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The American University in Cairo
School of Global Affairs and Public Policy

**IMF'S LOAN CONDITIONALITY: NEGATIVE CONSEQUENCES
IN THE BORROWER COUNTRY AND THE BURDEN OF
RESPONSIBILITY**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for
the LL.M. Degree in International and Comparative Law**

By

Sara Mohamed Osama Abdalla Atta

Fall 2021

The American University in Cairo
School of Global Affairs and Public Policy

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September 2021

in partial fulfillment of the requirements for the
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DEDICATION

*This work is dedicated to the one who made me a mom, my first born, my beloved son Mourad who made me stronger, better and more fulfilled.
Your existence means the world for me. Love you endlessly.*

ACKNOWLEDGEMENTS

The completion of this study could not have been possible without the help and encouragement of my caring mom, who has provided me with her generous support and care.

A debt of love and gratitude to my beloved husband Ahmed, he is my best friend, closest advisor and love of my life..... He supported me every step of the way, as he always does, with patience, great insight, humor, and love.

The American University in Cairo
School of Global Affairs and Public Policy
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IMF'S LOAN CONDITIONALITY: NEGATIVE CONSEQUENCES IN THE
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Sara Mohamed Osama Abdalla Atta

Supervised by Professor Hani Sayed

ABSTRACT

People often think that IFIs, such as the World Bank and the International Monetary Fund are prominent players in the global economy by providing funds to countries in need of development and sustainment of welfare, unfortunately these institutions can cause devastating effects in the borrower country. The harsh conditionality of the IMF plays a huge role in the negative economic consequences incumbent upon the borrower country. Meanwhile, the lack of legal remedies for private individuals suffering from the conditionality aggravates the consequences for these people. On the one hand, conditionality may strain the economy of the borrower country which leads to impeding the government's ability to fulfill their international obligations to provide certain rights to their citizens. On the other hand, there are no available legal remedies for private individuals neither in the international sphere or the domestic one. Internationally, IFIs flee responsibility for the consequences of their policies in the borrower countries by escaping behind the lack of adequate internal remedy mechanisms within these institutions and behind the controversial adherence of the these institutions to the right to remedy established under customary international law and to human rights. Domestically, these institutions cannot be held accountable before domestic courts of the borrower country as they enjoy immunity. So the burden of responsibility for the consequences of policies and conditionality imposed by IFIs is shifted from the institution to the administrative bodies of the borrower state who implement the conditionality of the institutions. This paper argues that private individuals suffer from the negative consequences of loans conditionality given by IFIs by causing negative economic effects leading to violations to the rights of private individuals that are supposed to be guaranteed by international conventions due to the burden placed upon the borrower country. It further argues that the lack of remedies deprives private individuals of their rights, as a right with no remedy is no right at all.

Key Words: IFIs, IMF, World Bank, International Accountability, Customary International Law, Human Rights, Right to Health, ICESCR, State Council, Supreme Constitutional Court

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I. Introduction

The world has encompassed a well-established body of international instruments, which enumerate a great spectrum of human rights, yet there are constant violations to these rights due to lack of sufficient resources, despite the existence of international financial institutions. These rights are affected by the surroundings where they are meant to be exercised, most importantly the economic situation of a country. For example, a government is required to have the capacity to allocate a percentage of its expenditure to provide healthcare services to ensure fulfillment of the right to health. Meanwhile, international financial institutions boost billions of dollars in funds to help countries facing economic difficulties to achieve economic reform. However, the fund that Egypt obtained from the International Monetary Fund in 2016 has been criticized for having negative economic consequences; by which it stultify Egypt's capacity to fulfill its obligations under the constitution, specifically regarding the right to health. Consequently, the controversial question that arises is to what extent could international financial institutions, as the IMF, be held accountable? And what are the available remedies for private individuals when their right to health has been breached?

Egypt has obtained an extended fund facility from the IMF in 2016, which incorporates specific conditionality to achieve certain objectives as perceived by the IMF. The conditionality that has been applied in Egypt are the devaluation of the Egyptian pound, introduction of value-added tax (VAT), reduction of energy subsidies and containing the public sector wage bill.¹ From the IMF's perspective these conditions would lead to the realization of certain objectives. These objectives could be summarized in increasing international reserve, attracting investment, increasing tax revenue and decreasing expenditure.² However, this conditionality resulted in aggravating economic

¹ IMF Press Release No. 16/501, 11 Nov.2016, <https://www.imf.org/en/News/Articles/2016/11/11/PR16501-Egypt-Executive-Board-Approves-12-billion-Extended-Arrangement> (last visited 29/03/2021).

² IMF, *Id.*

consequences in a very short period of time. These consequences revolve around unprecedented increase in rates of inflation, poverty and external debt.³

There is a dilemma that international financial institutions' policies in some cases cause harm in the borrowing country accompanied by the lack of a well-established accountability system for these institutions. Especially that there is an "increasing demand and some movement toward ensuring that IOS take concrete steps to ensure their accountability."⁴ It is worth mentioning that some scholarly organizations as the ILA have provided guidance on matters related to the accountability dilemma of IOS.⁵ So there are several reasons calling for the urgent need of such accountability. First, they are powerful organizations as they interfere in the domestic affairs of countries via conditionality affecting social, political and macroeconomic matters.⁶ Second, they have a weighed voting system granting influence to richer countries.⁷ Third, there is a lack of an adequate internal accountability mechanism system. The dilemma is even further complicated due to the immunity enjoyed by these institutions along with the unclear standing of these institutions from customary international law and human rights considerations.

