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IMF Conditionality and the Economic, Social and Cultural Rights of the Poor in Developing Countries.

Abstract

The policies that countries agree to follow as a condition for borrowing from the IMF have a profound impact on economic and social rights safeguarded by the International Covenant on Economic, Social and Cultural Rights (ICESCR). In the process of attaching conditions to its loan packages, the IMF imposes policies that are extremely harmful and deeply injurious to the welfare of the citizens of its borrowing member countries. These stabilization and structural adjustment programs impose enormous social costs and distributional unevenness on citizens of developing countries. Nevertheless, the proponents of these policies are convinced of their appropriateness, and empowered by the economic weakness of the developing countries, insist that, in order to achieve long term economic development and financial stability these measures are imperative. The end result is that the national governments of developing countries have become more responsive to the Fund rather than to their citizens and in implementing the measures imposed by the IMF, violate the economic and social rights of the people they were elected to protect.

Introduction

This paper examines whether the conditions imposed by the IMF during its lending process contravenes the economic and social rights of the citizens in the borrowing countries and if so whether the IMF can be held accountable under the principles of international law. The gist of my proposal is that the IMF should have an obligation towards the citizens in these developing countries not to implement policies that violate their economic and social rights. Even though the IMF is not a signatory to the ICESCR, it should be held accountable under the general principles of public international law. This paper does not establish how the governments of the borrowing nations may be held accountable to their citizens for violating their economic and social rights.

Part I is divided into four subheadings. First, I give a brief introduction of the ICESCR followed by a brief overview of the IMF. Third, I discuss the purpose of conditionality and fourth, I describe the IMFs coercive use of conditionality and its impact on the economic and social rights of the citizens of its borrowing countries. The actions of the IMF have a significant impact on the lives of the people within these developing countries. When such coercion results in deprivation of basic human rights, the need for accountability to the citizens of these countries becomes imperative. Part II sets out a proposal for enforcement mechanisms through which the IMF may be held accountable to those subject to its policies and the possible problems that may be encountered in trying to hold the IMF accountable and solutions to these problems.

A. Brief Summary of the ICESCR

The ICESCR is a global instrument which crystallizes economic and social rights. It was adopted by the United Nations General Assembly in 1966 and came into force among countries that had become party to it in 1976. It is presently in force in 157 countries, most of which are Fund members.[1] The ICESCR protects economic rights such as the right to self determination,[2] the right to work, [3]the right to work within favorable conditions[4] the right to social security and social insurance,[5] the right of everyone to an adequate standard of living for himself and his family,[6] and the right to education.[7] 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 its implementation.

B. Overview of the IMF

The IMF was established during the 1944 Bretton Woods Conference. It sought to promote international monetary cooperation, exchange stability, and orderly exchange arrangements; to foster economic growth and high levels of employment; and to provide temporary financial assistance to countries to help ease balance of payments adjustment.[8] The

[1] Indonesia, Malaysia, Pakistan, Saudi Arabia, Turkey and the United States are not parties to the Covenant. The US signed the Covenant in 1977, but has not ratified it.
[2] See art. 1 of the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 U.N.T.S. (entered into force on Jan. 3, 1976), [hereinafter ICESCR]. By virtue of this right, all people can freely determine their political status and freely pursue their economic, social and cultural development.
[3] See *Id.* art. 6.
[4] See *Id.* art. 7.
[5] See *Id.* art. 9.
[6] See *Id.* art. 10(1).
[7] See *Id.* art. 13.
[8] See "About the International Monetary Fund," Introductory information, http://imf.org/external/about.htm

specific purposes of the fund are set out in article I of its Articles of Agreement.[9] The IMF's operation focuses mostly on member countries with persistent balance of payment problems, and occasionally responds to crises that threaten the international monetary system as a whole.[10] Most often, the member countries which turn to the IMF for loans are developing countries. Therefore IMF loan packages and consultations to developing States are extremely important. When developing countries encounter balance of payment difficulties, they turn to the IMF for aid and funding for both immediate crises and long-term adjustments of their economic structure.[11] To resolve these problems, the IMF loans some of its own resources to the State. Through the seal of approval that the IMF loan package conveys, other commercial banks are convinced that the State is credit worthy and may also disburse loans. [12] Therefore, the Fund plays a central role in bailing developing states out of financial difficulties.

IMF Financial Activities

The IMF provides financing to its member countries through several different mechanisms. The most common type is a Stand-By Arrangement (SBA), first used in 1952. Under the SBA, the IMF assures a member country that it can draw up to a specified amount of money usually over twelve to eighteen months, to deal with short-term balance of payment deficits of a short-term or cyclical nature.[13] In close association with the SBA, the Extended

[9] See http://www.imf.org/external/pubs/ft/aa/index.htm for the full provisions of Art 1.
[10] John W. Head, Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund, 52 U. Kan. L. Rev. 521,526 (2004)
[11] Robert P. Delonis, International Financial Standards and Codes: Mandatory Regulation without Representation, 36 N.Y.U. J. Int'l L. & pol. 563, 565 (2004).
[12] Id.
[13] See art. XXX(b) of the Articles of Agreement, Explanation of terms.

Fund Facility (EFF) supports medium-term programs that run for three to four years.[14] Another source of IMF financing is the Poverty Reduction and Growth Facility, created in 1999. The essential purpose of the PRGF is to bring poverty reduction within the key objectives of IMF concessional lending.[15] It gives low interest financing to eligible low-income members facing protracted balance of payment problems, usually at an interest rate of 0.5 to 1 percent.[16] In addition to the above methods of financing, the IMF operates a number of special facilities.[17] Emergency Assistance is also provided by the Fund to help members finance their recovery efforts and support economic adjustment following a natural disaster or conflict.[18] In addition to its lending activities, the IMF provides surveillance and technical assistance to its member countries.[19]

The IMF gets the money to make its loans from a pool of resources formed by its member's subscriptions to the IMF's capital. The level of each member's subscriptions is equal to its quota in the IMF. The quota determines the amount of money a member can borrow from the IMF.[20] A member's quota is largely determined by its economic and financial position

