determined by its Articles of Agreement, itself a treaty among its 183 member countries. As has been aptly written,

“[...] there is a limit to “institutional elasticity”, *i.e.*, the extent to which institutions created and still used for other purposes can be “stretched” in order to get them to perform human rights functions when those functions are accomplished *at the expense* of their manifest functions.”<sup>58</sup>

59. In a time when the Cold War is over, and the wide ideological divide that had dominated the post-World-War-II period has all but disappeared, it is tempting to brush aside the principle of specialization that has governed the establishment of the specialized agencies and their relationships with the United Nations and among themselves. However, States continue to have differing (and sometimes divergent) views on a number of topics, many of them with human rights implications. The principle of specialization continues to permit States with different views to cooperate among themselves on matters of common interest to them in spite of these differences.

60. In the end, the question may be raised, just how important are these institutional rules that limit the extent to which the Fund can take the Covenant into account? Should they not be bent, or ignored entirely, to put the Fund fully at the service of the higher cause of human progress that the Covenant represents? The answer to this question is to be found in the

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<sup>58</sup> W. Michael Reisman, “Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs, 72 *Iowa L. Rev.* 391, at 395 (1987) (emphasis in the original).

nature of the Covenant itself. The Covenant is a treaty, a set of legal rules binding on the parties to it. In selecting this form, the drafters of the Covenant relied on the rule of law as the vehicle to bring about more fully the human progress expressed in the Universal Declaration of 1948. International organizations are also subject to the rule of law. Their members, their debtors and their creditors all expect them to carry out their activities at all times in conformity with the rules that apply to them. However, the international financial organizations, including the Fund, are helping their member countries in developing sound frameworks for governance and better legal and judicial systems, all of which highlights the rule of law as a central element of development. If the international organizations are to be successful in this task, they must be credible. To be credible, they must apply the rule of law to their own situation, just as they encourage others to apply it to theirs.

61. Hence, legal considerations do matter, and the Fund is not free to disregard its own legal structure for the sake of pursuing goals that are not its own mandated purposes. If the members of the Fund believe that it should adopt a more direct approach to the integration of human rights considerations in its decisions, they may of course propose an amendment to the Fund's Articles of Agreement. It is the theme of this paper that the Fund already contributes significantly to the achievement of the objectives of the Covenant, while discharging all of its responsibilities towards all of its members.