To have a clear understanding of the topic it is essential to consider the meaning of accountability, responsibility and legal remedies. First from a linguistic perspective, 'accountability' means "the quality or state of being accountable, especially an obligation or willingness to accept responsibility or to account for one's actions."⁸ While, 'responsibility' means the "quality or state of being responsible such as: moral, legal, or

³ World Bank, <https://www.worldbank.org/en/country/egypt/publication/economic-monitor-april-2019> (last visited 29/03/2021).

⁴ Ved P. Nanda, *Accountability of International Organizations: Some Observations*, Volume 33, Issue 3, DENV. J. INT'L L. & POL'Y, pp 379–390 (2004), at 390, <https://heinonline.org/HOL/P?h=hein.journals/denilp33&i=389> (last visited 20/07/2021).

⁵ Ved P. Nanda, *Id*, at 390.

⁶ Susan Park, *Designing accountability, international economic organisations and the World Bank's Inspection Panel*, 64 Aust. J. Int. Aff. pp 13–36 (2010), at 15, <https://doi.org/10.1080/10357710903459990> (last visited 15/3/2021).

⁷ Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT. LAW, pp 177–226 (2005), at 184, <https://heinonline.org/HOL/P?h=hein.journals/mjil27&i=189> (last visited 16/3/2021).

⁸ Definition of Accountability, <https://www.merriam-webster.com/dictionary/accountability> (last visited 20/07/2021).

mental accountability or something for which one is responsible: burden.”⁹ Accordingly, the difference is that ‘accountability’ focuses on results, which is the “duty to give an account of tasks after they are completed,”¹⁰ so it is considered after a situation occurs. Meanwhile, ‘responsibility’ focuses on tasks.¹¹ The word ‘remedy’ means the “legal means to recover a right or to prevent or obtain redress for a wrong.”¹² Second from a legal perspective, responsibility of international organizations according to the Report of the International Law Commission on the Responsibility of International Organizations is considered as a “breach of an international obligation and its consequences for the responsible international organization.”¹³ According to the International Law Association, accountability of international organizations has different forms: “legal, political, administrative, and financial,”¹⁴ where the form upon which accountability arises depends on the “particular circumstances surrounding the acts or omissions of IOS, its member States or third parties.”¹⁵ The ILA has further demonstrated that

Accountability is an overarching term, a notion which covers both a variety of primary rules governing the conduct of IOs and secondary rules to render accountability operational *vis-a-vis* those entitled to raise it (means of redress).¹⁶

The ILA has also referred to the accountability by being linked to the “authority or power of an IO. Power entails accountability, that is the duty to account for its exercise.”¹⁷

⁹ Definition of Responsibility, <https://www.merriam-webster.com/dictionary/responsibility> (last visited 20/07/2021).

¹⁰ Responsibility vs Accountability: What’s the Difference?, <https://sprigghr.com/blog/hr-professionals/responsibility-vs-accountability-whats-the-difference/> (last visited 20/07/2021).

¹¹ Responsibility vs Accountability: What’s the Difference?, *Id.*

¹² Definition of Remedy, <https://www.merriam-webster.com/dictionary/remedy> (last visited 20/07/2021).

¹³ Report of the International Law Commission on the Work of its Sixty-Third Session, Draft Articles on the Responsibility of International Organizations, with commentaries, pp 46-105, at 46, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf (last visited 15/07/2021).

¹⁴ Committee on Accountability of International Organisations, 68th Conference, Int'l L. Ass'n Rep. Conf. (1998), pp 584-615, at 598, <https://heinonline.org/HOL/P?h=hein.ilarc/ilarc1998&i=1> (last visited 15/07/2021).

¹⁵ Committee on Accountability of International Organisations, 68th Conference, Int'l L. Ass'n Rep. Conf. *Id.*

¹⁶ Committee on Accountability of International Organisations, 68th Conference, Int'l L. Ass'n Rep. Conf. (1998), *Id.*, at 610.

¹⁷ International Law Association Berlin Conference (2004), Accountability of International Organisations, INTERNATIONAL ORGANIZATIONS LAW REVIEW, VOL 1, ISSUE 1, PP 221–293 (2004), at 225, http://brill.com/view/journals/iolr/1/1/article-p221_15.xml (last visited 15/07/2021).