[14] Darrow Mac, between light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law 38 (Hart publishing, 2003).
[15] Id. at 41
[16] Id.
[17] Other IMF financial activities include the Systemic Transformation Facility (STF), the Compensatory Financing Facility (CFF), the Supplemental Reserve Facility (SRF), and the Contingent Credit Line Facility (CCL).
[18] IMF, 'IMF Emergency Assistance Related to Natural Disasters and Post-Conflict Situations: A factsheet,' http://www.imf.org.
[19] Surveillance is the regular dialogue and policy advice that the IMF offers to each of its members on a regular basis. Through surveillance the IMF conducts regular consolations, and in depth appraisals of each member country's economic and financial policies. The consultations are referred to as art. IV consultations. Through its technical assistance operation, the IMF provides training mostly free of charge to help member countries strengthen their capacity to design and implement effective policies, draft and review legislation and build institutional capacity.
[20] See "About the International Monetary Fund," Introductory Information http://imf.org/external/about.htm

relative to the other member countries.[21] In addition to obtaining capital from the quotas, the IMF maintains two standing borrowing arrangements with official lenders. The New Arrangements to Borrow (NAB) and the General Arrangements to Borrow (GAB) which has a total borrowing capacity of SDR 34 billion (about $55 billion).[22] (IMF has not had to draw upon either of these arrangements for several years) and also borrows from private markets.

C. Background information on conditionality

Definition of conditionality

In the most simplistic terms, conditionality refers to the policies that countries agree to follow as a condition for borrowing from the IMF[23]or it encompasses all the policies that the Fund wishes a member to follow so that it can resolve its problem consistently with its Articles.[24] Under conditionality the IMF disburses money to a borrowing country only on a piecemeal basis and only if the country demonstrates that certain economic and financial obligations that the borrowing country's government committed to in advance are in fact being implemented and having the desired results. Therefore, conditionality requires the Fund to reassess the program of a member when there are deviations from earlier agreements and gives the Fund the right to cease providing financing or to refrain from providing such financing unless certain key policies have been implemented. [25] Conditionality has several purposes. Its

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[21] The U.S. has the largest quota.

[22] Through the GAB and the NAB, a number of member countries and institutions stand ready to lend additional funds to the IMF. See http/www.imf.org/external/np/exr/facts/gabnab.htm

[23] Alex Mourmouras, IMF conditionality and Country Ownership of Reforms, IMF Research Bulletin, at 1, Vol. 3 No. 4 (2002).

[24] Darrow Mac, supra note 14, at 45.

[25] Jack Boorman, Conditionality in Fund Supported Programs, IMF Policy Development and Review Department, Feb. 16, 2001.

main purpose is to ensure that IMF resources provided to members are used to resolve their balance of payment problems in a manner consistent with the Funds articles, and in a manner that establishes adequate safeguards for the temporary use of the Funds resources[26] Conditionality also provides adequate safeguards to the IMF and its member countries (especially the large contributors), that borrowers will repay their loans and adjust their policies in ways conducive to national and international prosperity.[27] Conditionality assures borrowing countries that they will continue to receive IMF financing if they meet specified conditions.[28] Making financing contingent on policy implementation also provides a "stop-loss" option with a view to safeguarding the Fund's resources and enabling the Fund to avoid throwing good money after bad if policies are not implemented or the overall program is going off track.[29]

The term conditionality was not expressly included in the original Articles of Agreement and neither did the articles include any express statement that the Fund had to adopt policies on the use of its resources.[30] But a series of early Executive Board decisions and Annual report references espoused the view that the Fund could prevent any proposed uses of Fund resources that it considered improper.[31] This ambiguity was eventually clarified in 1968 when a First Amendment included clear language requiring the Fund to have policies on the use of its resources.[32]An Executive Board decision on 20th September 1968 set forth the results of a review of the Funds policies on the use of its resources. This decision was revised and extended

[26] Mourmouras, supra note 23, at 2.
[27] Id.
[28] Id.
[29] Id.
[30] Darrow Mac, supra note 14 at 46. See also J Gold "Natural Disasters and Other Emergencies beyond Control: Assistance by the IMF, (1990).
[31] Id. at 46.
[32] Id. at 47.

by the decision of March 2, 1979, which set forth the guidelines for the use of the Funds resources and for Stand by Arrangements.[33] On September 25, 2002, the IMF approved new guidelines for the design and implementation of conditionality in its Fund supported programs.[34] This change was a response to substantial external and internal criticism of the Funds use of conditionality in its lending practices.

D. IMF conditionality and its impact on economic and social rights

IMF conditionality has been an integral part of its lending practices. Over the last twenty years the economic and financial policies imposed by the IMF as conditions for borrowing have had a significant impact on the economic and social rights of the citizens in its borrowing member countries. These violations have caused the IMF to be perceived by many as apathetic to the economic rights of the people subject to its policies. This section considers some of the criticisms of conditionality and its impact on these rights.

Distributional and social injustice

According to this criticism even if the austerity programs that the IMF pressures its borrowing member countries to adopt do in fact provide net overall and economic financial benefits to those countries by helping them to restore economic stability or to avoid defaulting

[33] See decision No. 6056-(79/38) March 2, 1979

[34] International Monetary Fund Guidelines on Conditionality available at, http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.htm. Four main principles are at the core of the revised guidelines: National ownership of the reform program; parsimony and clarity in the application of program related conditions; tailoring of the programs to the member's circumstances, and effective coordination between the IMF and other multilateral institutions.

on foreign debts, these countries achieve this economic growth at the expense of the poor.[35] Consequently whatever benefits IMF policies and austerity measures might have for a country in aggregate economic terms, these benefits are achieved at a cost that no society should have to bear.[36]

The one size fits all austerity measures that the IMF policies promote typically involves reduction in public expenditures including those on social services like health services and education,[37] elimination of subsidies,[38] restriction of credit, privatization of state enterprises, trade liberalization, devaluation, tax reform, removal of barriers to foreign investment and reduction in wages.

IMF loans conditioned upon the implementation of market liberalizing economic and social policies by the borrowing countries have left many developing countries without the resources and infrastructures necessary to respond to the ills of globalization.[39] The export led growth strategies spurred by market liberalization has caused many states to rapidly increase commodity exports in order to generate the foreign exchange capital needed to service

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[35] Head supra note 3 at 537

[36] Head, supra note 10, at 537.