Furthermore, the ILA pointed out that “responsibility of IOs may arise from non-compliance with any of the applicable bodies of law, while their liability will be implicated when (significant) harm has been caused by any of the lawful activities carried out by the IOs.”¹⁸ Moreover, the ILA has stated that the term ‘remedy’ is a form of

Acceptable outcome arrived at through a procedure instigated by an aggrieved party and is intended to include, in addition to remedies of a formal kind, other means of redress which might be more appropriate to the circumstances of the case e.g. prospective changes of policy or practice by the IO.¹⁹

The problem of accountability of international financial institutions is of vital importance as their policies touch millions of private individuals daily. This research is essential as it generally examines the causes of the lack of accountability of these institutions and specifically focuses on the effect of the IMF’s policies in Egypt in 2016 on the right to health of Egyptians stated under the constitution and under the International Covenant on Economic, Social and Cultural Rights. In addition, not only does the research view the problem from an international perspective, but also sheds the light on the available remedies within domestic jurisdiction. So this research is helpful for practitioners in the field of human rights, specifically the right to health, and for policy makers concerned with finding solutions for the negative effects of the international financial institutions’ policies. This is because it identifies the causes of the dilemma to pave the way for solutions. The study complements the already existing studies and adds to the literature in this field by focusing on the effect of the IMF policies on the right to health of Egyptians and on the accountability of the IMF in this regard from both an international and domestic perspective.

This paper argues that international financial institutions flee accountability for the negative consequences that might occur because of their policies that are implemented in the borrower country. The argument focuses on the conditionality of the funds given to the borrower country that may hinder the government’s capacity to fulfill its obligations

¹⁸ International Law Association Berlin Conference (2004), *Id*, at 245.

¹⁹ International Law Association Berlin Conference (2004), *Id*, at 263-264.

to provide and to protect human rights of its citizens. On one hand, their conditionality revolve around the implementation of austerity measures that strain the government's budget and resources, resulting in lack of adequate resources to ensure the efficiency of services required to attain human rights. On the other hand, international financial institutions refuse to be held accountable for any negative consequences of their policies based on the lack of sufficient remedies for harmed private individuals. The matter of remedies is problematic on both the international and the domestic levels. Internationally, these institutions fail to provide adequate internal remedy mechanisms for private individuals harmed by the policies of the institution. In addition, these institutions argue about their adherence to principles established under customary international law, as the right to remedy is one of these well-established principles and are reluctant to consider human rights in their operations. Meanwhile on the domestic sphere, these institutions cannot be held accountable before domestic courts due to immunity demonstrated under their constitutive instruments. Consequently, the paper argues that the burden of responsibility of IFIs to ensure that their policies cause no harm and are consistent with human rights considerations is shifted from the institution to that of the borrowing country that implements the policies from which private individuals are harmed.

Part I describes the establishment of the IMF including the causes of its establishment, objectives and principles as well as details the conditionality of the IMF concerning its types, scope, rationale and criticism directed towards it. This provides a clear view of the historical background of IFIs as the IMF. In addition it sheds the light on the evolution of conditionality and clarifies the reasons behind the criticism directed against it. Part II explores the accountability dilemma of international financial institutions as international organizations concerning the internal mechanisms of legal remedies, where they stand from customary international law and the legal framework for the establishment of IMF responsibility. This part discusses the current available remedy mechanisms in IFIs and explains the reasons for being inadequate for harmed private individuals. Furthermore, it sheds the light on the debate of why IFIs are reluctant to abide by customary international law, specifically regarding the right to remedy. Moreover, it emphasizes on the argument that IFIs should consider human rights in their policies and provides answers for the

argument alleged by IFIs in order not to consider human rights. In addition, it details the elements upon which responsibility of IOS as the IMF could be held and what hurdles the completion of these elements in practice. Part III analyzes the effects of the extended fund facility given to Egypt in 2016 by the IMF on the right to health of Egyptians guaranteed by the Egyptian constitution and article 12 of the International Covenant on Economic, Social and Cultural Rights, while presenting the available remedies for private individuals within domestic law. This is considered an obvious recent example for the negative consequences that might occur in a borrower country due to the implementation of the IMF conditionality. It further examines the remedies available within the domestic sphere due to the lack of a remedy mechanism on the international scale.

II. Establishment of the International Monetary Fund

A. Historical Overview:

World War II was a turning point in history as the world is still experiencing its consequences to date in politics and in global economy. In the political sphere, the Allied countries won the war and the United States gained its position as the world's great power. This power has been accompanied by changes in global economy which started in the Bretton Woods Conference that took place in the United States in July 1944. Driven by the need to avoid the mistakes of the Great Depression and World War II, representatives of 44 allied nations met to plan a new economic order based on global cooperation.²⁰ This Conference resulted in two main economic consequences upon which current global economy is built. First, the Conference set up a system of exchange rate linked to the dollar²¹ instead of the gold standard. Accordingly the United States became the world's great economic power as it is the only country that can print dollars. Second, the Conference agreed on the establishment of the International Monetary Fund "IMF" as the supervisory body on the new exchange rate system. Since then the IMF has played a crucial role in global economy and "became the key intergovernmental organization underpinning the global financial system."²²

The IMF is a well-established financial institution which has set its mandate, objectives and principles. These bases reflect the vision of its founding fathers; its chief architects were the famous British economist John Maynard Keynes and Harry Dexter White of the U.S. Treasury Department, while the main sponsors behind its establishment were the United States and the United Kingdom.²³ In the founding fathers' vision, the IMF "would help member governments stabilize their currencies without resorting to the currency controls that had disrupted international commerce since the 1930s." Meanwhile,

²⁰ The International Monetary Fund, <https://www.imf.org/en/About/Timeline> (last visited 1/3/2021).

²¹ The International Monetary Fund, *Id.*

²² Alexander E. Kentikelenis, Thomas H. Stubbs & Lawrence P. King, *IMF Conditionality and Development Policy Space 1985-2014*, Review of International Political Economy, vol. 23, no. 4, pp. 543-582, at 549, <https://doi.org/10.1080/09692290.2016.1174953> (last visited 2/3/2021).

²³ Sarah L. Babb, Bruce G. Carruthers, *Conditionality: Forms, Functions and History*, Annual Review of Law and Social Science, Vol 4, Issue 1, 12/2008, pp. 14-29, at 17, <http://www.annualreviews.org/doi/10.1146/annurev.lawsocsci.4.110707.172254> (last visited 1/3/2021).

members of the IMF are “committed to pegging the value of their currencies to the U.S. dollar, to making progress toward dismantling currency controls, and to consulting with the IMF before engaging in currency devaluation. In times of temporary crisis, members were entitled to draw on IMF resources to help stabilize their currencies.”²⁴ This vision has been demonstrated in its mandate which is “the promotion of economic and financial cooperation among its member countries.”²⁵ Moreover, to fulfill this mandate the IMF has clearly laid out its objectives in article 1 of its articles of agreement. The highlights of these objectives are “promoting international monetary cooperation, supporting the expansion of trade and economic growth, and discouraging policies that would harm prosperity.”²⁶ The broad aims of these objectives are to promote and to maintain employment and real income reached through the development of the productive resources of all its members.²⁷ Yet, to be able to reach its objectives the Articles of Agreement has also stated the principles upon which the IMF should follow as a path for these objectives. Article 1(v) stated these principles,

Which calls for the IMF to adopt policies on the use of its resources: (1) that would assist members to overcome their balance of payments difficulties; (2) in a manner consistent with the purposes of the institution; and (3) under adequate safeguards to ensure that such use would be temporary.²⁸

This drives us to the core mission of the IMF which is assistance of its member countries.

The assistance referred to in the principles of the IMF under article (1) of its articles of agreement could be concluded in three main functions; economic surveillance, capacity

²⁴ Sarah L.Babb, Bruce G. Carruthers, *Id.*

²⁵ Manuel Guitián, *Conditionality: Past, Present, Future*, Staff Papers (International Monetary Fund), vol. 42, no. 4, 1995, pp. 792–835, at 792, *JSTOR*, www.jstor.org/stable/3867599 (last visited 1/3/2021).

²⁶ The International Monetary Fund, *Supra* note 20.

²⁷ Manuel Guitián, *supra* note 25, at 793.

²⁸ Manuel Guitián, *supra* note 25, at 793. See article 1(v) which demonstrated that one of the IMF’s purposes 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.”

development and lending. First under economic surveillance, the IMF monitors the international monetary system and financial policies of its member countries by highlighting “possible risks to stability and advises on needed adjustment policies.”²⁹ Second, the IMF works with governments to modernize their economic policies and train their people to improve their economy and create more jobs.³⁰ Third, the IMF provides loans for “member countries experiencing actual or potential balance of payments problem to help them rebuild their international reserves, stabilize their currencies, continue paying for imports, and restore conditions for strong economic growth, while correcting underlying problems.”³¹ In this regard, the IMF provides three types of arrangements, as there are loans given to impoverished countries and other loans given to more developed ones. The first type dates back to 1951 and is called the Stand-By Arrangement “SBA”. It is supposed to last for one or two years, but in many cases it lasted longer.³² In the 1970s, the IMF recognized that many countries entered into several consecutive SBAs, so it opened the Extended Fund Facility “EFF”, which is supposed to last for around four years.³³ Last but not least, the IMF in the 1980s opened the Extended Credit Facility that is targeted to develop economies in the poorest countries.³⁴

The various types of arrangements offered by the IMF are a response to the change in the clientele since establishment till date. By having a glimpse on history, it is noted that the number of IMF member countries has increased dramatically, which accordingly resulted in a change in the type of economies that the IMF deals with. The IMF has initially

²⁹ The International Monetary Fund, <https://www.imf.org/en/About> (last visited 1/3/2021). See article 1(i) of the IMF articles of agreement which specifically stated that the purpose of the IMF is “to promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.”

³⁰ The International Monetary Fund, *Id.* This reflects article 1(ii) which mentioned that “To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.”

³¹ The International Monetary Fund, *Id.* See article 1(v)(vi) of the IMF Articles of Agreement.

³² Axel Dreher, Jan-Egbert Sturm, James Raymond Vreeland, *Politics and IMF Conditionality*, *The Journal of Conflict Resolution*, Feb 2015, vol. 59, no. 1, pp 120-148, at 123, <https://www.jstor.org/stable/24546221> (last visited 1/3/2021).