[37] This was the case in the Argentine crises in the 1990s. During Argentina's recession in the late 1990's, the IMF's formula was: raise interest rates to slow down domestic consumption and increase tax pressures to shrink domestic demand which in turn increases the proportion of exports to imports and results in a balance of payments. During this crisis the IMF battled the Argentine government's efforts to institute labor reform, raise teachers' salaries and improve deteriorating road conditions. Concerns about rising unemployment were dismissed when the Argentine Labor Minister tried to obtain relief from the pending IMF conditions.

[38] For instance, following the implementation of SAPs in India, the Public Distribution Scheme which was meant for meeting the food needs of the poorest sections of the population was modified and converted into the Targeted Public Distribution Scheme that restricted the access of this scheme to only the poorest of the poor by changing the eligibility criteria.

[39] Benjamin Mason Meier, Employing Health Rights for Global Justice: The Promise of Public Health in Response to the Insalubrious Ramification of Globalization, 39 Cornell Int'l L. J. 711, 720 (2006). See also Jeffrey D. Sachs, Tropical Underdevelopment (Nat'l Bureau of Econ. Research, Working Paper No. 8119, Feb. 2001), available at http:// www.nber.org/papers/W8119 (where he points out that IMF measures contribute to low growth rates and instability in recipient countries).

persistent debts to international financial institutions.[40] The agricultural sector which is the most important sector, and accounts for between thirty to sixty percent of Gross Domestic Product (GDP) has been greatly affected. Most states have abandoned rural based agricultural systems in favor of rapid urbanization.[41] Urbanization has led to migration by the poor from the rural to urban areas in search of work. Extensive migration has overwhelmed crumbling urban areas leading to widespread unemployment and unsustainable living conditions.[42] This increase in unemployment affects the right to work. [43] Overpopulation in the urban areas increases the demand for commodities, leading to a rise in the cost of land, services and basic goods and consequently a decrease in real wages for workers.[44] For most of these workers, whose only asset is labor, the loss of jobs and reliance on low wages, impinges on their ability to provide for basic livelihood. This in turn violates the right to an adequate standard of living including, adequate food, clothing and housing and medical services.[45] The mandated proscription of state intervention means that these impoverished persons must bear risks and costs alone, leading to a decline in real income and dramatic increases in the level of poverty and homelessness.[46] The overall effects of these measures have led most of the citizens of these developing countries to a state of destitution.

Removal of barriers to foreign direct investment, albeit beneficial, may cause severe unemployment and may lead to the abolition of minimum wages and collective bargaining laws

[40] See Meier, 39 Cornell Int'l L. J. 711, 723 (2006).
[41] See Id.
[42] See Id.
[43] ICESCR, supra note 2, art. 6.
[44] Id.
[45] Id. art. 11.
[46] Mason Meier, supra note 39, at 724.

when prematurely imposed.[47] The abolition of minimum wages will likely affect an individual's right to work within favorable conditions that provide for fair wages.[48] These developing countries may instead benefit from a limit in foreign investment because domestic actors need to be strengthened before they can sustain competition with foreign investors. The Fund austerity programs also include policies to devalue the borrowing member state's currency[49] without increasing the supply of money in the economy. The result is that devaluation raises the prices of goods, and severely reduces consumer purchasing power.[50]This affects the individual's ability to maintain an adequate standard of living for himself and his family.[51]

The most criticized and possibly the most harmful of the Fund austerity measures requires that borrowing member countries reduce public spending in order to balance the government's budget and raise revenues. These measures force the governments to eliminate public spending for social programs and to increase the price for social services, thereby making health care and education unaffordable for the poor. These policies have violated people's rights to social security including insurance [52]and lowered their ability to maintain an adequate standard of living. The elimination of public spending and subsequent inability of the government to provide affordable education to its citizens violates the right to education.[53]

[47] Ofer Eldar, Reform of IMF Conditionality: A Proposal for Self-Imposed Conditionality, 8 J. Int'l Econ. L. 509, 519 (2005).
[48] ICESCR, supra note 2, art. 7.
[49] Devaluation is a reduction in the value of a currency with respect to other monetary units. It specifically implies an official lowering of the value of a country's currency within a fixed exchange rate system, by which the monetary authority formally sets a new fixed rate with respect to a foreign reference currency.
[50] Brian Trubitt, International Monetary Fund Conditionality and Options for Aggrieved Fund Members, 20 Vand. J. Transnat'l L. 665, 682 (1987).
[51] See ICESCR, supra note 2, art. 11.
[52] See Id. art. 9.
[53]See Id. art. 13.

The harsh realities of these measures have also led to the uneven distribution of wealth and enrichment of a selected few at the expense of the poor and vulnerable. Since, globalization operates at a collective level without regard for individual benefits, those who suffer adjustment costs such as lost jobs, higher food prices, and inferior health, do not share in the collective benefits of efficient markets like their substantially wealthy countrymen.[54] In some developing countries, the IMF funds are mismanaged and siphoned by government officials responsible for their implementation. In other circumstances, the IMF funds are used to protect the affluent whose bad investments are repaid with IMF loan money at the expense of the poor, who ultimately absorb the costs of the austerity programs installed to pay for the loans.[55]

IMF policies have been seen to undermine democratic participation and contribute to civil unrest and a breakdown in social cohesion in some borrowing countries.[56] This is the case in West and Central African countries in the last few weeks where the global increase in food prices has sparked civil unrest. The riots were started in Cameroon on Monday, February 25th and lasted through the 29th. The Cameroonian population took to the streets in protest to the increase in food and fuel prices.[57] Most of those agitating for economic relief measures in Cameroon regard the IMF as one of the ultimate causes for their plight. In 1993, as part of the