³³ Axel Dreher, Jan-Egbert Sturm, James Raymond Vreeland, *Id.*

³⁴ Axel Dreher, Jan-Egbert Sturm, James Raymond Vreeland, *Id.*

started with 28 countries in 1945,³⁵ and has reached 190 member countries in 2021.³⁶ This increase in member countries throughout the years has experienced two main benchmarks. The first is the decolonization of Africa in the 1960s under pressure from independence movements. In 1961, Egypt, Ethiopia and South Africa became member countries and by 1969 another 34 countries joined the IMF.³⁷ The second benchmark is in the 1990s when the Soviet Union dissolved and by the collapse of communism, 20 formerly communist countries joined the IMF.³⁸ The increase in member countries with a variety of different economies was reflected in the change in the IMF operations and its evolution as it stands today. It is worth mentioning, that there was no lending programs in the first seven years of the IMF's establishment.³⁹ By the 1950s and the 1960s, the IMF started its lending programs by short-term loans to advanced economies,⁴⁰ for example, Belgium and Finland were the first countries to utilize IMF resources in 1952, while the United Kingdom had 11 SBA between 1956 till 1977.⁴¹ In the 1970s, the IMF's role started reaching countries with a wider range of crisis, as between 1976 and 1983 the IMF lending programs doubled targeting less developed countries.⁴² This is correlated with the oil and debt crises that occurred in the second half of the 1970s and 1980s. The operations of the IMF has changed because the crises caused a shift in the identity of the countries that make the most extensive use of the IMF services; as before the crises the main clients were industrialized countries while after that the primary users became developing countries.⁴³ This explains the need for the emergence of the new types of arrangements from short-term SBA to EFF and Extended Credit Facility.

³⁵ Carmen M. Reinhart, Christoph Trebesch, *The International Monetary Fund: 70 Years of Reinvention*, *The Journal of Economic Perspectives*, vol. 30, no. 1, 2016, pp 3-27, at 6, <https://www.jstor.org/stable/43710008> (last visited 1/3/2021).

³⁶ The International Monetary Fund, *supra* note 29.

³⁷ The International Monetary Fund, *supra* note 20.

³⁸ The International Monetary Fund, *supra* note 20.

³⁹ Carmen M. Reinhart, Christoph Trebesch, *supra* note 35, at 7.

⁴⁰ Carmen M. Reinhart, Christoph Trebesch, *supra* note 35, at 5.

⁴¹ Carmen M. Reinhart, Christoph Trebesch, *supra* note 35, at 8.

⁴² Carmen M. Reinhart, Christoph Trebesch, *supra* note 35, at 10.

⁴³ Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights Symposium*, *Transnational Law & Contemporary Problems*, vol. 6, no. 1, 1996, pp. 47-90, at 70, <https://heinonline.org/HOL/P?h=hein.journals/tlcp6&i=73> (last visited 1/3/2021).

It is understood that the 190 member countries have joined the IMF to have access to the benefits offered by the institution as helping countries to increase their opportunities in development and economic expansion and to obtain IMF financial assistance, however; the question that arises is where does the principle of sovereignty stand in the relation between the IMF and member countries? On one hand, international organizations established after the end of World War II were based on the principle of sovereignty as a normal consequence to declare the end of a war and to put an end to the intervention in countries domestic affairs. Only countries had the right to join these organizations and had the vote in policymaking bodies in these organizations.⁴⁴ Based on the principle of sovereignty, “international organizations were granted limited ability to intervene in the domestic affairs of their member states.”⁴⁵ On the other hand, the establishment of the United Nations and the Bretton Woods institutions were considered taking a step away from the basis of absolute sovereignty.⁴⁶ This has been justified by the fact that member countries have agreed to “surrender some aspect of its sovereignty in return for the benefits it expected to derive from membership in these organizations.”⁴⁷ While shedding the light on the IMF membership in particular, it is recognized that member countries enable the IMF to intervene in its exchange rate and monetary policy, in order to benefit from the IMF consultations, monitoring and lending. Furthermore, international financial institutions over the years have increased their supervision and involvement in their member countries affairs. Although, the IMF had the right to intervene in the affairs of its member states, yet it has been criticized for being uneven in the treatment of its members. This is because while the IMF “is able to exercise substantial control over the affairs of its poorer member states, it has very little control over the behavior of its richer member states.”⁴⁸ This drives us to the core of the uneven treatment by the IMF which is structured in the debatable issue of conditionality.

⁴⁴ Daniel D. Bradlow, Claudio Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, Human Rights Quarterly, vol. 17, no. 3 ,Aug 1995, pp. 411-442, at 416, <https://www.jstor.org/stable/762387> (last visited 2/3/2021).

⁴⁵ Daniel D. Bradlow, Claudio Grossman, *Id*, at 416.

⁴⁶ Daniel D. Bradlow, Claudio Grossman, *Id*, at 418.

⁴⁷ Daniel D. Bradlow, Claudio Grossman, *Id*, at 418.

⁴⁸ Daniel D. Bradlow, Claudio Grossman, *Id*, at 420.

B. Evolution of Conditionality:

The most essential purpose of the IMF is that it provides financial assistance in the form of loans granted under specific conditions. This purpose is derived from Article 1(v) of the IMF's Articles of Agreement which explicitly stated that one of the IMF's purposes 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.⁴⁹

Although the above mentioned article seems clear and straight forward at first sight, yet it holds several aspects that hugely affect a lot of economies that have dealt or are dealing with the IMF. The article specifies not only the role of the institution towards its member countries, but has also specified the action that the borrower country is expected to perform when taking the loan. And last but not least, it has stipulated that the assistance provided must be “temporary” and “under adequate safeguards.” So this article created an obligation for the IMF to ensure that these safeguards are fulfilled. Consequently; these safeguards were “translated into operational procedures by means of Executive Board decisions, which adapted the implementation of conditionality as the world and members’ economies evolved.”⁵⁰ Hence, the article enumerated the elements of the financial assistance equation. First, members who seek the financial assistance of the IMF must have a payment need. These members must have an actual or potential balance of payment need to be eligible to use the IMF resources, which could be referred to as an “adjustment need.”⁵¹ Second, the member country is expected to adopt economic policy measures to correct the imbalance, and this is referred to as “adjustment effort.”⁵² In essence, there has been a “general consensus that the IMF’s financial assistance should be conditional on the adoption and implementation of adjustment policies.”⁵³ In a nutshell, the IMF offers financial assistance to member countries facing balance of payment needs

⁴⁹ The International Monetary Fund, Articles of Agreement, <https://www.imf.org/external/pubs/ft/aa/index.htm> (last visited 2/3/2021).

⁵⁰ Manuel Guitián, *supra* note 25, at 795.

⁵¹ Manuel Guitián, *supra* note 25, at 794.

⁵² Manuel Guitián, *supra* note 25, at 797.

⁵³ Manuel Guitián, *supra* note 25, at 794.

and in return the borrower country is expected to implement and adopt certain reform policies named “conditionalities”, so that the IMF ensures that such assistance is temporary and is adequately utilized.

The concept of conditionality imposed by the IMF on the borrower country has not been the same since the institution’s establishment; it has evolved throughout the years. It is worth mentioning that conditionality was not mentioned in the original 1944 Articles of Agreement, thus “during its first half decade of existence, the IMF did not engage in conditionality.”⁵⁴ This is justified by the fact that the founding father of the IMF British Economist John Maynard Keynes, representing the English position, has rejected the concept of conditionality.⁵⁵ The rationale behind it is that Keynes had argued that “an international institution should not be given the authority to regulate national policies by withholding funds,”⁵⁶ based on the respect of the principle of sovereignty. However, this has been opposed by the US delegation, as the US believed that conditionality is necessary to “prevent the IMF from being drained of its resources for purposes contrary to its charter.”⁵⁷ The IMF had both an adjustment role by encouraging countries to pursue suitable adjustment policies and a financing role by supporting them with balance of payments finance.⁵⁸ Despite not being part of the IMF’s original mandate, “by the early 1950s the two roles were linked by the conditionality attached to many of the Fund’s loans.”⁵⁹ Under US pressure the IMF adopted the principle of conditionality, where it started its application in 1952 and has been “elaborated in explicit general decisions of the Executive Board.”⁶⁰

⁵⁴ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 17.

⁵⁵ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 17.

⁵⁶ R.S Eckaus, *How the IMF lives with its Conditionality*, Policy Sciences, vol. 19, no. 3, (Oct. 1986), pp. 237-252, at 242, <https://www.jstor.org/stable/4532081> (last visited 3/3/2021).

⁵⁷ R.S Eckaus, *Id.*

⁵⁸ Graham Bird, The IMF: A Bird’s Eye View on its Role and Operations, *Journal of Economic Surveys*, vol. 21, no 4, pp 683-745, at 686, <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-6419.2007.00517.x> (last visited 3/3/2021).

⁵⁹ Graham Bird, *Id.*

⁶⁰ R.S Eckaus, *Supra* note 56.

After the adoption of the principle of conditionality in early 1950s, the principle has evolved in the 1960s till the early 1980s under what is called the first and the second general review of conditionality. First, the first general review of conditionality by the Executive Board occurred in 1968, reviewing the conditionality activity that took place in the 1950s and 1960s. It concluded and stressed on the importance of “ensuring adequate safeguards to preserve the revolving nature of those resources and the need to allow for flexible, yet uniform, treatment of all members.”⁶¹ In the 1970s, countries started to face more payment imbalances requiring longer periods of adjustment and larger amounts of assistance than what is available under the SBA. In response to this need, the IMF established an Extended Facility in 1974 to “provide member countries experiencing severe balance of payments problems.”⁶² Due to the new adaptations that took place in the 1970s, the Executive Board conducted a second general review of conditionality in 1978-1979. The guidelines of this review stressed on the importance of early adjustment, member countries must seek assistance once needed, the IMF must pay due regard to variables that have a macroeconomic impact and that there should be periodic reviews for conditionality practices, which has been taking place since then.⁶³ It is worth noting that in the 1970s developing countries were able to borrow from private sources, accordingly the IMF has lost some of its customers and loosened its conditionality, however; in the 1980s conditionality reappeared with vengeance but not for developed countries.⁶⁴ In the 1980s, the developing countries have faced debt-servicing difficulties, it was known as the debt crisis. So the IMF intervened to resolve the crisis and broadened its scope of conditionality practices by focusing on structural reforms and microeconomic measures to ensure efficiency in resource allocation.⁶⁵ Accordingly, the 1980s was a turning point in IMF’s conditionality because of the occurrence of the unprecedented shift from macroeconomic to structural conditionality.⁶⁶

⁶¹ Manuel Guitián, *supra* note 25, at 805.