[54] Mason Meier, supra note 39, at 723.
[55] Juan Carlos Linares, After the Argentine Crisis: Can the IMF Prevent Corruption in its Lending? A Model Approach, 5 Rich. J. Global L. & Bus. 13, 21 (2005). Linares points out that after the Argentine crisis, the wealthy people who had embezzled and benefited from the IMF bail outs transferred funds out of the country while the Argentine people were left to share the burden of the failed IMF policies and loans.
[56] Namita Wahi, Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability, 12 U.C. Davis J. Int'l L. & Pol'y 331, 345 (2006).
[57] The Cameroonian riots were followed by riots in several towns in Burkina Faso and Niger. The riots in Cameroon led to the death of about 24 people and the arrest and detention of more than 1600. Human Rights activists put the death toll in Cameroon at over 100. See 'Food Riots hit West and Central Africa,' [Hereinafter Food Riots] http://www.bicusa.org/en/Article.3702.aspx

IMF backed reforms, the Cameroon government cut wages by 70 percent and one year later the CFA franc was devalued by 50 percent, slashing consumer purchasing power.[58] The effect was devastating and led to large-scale unemployment and poverty. In response to the current unrest, the Cameroon government raised state salaries by 15 percent and suspended customs duties on basic foodstuffs like fish, rice, and cooking oil to ease the discontent.[59] Neighboring West African countries announced similar measures.[60] This is a positive step taken by the president of Cameroon because indebted African governments in general are too dependent on the IMF's conditional aid to criticize or go against the policies it enforces.

Under normal circumstances, the IMF would be unlikely to approve of the steps taken by President Paul Biya of Cameroon (and the other African countries).[61] However, when Mr. Dhaneshwar Ghura[62] was asked in Cameroon whether it was prudent to increase the remuneration of civil servants, he responded that "his delegation had taken good note of the preoccupations of the population and he was glad that the government was already preparing a

[58] See 'Cameroon ups state wages, cuts prices after riots.' [Hereinafter Cameroon ups state wages]. http://africa.reuters.com/business/news/usnBAN849502.html,

[59] Even though the Cameroon government has called for increases in government salaries, Unions have called the planned salary increases insufficient because pay levels will remain lower than they were before 1993 wage cuts imposed by the IMF and the 1994 devaluation of the CFA franc. Mr. Simon Nkwenti, the president of the Cameroon Teachers Trade Union (CATTU), stated that the measures proposed by the president are just cosmetic measures because what the Cameroonian teachers want is a restoration of salaries to their pre 1993 level when the IMF asked the government to cut wages by 70 percent. See 'Food Riots.'

[60] Burkina Faso announced a reduction in customs on basic foodstuffs, and Niger announced the suppression of all taxes and customs duties on rice imports for three months and proposed to increase government stockpiles of rice and cereals. See 'Cameroon ups state wages.''

[61] Note that the IMF is likely to welcome the reduction in tariffs and duties because the IMF is committed to free trade. But it may be concerned with the proposed 15% increase in salaries in Cameroon. Cameroon's November 2007 "letter of intent" laying out its agreement with the IMF under a PRGF loan indicates a planned increase of about 10% in the country's public wage bill. It seems unlikely that the 15% wage increase which is higher than what was approved will be compatible with the terms of the IMF agreement, especially the government's planned new hiring and payment of salary arrears to some employees. See 'Food Riots.'

[62] Head of the delegation for the Joint mission of the International Monetary Fund, the World Bank and the African Development Bank who met with the Cameroon Minister of Finance during a two week economic evaluation.

number of measures to address some of them. He further stated that "the IMF was open to proposals for discussions." On February 25th while in Burkina Faso, the IMF Managing Director Dominque Strauss Kahn noted that "countries are potentially facing a situation where all of a sudden the price of oil and food may increase." He suggested that the IMF could provide short term emergency measures including new loans and advice on tax policy to ease the pressure on African countries.[63] Some West African leaders and economists have already rejected this one size fits all solution and called upon the IMF to chart a new course.[64] Sarah Williams[65] stated that "these policies have been shown time and time again to be harmful and undemocratic to the poorest countries and people." She suggested that the IMF should give the African governments the space to set their own economic policy priorities without dictating to them. According to her, debt relief must be part of the solution to the crisis.[66]

By issuing more loans and prescribing more conditions, the IMF further indebts the African countries without improving their economic performance in ways that make future use of the Funds' resources unnecessary. Most African countries have, to greater or lesser degrees, espoused and implemented IMF policies for the last 25 years, but the levels of poverty are the same and even worst in some circumstances. For instance African agricultural sectors

[63] See 'Food Riots.'
[64] The Benin President Yayi Boni told journalists that "we expect the IMF to adapt its instruments, methods and procedures to take into account the current concerns of our countries, which are still poor and highly indebted." See 'Food Riots.'
[65] Policy officer for, the International Campaign Organization Jubilee Debt 2000.
[66] The IMF has reduced the debt burdens of some of the African countries like Cameroon, Senegal, Benin, Burkina Faso, Ghana, Mauritania, and Niger but each country's still repays on average US$5 per person per year to creditors. Statistics from the IMF Heavily Indebted Poor Countries Initiative report.

demonstrate through continuous low growth rates and deepening rural poverty, the impact of IMF and World Bank policies.[67] The result is that these countries become Fund recidivists.

Despite the shortcomings of IMF financial prescriptions, the pervasive mismanagement of public funds, the persistent and endemic corruption and the inability and incapacity of most African leaders to govern effectively in the common interest is also a hindrance to the implementation of sustainable economic and social development policies. There is wide acceptance that the quality of a country's governance system is a key determinant of its ability to pursue successful economic policies and reduce poverty.[68] The IMF has resolved the issue of good governance by incorporating good governance related conditionalities with loan packages.[69] In the last few years the bulk of IMF structural conditions incorporate good governance measures. The question remains why the level of good governance is weak in most developing countries and what else the IMF and financial institutions can do to exert pressure on these countries to implement good governance policies. One solution is to take away the borrowing privileges of the inefficient and autocratic leaders, which will either force them to borrow less or at higher interest rates or make it impossible for them to borrow.[70] Maybe the inability of these leaders to obtain funds that are used to entrench themselves in power instead

[67] Kjell Havenevik, Deborah Abryceson, Lars-Erik Birgegard, Prosper Matondi & Atakilte Beyebe, African Agriculture and the World Bank: Development or Improvement? Pambazuka Weekly Forum for Social Justice in Africa, March. 11, 2008, available at http://pambazuka.org/en/

[68] Carlos Santino, Good Governance and Aid Effectiveness: The World Bank and Conditionality, 7 Geo. Pub. Pol'y Rev. 1, 4 (2001).