⁶² Manuel Guitián, *supra* note 25, at 806-807.

⁶³ Manuel Guitián, *supra* note 25, at 808.

⁶⁴ Sarah L.Babb, Bruce G. Carruthers, *supra* note 23, at 18.

⁶⁵ Manuel Guitián, *supra* note 25, at 808-809.

⁶⁶ Sarah L.Babb, Bruce G. Carruthers, *supra* note 23, at 18.

The change in the IMF conditionality practice in the 1980s marked the evolution of the scope of conditionality. In 1985, the IMF has based its loans not only on traditional macroeconomic reforms, but also on fundamental changes in national economies, accordingly the IMF has established its own structural adjustment facility.⁶⁷ A decade later, the IMF introduced a new form of structural conditionality which is linked to the emerging standard of “good governance.”⁶⁸ Nowadays, IMF’s conditionality proliferated as never before due to its wide scope, which for example includes but not limited to ; central bank reform, exchange system, financial sector, government budget, monetary ceiling, pricing, privatization, public sector, social sector, trade, wages and pension and governance. Furthermore, the existence of multiple structural reforms in IMF programs left conditions more complex, intrusive and difficult to enforce.⁶⁹

C. Types and Rationale of Conditionality:

In addition to the scope of conditionality, the IMF has established the types or components of conditionality. These types are used to determine how and when the IMF measures compliance to the conditionality it sets. First, there are the “prior actions” that governments should take before the IMF makes the first loan disbursement.⁷⁰ In other words, they are the reforms that the borrower government is required to implement before it is eligible to receive the loan. Second, there is the “performance criteria” which include fiscal deficit targets that the government should achieve throughout the loan arrangement in order to ensure continued loan disbursements.⁷¹ It is a quantified criterion which is used “to provide an objective indication of whether the agreed program of economic policy reform is on track.”⁷² Third, there are the “structural benchmarks” which include market-friendly or neoliberal reforms as trade liberalization and privatization and it also includes governance reforms such as national bankruptcy legislation and judicial

⁶⁷ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 19.

⁶⁸ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 19.

⁶⁹ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 19.

⁷⁰ Axel Dreher, Jan-Egbert Sturm, James Raymond Vreeland, *supra* note 32, at 123.

⁷¹ Axel Dreher, Jan-Egbert Sturm, James Raymond Vreeland, *supra* note 32, at 123.

⁷² Graham Bird, *supra* note 58, at 705.

systems.⁷³ These structural reforms aim to change the overall architecture of national and/or political systems to achieve economic growth goals and democratization.⁷⁴ Moreover, the most common types of structural reforms are in the fields of taxes and revenue, expenditure policy, public wages and employment.⁷⁵ Last but not least, there is the “letter of intent” that includes qualitative aspects of policy reforms; this letter is signed by the government to gain the IMF’s financial support.⁷⁶

After laying out the definition of conditionality, a historical overview of its evolution as well as its scope and types, the question that arises is what is the rationale behind the principle of conditionality? On one hand, it is been argued that conditionality contains moral hazard. This is because from one side the IMF provides financial assistance as insurance to its member countries against sudden imbalances.⁷⁷ On the other side, there is less determination on the part of the member country that it will adopt or maintain appropriate policies. Accordingly, the IMF made “its resources conditional on the implementation of adjustment measures”⁷⁸ so the risk of moral hazard is thus contained. In a nutshell from the institutional interest view, the IMF allows access to its resources when the borrower country adopts economic adjustment measures to assure that the imbalance will be redressed. On the other hand, conditionality is a mean to protect the IMF’s asset portfolio. Conditionality is a mere form of the “adequate safeguards” stated under article 1(v) of the Articles of Agreement. It has been demonstrated that the need to protect the asset portfolio of the IMF is because if the borrower country postponed the adjustment effort that it should implement from its side and allows the imbalance to grow, “the cost of correction are likely to increase, and with them, the risks embedded in IMF financial support.”⁷⁹ Moreover, a third reason for conditionality is the cooperative nature of the IMF. Article 1(v) has also mentioned that the financial assistance must be

⁷³ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 16.

⁷⁴ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 16.

⁷⁵ Axel Dreher, Jan-Egbert Sturm, James Raymond Vreeland, *supra* note 32, at 124.

⁷⁶ Graham Bird, *supra* note 58, at 705.

⁷⁷ Manuel Guitián, *supra* note 25, at 796.

⁷⁸ Manuel Guitián, *supra* note 25, at 796.