[69] The World Bank defines good governance as "the manner in which power is exercised in the management of a country's economic and social resources for development." According to researchers at the World Bank Institute, good governance entails (i) managing public affairs in a transparent, accountable, participatory and equitable manner, (ii) control of corruption, (iii) respect for the rule of law, (iii) independence of the judiciary, (iv) government effectiveness, (v) institutional checks and balances (vi) Voice and accountability, which includes civil liberties and political stability and, (vii) The lack of regulatory burden.

[70] See Thomas Pogge, World Poverty and Human Rights, 154 (Polity Press . 2002)

of providing for their citizens will create an incentive to implement democratic principles of governance. However, it is difficult to devise and apply consistent criteria to measure country performance in terms of governance because individual country circumstances make judgmental approaches inevitable[71] Poor performance may not always be voluntary but may be caused by a variety of factors affecting a developing country's capacity to implement reforms.[72] Furthermore concentrating aid exclusively on good performers (most of which are middle income countries) will only exacerbate the already high levels of poverty in poorly performing countries whose poverty stricken citizens already have to bear the burden of inept governments and authoritarian regimes.

The IMF's prescriptions have been ineffective

In many instances the Funds prescriptions have been ineffective in restoring confidence and financial stability. Critics argue that in most circumstances, the economic and financial policies that the IMF prescribes for countries that come to it for financial assistance do little or no good, and it appears that some of the conditions actually aggravate the country's financial situation.[73] The core of this criticism is levied at IMF prescribed policies following a "Washington consensus"[74] i.e. standard policy measures that consist of "reducing budget and

[71] Santino, supra note 68, at 10
[72] Id.
[73] Id. at 519. The most common paradigm is the IMFs handling of the Asian financial crisis that struck in the latter part of 1997 and the Argentina and Russian crisis in the latter part of the 1990s.
[74] The term Washington consensus was first used by John Williamson in 1989, in a background paper for a conference on dealing with economic policy in Latin America as a label for ten types of reforms that almost everyone in Washington thought was needed in Latin America as of that date. The ten reforms included: fiscal discipline; reordering public expenditure priorities; tax reform; liberalization of interest rates, a competitive exchange rate; trade liberalization, liberalization of inward foreign direct investment, privatization, deregulation, and property rights. John Williamson, from Reform Agenda to Damaged Brand Name, Finance & Development, at 10, Sept. 2003.

balance of payment deficits, raising interest rates, reducing inflation, privatizing state assets, and reducing trade barriers and regulation on capital flows in and out of the country."[75] When the above mentioned policies fail to improve the economic situation, it affects the overall health of the economy and trickles down to certain segments of the population especially the poor. For instance, in some developing countries conditions requiring member countries to privatize state owned enterprises before they had effective competition laws led to the creation of predatory private monopolies.[76]

Fund programs are supposed to improve economic performance in ways that make future use of the Funds' resources unnecessary. However this has not been the case as evidence shows that many developing countries keep on coming back to the IMF (commonly known as Fund recidivists).[77]Critics see this failure of countries to recover from financial distress as the consequences of the ineffectiveness of conditions prescribed by the Fund.[78] Whether or not this is a reasonable conclusion depends on a number of factors, for instance, whether or not programs are being implemented, and whether the country's policies and external economic conditions are conducive to recovery. Although the failure of certain countries to recover from financial distress is attributable to the country's policies and external economic conditions, there is nevertheless considerable evidence of misguided policies in the

[75] John V. Paddock, IMF Policy and the Argentine Crisis, 34 U. Miami Inter-Am. L. Rev. 155, 168 (2002).
[76] Eldar, supra note 47, at 519. See also Joseph Stiglitz, Globalization and its Discontents at 57(Penguin, 2002).
[77] See Graham Bird, Reforming the IMF, University of Surrey. Bird points out that some countries are almost permanently under the IMF programs. In the period of 1980-1996, the following countries spent 10years or more on the Fund: Argentina, Congo, Haiti, Malawi, Honduras, Jamaica, Mozambique, Niger, Panama, Togo, Sri Lanka, Uganda, Senegal, Uruguay, Somalia, Mali, Costa Rica, Central African Republic, and Cote D'Ivoire.
[78] Eldar, supra note 47, at 519.

Funds' prescriptions. The Independent Evaluation Office (IEO) reports[79] criticize the Fund for several failures, including but not limited to: failures to address vulnerabilities in countries economies; failure to take into account the political feasibility of Fund programs and implementation capacity constraints; over optimistic assessments of the effects of conditionality, and insufficient attention to social concerns and the need for adequate safety nets.[80]

It is important to note that studies examining the effect of IMF prescriptions and looking to determine whether they are effective suggests that this is a very difficult and controversial question. Despite the above mentioned criticisms, some of the Funds prescriptions have been successful and yielded desirable results when adequately followed. For instance the austerity package that Mexico committed to in 1995 proved extremely successful, and Mexico was able to pay off its debt to the Fund even before it became due.[81] Proponents of conditionality argue that it is illogical to conclude that countries that received IMF prescriptions took a nose dive primarily because of those prescriptions. Graham Bird, a prominent scholar, points out that such a conclusion is troublesome because while the outcome is known in countries that adopted Fund programs, what might have happened if the agreement between the Fund and the country had not been reached cannot be known – this is the so called *counter factual*

[79] The Independent Evaluation Office [hereinafter IEO] of the IMF was established in 2001 to conduct independent and objective evaluations of Fund policies and activities. Under its Terms of References, it is fully independent from the Management of the IMF and operates at arm's length from the Board of Executive Directors. The IEO's mission is to enhance the learning culture within the Fund, strengthen the Fund's external credibility, promote greater understanding of the work of the Fund, and support institutional governance and oversight.

[80] See Independent Evaluation office, IMF, 'Evaluation of Prolonged uses of IMF resources' (2002); See also Independent Evaluation Office, IMF 'The IMF and Recent Capital Account Crises: Indonesia, Korea, Brazil' (2003). All reports of the IEO are available at http://www.imf.org/external/np/ieo/pap.asp.

[81] Eldar, supra note 47, at 519. Id. See also Andreas Lowenfeld, International Economic Law (New York: Oxford University Press, 2003), at 590.

problem. Furthermore, proponents of conditionality argue that it is unfair and economically unsound for a borrower to blame the IMF for economic difficulties that originated before the Funds intervention began.[82] Frequently, domestic governments contribute to or even precipitate a financial crisis.

It is useful to note that what is needed to solve economic crises is a subject of substantial disagreement amongst most economists. The fundamental challenge lies in determining what changes in policies will be effective in addressing a country's economic crisis while safeguarding the economic and social rights of the poor.

The Democracy Deficit Criticism

The essence of the democracy deficit argument is that "the IMF controlled by a handful of rich countries is an unaccountable autocracy in which the people most affected by its operations have no chance to participate in its decision making process."[83] Evidence of the IMFs democracy deficit is seen in its weighted voting system which places a preponderance of power in the hands of a few advanced economies.[84] These supplier states control the policy agenda of the IMF and push for policies that are more favorable to them and detrimental to those it affects. The IMF has taken steps to remedy the unaccountability situation. In order to strengthen the voice of the people of developing countries, the IMF continues to develop the IMFs Poverty Reduction Strategy Papers (PRSP) through which poverty reduction strategies are

[82] Head, supra note 10, at 546.
[83] Head, Supra note 10, at 539.
[84] The G7 countries alone have 44.5% of the votes [84] and advanced economies (28 countries[84] which represent less than 14% of membership population) hold over 61% of the voting power.

prepared through a coordinated participation of development partners such as government domestic stakeholders and external development partners.

The parties affected by the IMFs decisions have no means to raise a legal challenge or appeal against IMF decisions.[85] The IMF charter provision empowers the institution itself to determine the legality of its own actions. Consequently there is the absence of a genuinely independent tribunal or other panel in which IMF action can be challenged or an adequate set of publicly available rules that could be used to challenge its actions.[86] Professor Daniel Bradlow of American university, argues that "If part of the IMFs insistence on good governance requires its borrowing member countries to make their own policy makers accountable for their actions, then there is no obvious reason why the IMF when it descends into the national policy making process should be less accountable to those people affected by its decisions.[87] The increase in the effect of conditionality on the economies and political structure of developing countries calls for greater accountability of the Fund to its stakeholders and the public at large and for better transparency in its decision-making process.

The democracy deficit criticism also extends beyond the IMF to its member countries. In democracies citizens have a legitimate expectation to participate in decisions that have direct consequences on their incomes and assets. However, many of the developing countries which benefit from the Funds services are undemocratic in character. There is no guarantee that a government's participation in IMF decision making will in fact reflect the views of the countries people, especially the poor who are most affected by IMF policies. As already mentioned, in

[85] Head, supra note 10, at 539.
[86] The IMF Executive Board has the power to interpret the IMF Charter and hence to judge the legality of its actions
[87] Daniel D Bradlow, Rapidly Changing Functions and Slowly Evolving Structures: The Troubling Case of the IMF, 94 Am. Soc'y Int'l L. Proc. 152, 156 (2000).

most cases the Executive Director who represents the government was not elected by the people nor is he accountable to the people. This problem is further compounded because even if the Executive Director's participation reflects the views of the citizens from his country, he has very little capacity to influence the decisions of the Board since the Board is dominated by Executive Directors from countries with the highest quotas.

In response to the above democracy deficit criticisms, the IMF created the IEO in July 2001[88] to conduct objective and independent assessments of issues relating to the mandate of the IMF. Even though the IEO is a first step towards creating greater oversight and accountability for the IMF; it fails to constitute an independent accountability mechanism that is needed to curb the IMFs exercise of substantial power over its borrowing member states. This is because (I) the Director of the IEO is appointed by the IMF Executive Board and may be dismissed by them at any time, (ii) the IEO relies on the Executive Board for funding and reports to the Board and,[89] and (III) the IEO can only make recommendations based on its evaluation of the projects but it has no power to give binding decisions if it deems the IMFs actions ultra vires or improper.

Conclusion

The above criticisms of the use of IMF conditionality reveal that the IMF exercises public power over the citizens in developing countries. This indirect transfer of public decision making power to the IMF by the borrowing states necessitates the demand for the respect for human

[88] International Monetary Fund, Annual Report 2003 (2003) available at http://www.imf.org/external/pubs/ft/ar/2003/eng/index.htm last visited March 2008.
[89] IEO Annual Report at 27.

rights by the IMF when imposing developmental policies. The next part of the paper discusses whether there are any effective mechanisms both in international law and within the IMF organization through which the IMF could be held accountable to the citizens of these developing countries. To this end I examine both institutional and non-institutional mechanisms and discuss some problems with using the institutions to hold the IMF accountable.

PART II

Why should the IMF Respect Economic and Social Rights?

In recent years there has been a remarkable expansion in the economic and political power of non-state actors in both domestic and international settings.[90] The power of these non-state actors like the IMF arises from the financial clout they possess over the borrowing member states.[91] There is a need to hold the IMF accountable in order to safeguard the human rights of those whose lives are affected by actions taken under its policies and programs and implemented by borrowing states. Many human rights advocates perceive IMF conditionality as an indirect transfer of public decision making power from the borrowing member states to the IMF. Since the IMF's interference in the domestic settings of these countries has a significant impact on the lives of its citizens, critics suggest that the IMF is in fact exercising governing power that justifies the claim for accountability.[92]

[90] Wahi, supra note 56, at 333.
[91] Id. 372.
[92] Id.

Institutional Accountability of the IMF

Institutional accountability mechanisms include those mechanisms that the IMF has put in place to ensure that its operations are consistent with its Articles of Agreement. From the onset the IMF did not see any link between its activities and the economic, social and cultural rights enshrined in the ICESCR. [93] Continuous and incessant criticism of its policies prompted it to devise institutional mechanisms for taking human rights considerations into account. During the IMFs Art. 4 consultations with member states, the IMF engages the member country in discussions of its policies relating to healthcare, the environment, welfare, housing, unemployment, labor markets and certain aspects of management of the state's public sector.[94]This leads to the conclusion that the IMF recognizes the necessity to engage in discussions about the social and economic rights of the citizens of its borrowing member countries. This recognition led the IMF to undertake certain measures to increase the participation in the decision making process of those affected by its measures. First the IMF has introduced the Poverty Reduction Strategy Paper through which written plans for reducing poverty are prepared by governments in low-income countries through a participatory process involving domestic stake holders and external development partners.[95] Through this process the member state countries are empowered to adopt policies that will not infringe on the

[93] Francois Gianviti, Economic Social and Cultural Rights and the International Monetary Fund, at 4(2002). This reluctance was expressed on two grounds. First, the IMF argued that under its Articles of Agreement, it was not empowered to take human rights considerations into account while designing its policies and programs. Second, its Article of Agreement prohibited it from being influenced by political non economic considerations while dealing with member states (See art. 4 § (3)(b) of its Articles of Agreement). However, most critics have rejected the non political interference argument on grounds that the IMF attaches non economic conditions to their funding that relates to governance, corruption, and budgetary allocations all the time.

[94] Wahi, supra note 56, at 355. See Social Dimensions of the IMF's Policy Dialogue, (IMF Pamphlet Series No. 47), Excepted in IMF SURVEY, Apr. 3, 1995, at 97. http://www.imf.org/external/pubs/ft/pam/pam47/pam4701.htm

[95] See Poverty Reduction Strategy Paper (PRSP) A fact sheet – September 2005, http://www.imf.org/external/np/exr/facts/prsp.htm

economic rights of its citizens. However this form of self regulation is too ad hoc and piecemeal to adequately protect the economic and social rights.[96] A more concrete effort towards internalizing a commitment towards the protection of economic and social rights must be considered. Second, the IMF created the IEO in 2001 which has failed to constitute an independent accountability mechanism through which the IMF can be held accountable for its violation of the economic and social rights of these citizens.[97]

The absence of efficient independent accountability mechanisms implies that the IMF is solely responsible for compliance with its constituent articles. The IMF's reluctance to internalize economic and social rights in its Charter or Articles of Agreement, despite all the criticisms and the effects of its policies, signifies that the IMF does not accept the far reaching consequences of its policies on the economic and social rights of the citizens of developing countries, or it does not think that it should be held accountable for such violations. Since there is no adequate independent accountable mechanisms through which the IMF can be made to respect the economic and social rights of the citizens in its borrowing member countries, there is a need to explore whether there are any non institutional accountability mechanisms through which it can be held accountable.

Can the IMF be Held Accountable under International Legal Mechanisms?

Juridical personality of the IMF

[96] Wahi, Supra note 56, at 356.
[97] See concluding paragraph of the democracy deficit criticism in part I for some reasons why the IEO has failed to act as an independent accountability mechanism.

The international accountability of the IMF can only be established if it possesses international juridical personality. Under international law, international organizations are subjects of international law possessing international legal personality like states, even though with different characteristics. The default rule is that an international organization's legal personality is conferred upon it by the treaty that created it, *Reparation for Injuries Suffered in the service of the United Nations*, 1949 I.C.J. 174, (Apr. 11). In *Reparations*, the ICJ also held that in the absence of express provisions in the organization's Charter prohibiting it from possessing an independent personality the International Governmental Organization has legal personality necessary to carry out its functions. The ICJ further stated that the powers are not limited to what is conferred by the constituent treaty but extend to what is necessary to perform its functions effectively.[98] The IMF's Articles of Agreement do not grant it express international personality therefore, it is necessary to discuss its modus operandi to determine whether it possesses de facto international personality.

The IMF's Articles of Agreement indicate an active independent functioning of the IMF from its member states. Art. 1(2) of its Articles of Agreement with the UN provide 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. [99] Art. 12, S. 4(c) indicates independent functioning of the staff and management. It provides that "the Managing Director and the staff of the Fund shall owe their duty entirely to the Fund and to no

[98] In the *Reparations* case, the ICJ concluded that the UN has international legal personality in the absence of an express provision in the UN Charter to that effect and in the face of legislative history of the UN that pointed to a contrary conclusion.

[99] See art. 1(2) of the Agreement between the United Nations and the International Monetary Fund (entered into force Nov. 15 1947), 16 U.N.T.S. 328 available at http://www.imf.info.org/external/pubs/ft/sd/index.asp?decision=DN21, last visited March 2008.

other authority." Furthermore each member of the Fund shall refrain from all attempts to influence any of the staff in the discharge of these functions.[100] The IMF also has the capacity to create international rights and obligations. Art 9. S. 2 confers full juridical personality upon the IMF including the capacity to contract, acquire and dispose of immovable and movable property, and to institute legal proceedings.[101] This provision clearly shows the capability of the IMF to enter into agreements with other organizations. Art. 29(c) allows the IMF to submit disputes between the IMF and member states to arbitration.[102] Therefore it is evident that the IMF possesses the capacity to bring and defend international claims. Apart from the above literature that presumes the international legal personality of the Fund, the General Counsel of the IMF has also recognized that the IMF possesses international legal personality and is a subject of international law.[103] It is reasonable to conclude that the IMF possesses an international juridical personality such that it is possible in principle to devise accountability mechanisms for the IMF at the international level.

International Accountability of the IMF

International human rights law, as part of customary international law, transcends the barrier of state sovereignty to ensure fundamental rights and freedoms to everyone. Since the IMF possesses international legal personality, it is therefore bound by the rules of public and customary international law. Most commentators argue that the human rights obligations set

[100] See Art XII, S. 4(c) of the Articles of Agreement available at http://www.imf.org/external/pubs/ft/aa/aa12.htm
[101] See IMF articles of Agreement art XI, §2. This article is the basis of the agreement between the IMF and UN.
[102] This article applies only when a disagreement arises between the Fund and a member which has withdrawn or between the Fund and any member during liquidation of the Fund. The provision leads to the inference that a current member cannot sue the Fund while the Fund is still engaged in its ordinary functions.
[103] Francois Gianviti, Economic, Social and Cultural Human Rights and the International Monetary Fund (2002), http://www/imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf (Last visited March 2008)

forth in the ICESCR are part of general customary and public international law and the IMF is bound to comply with its provisions, even when it conflicts with its internal mandate.[104] According to these commentators, customary international norms would not operate to change the objectives of the international organization but will limit to some extent the actions the organization can legitimately take in pursuit of its objectives.[105] Therefore the IMF has a negative duty to ensure that its actions do not have a negative effect on the human rights situation of its borrowing members. In response to this argument Francois Gianviti, General Counsel of the IMF, argues that the human rights norms enshrined in the ICESCR have not reached the status of public international law, which entails that they do not impose themselves on the Fund. They can only be binding on the Fund if the Fund is a signatory to the treaty. Gianviti bases his argument on the theory that the International Court of Justice has never pronounced that economic and social rights are part of general international law. However Gianviti's argument is tenuous. As customary law, it need not be adopted or upheld by the International Court of Justice to obtain the status of general international law. The norms obtain this status from general practice and agreement amongst states. One hundred and fifty seven countries are signatories to the ICESCR, which leads to the inference that the rights adopted by the treaty are perceived as fundamental by many countries. Economic and social rights are fundamental rights and should be equated to political and civil rights. The right to food, adequate standards of living and health care are necessary for the daily functioning of every human being. Political and civil rights become meaningless to an individual who has no

[104] Id. at 373.
[105] Gianviti, supra note 103, at 113, Citing Pierre Klein, "La responsabilite des organizations financieres internationales et les droits de la personne", 1999 Revue Belge de droit international.

food to eat or who is destitute. This can be seen in African countries where most people perceive engaging in the political process as fruitless and are more preoccupied with hunger, disease, and illiteracy. If the IMF is bound to respect political and civil rights, then it must be bound to respect economic and social rights as well.

It is important to note that customary international law, was essentially perceived as carving out a sphere of human rights protection against the power of states. Therefore, it was understood to afford protection only against states. However in recent year's most non-state actors, such as the IMF, exercise political and economic power in the domestic activities of their member states and for this reason there is the need to extend the principles of general international law to them.

Another reason why the IMF is bound by the principles enshrined in the ICESCR is advocated by Sigrun Skogly.[106] She argues that the relationship between the Fund and the United Nations (UN) requires it to respect the rights enshrined in the ICESCR. According to her the Fund is a specialized agency of the UN and is bound by the general norms adopted by the UN charter.[107] She states that under Art. 63 of the UN Charter specialized agencies of the UN have been brought into a relationship with the United Nations Economic and Social Council (ECOSOC).[108] The creation of this formalized relationship with the UN grants the Fund legal and practical rights and obligations towards the UN. The IMF General Counsel rejects this argument on grounds that under Art. 57 of the UN Charter under which the Fund was brought into a

[106] Sigrun Skogly, the Human Rights Obligations of the World Bank and the IMF 78-105 (2001).
[107] The norms enshrined in the ICESCR were adopted by the United Nations General Assembly in 1966.
[108] Art. 62 of the UN Charter provides that ECOSOC was created to initiate studies and reports with respect to the international economic, social, cultural, educational, health and related matters and may make recommendations with respect to any such matters to the General Assembly and to the Specialized Agencies concerned. It was also empowered to make recommendations for the purpose of promoting respect for and observance of human rights and fundamental freedoms for all.

relationship with the UN by a 1974 agreement, the UN recognizes that the Fund is an independent organization therefore, the Fund's relationship with the United Nations does not require it to give effect to resolutions of the UN such as the resolution under which the General Assembly adopted the ICESCR.[109] Skogly emphasizes that even though the IMF has an independent status, this does not in any way lessen its obligations to cooperate with the Economic and Social Committee under Art. 63(2) of the UN Charter.[110]

Conclusion

This paper demonstrates how the policies imposed by the IMF through its coercive use of conditionality contravenes the economic and social rights safeguarded by the ICESCR and concludes that these violations are significant and raise the need for IMF accountability. Moreover, the IMF possesses international juridical personality such that it should be held accountable for these human rights violations at the international level. However, holding the IMF liable under the current international law enforcement mechanism raises two issues.

First, the economic and social rights enshrined in the ICESCR have not yet achieved the status of fundamental rights in all states. Some states are still reluctant to classify these rights as fundamental human rights, which is part of public international law. However, this limitation does not change the fact that we can make a case for their elevation to the same status as the rights protected by the Universal Declaration of Human Rights and political and Civil rights.

[109] Gianviti, supra note 103, 12-13

[110] Art 63 § 2 of the UN Charter also provides that the Economic and Social Council may coordinate the activities of the specialized agencies through consultations with and recommendations to such agencies and recommendations to the General Assembly and to the members of the UN. The aim of this cooperation has not been specified, but Skogly argues that it is logical to assume that the motive was to gather all possible resources for the promotion and fulfillment of the purposes of the organization Therefore, the independent status of the IMF does not lessen its obligation to engage in such cooperation.

Second, there has been no official and binding ruling on whether the IMF, as an independent and specialized body of the UN, is bound by UN resolutions. The IMF General Counsel adopts this view but, other advocates for IMF accountability insist that the IMF's independent status does not in any way lessen its obligations to cooperate with ECOSOC under Art. 63(2) of the UN Charter.

Even if the IMF can be held accountable for violations of general principles of international law, there is no judicial enforcement mechanism in place. Although there is no international human rights court, there exist three regional human rights courts: The African Court on Human and People's Rights,[111] The European Court of Human Rights, [112] and the Inter-American Court of Human Rights.[113] As international law evolves it is necessary to examine how the jurisdiction of these institutions can be expanded to allow human rights claims against non-state actors like the IMF.

[111] See Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT (III), available at http://www.achpr.org/english/_infocourt _en.html

[112] The European Court of Human Rights was set up in 1959 under the European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, Europ. T.S. No. 5, 213 U. N. T. S. 221 (entered into force Sept. 3, 1953), available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf

[113] The Inter-American Court of Human Rights was established pursuant to the statute of the Inter-American Court of Human Rights in 1979, available at http://www.corteidh.or.cr/general_ing/statute.html