⁷⁹ Manuel Guitián, *supra* note 25, at 796.

“temporary” so that the resources would be revolving to the member country in need for the financial assistance and to ensure this aspect this requires that the IMF’s “resource portfolio exhibit a significant measure of liquidity.”⁸⁰ Thus, from a national view IMF conditionality contributes to the containment of adjustment costs to enhance economic welfare and from an international perspective conditionality limits moral hazard risks, protects its assets and safeguards the IMF’s monetary identity.⁸¹

D. Criticism of Conditionality:

1. Reasons of Criticism:

Despite of the seemingly positive role that the IMF plays in the global monetary system, yet there are harsh criticism directed against it. First, conditionality has been criticized for being ineffective. The dilemma occurs because measuring the economic impact of IMF programs is a controversial issue as the country seeking financial assistance and entering into an IMF agreement is already in a crisis and “would therefore be expected to exhibit worse than average economic performance thereafter.”⁸² Furthermore, cross national quantitative studies suggest that “IMF programs seem to strengthen national balance-of – payments but have little effect on inflation and a significantly negative effect on economic growth.”⁸³ Second, the IMF has been facing a legitimacy problem for two reasons. On one hand, policies of the IMF are based on a shareholder model which awards the majority rule to the wealthy industrialized countries headed by the United States which has the largest vote.⁸⁴ Meanwhile, these developed countries no longer borrow from the IMF, so they are “not subject to the painful rigors of conditionality.”⁸⁵ In a similar vein, the IMF has been criticized because “conditionality is less stringent when loans go to countries considered strategically important by the IMF’s major shareholders.”⁸⁶ On the other hand, policies implemented by the IMF were virtually

⁸⁰ Manuel Guitián, *supra* note 25, at 797.

⁸¹ Manuel Guitián, *supra* note 25, at 797.

⁸² Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 22.

⁸³ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 22.

⁸⁴ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 20.

⁸⁵ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 20.

⁸⁶ Axel Dreher, Jan-Egbert Sturm, James Raymond Vreeland, *supra* note 32, at 121.

implemented in secret, which made conditionality to appear as procedurally illegitimate.⁸⁷ Third, the IMF has been opposed for not being neutral regarding the policy and advices it offers. The institution's reputation has been damaged during the Asian financial crisis of 1997-1998, where it is been said that the IMF's policies are

Tainted by the vested interests of wealthy countries that control it, for example, in the Asian financial crisis, Korea was forced to adopt policies that had little to do with the problem at hand but that had long been advocated by powerful lobbyists in the United States and Japan, such as reducing trade barriers to specific Japanese products.⁸⁸

2. Mission Creep:

The IMF and the WB were established with specific mandates, however; these mandates have expanded dramatically. The most essential principle after World War II was the principle of sovereignty. Countries at that time aimed to reach international peace through respecting the sovereignty of each country. This explains the reason why states which participated in the establishment of international organizations had a specific vision regarding the basis upon which these organizations would function. Their view was based on two premises. First, "was that the sovereign state was the most significant actor in the international order."⁸⁹ This has not only meant that exclusively states could join and participate in the affairs of these new organizations, but also international organizations had limited ability to interfere in the domestic affairs of their member states.⁹⁰ Second, "most of the organizations should have mandates that are limited to specific and defined set of problems."⁹¹ For example, if the International Bank for Reconstruction and Development deals with economic development issues, meanwhile, the IMF is concerned with the monetary matters.⁹²

⁸⁷ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 21.

⁸⁸ Sarah L.Babb,Bruce G. Carruthers, *supra* note 23, at 21.

⁸⁹ Daniel D.Bradlow & Claudio Grossman, *supra* note 44, at 411.

⁹⁰ Daniel D.Bradlow & Claudio Grossman, *supra* note 44, at 411.

⁹¹ Daniel D.Bradlow & Claudio Grossman, *supra* note 44, at 411.

⁹² Daniel D.Bradlow & Claudio Grossman, *supra* note 44, at 412.

Today, the WB and the IMF have vigorously expanded their mandates. Although, the WB was initially established to fund development projects, it became involved in a much broader range of activities. The WB today helps member states to draft statutes, reform government institutions and economic sectors, as well as expects “their member states to pay more attention to the social, environmental, cultural, and institutional implications of their projects and programs.”⁹³ Similarly, the IMF has widened its range of activities in the borrower country on two scales. First, the IMF is now concerned “with any macroeconomic issues that could affect the balance of payments and exchange rate of a country.”⁹⁴ Second, the conditionality accompanying loans have been interfering in various sectors of the borrower country that “could reduce the country’s ability to reduce its budget and current account deficits.”⁹⁵ For example, it may impose conditions related to the “privatization of a specific state owned enterprises and tax and pensions system reforms.”⁹⁶ Furthermore, the IMF helps countries to manage their sovereign debt crisis by “using its ability to provide financing, to pressure either sovereign debtors or their creditors to reach an agreement.”⁹⁷ Accordingly, the IMF has expanded from solely being an international monetary institution to a macroeconomic institution that “gets involved in a broad range of advisory reviews, capacity building initiatives, and funding operations in its member countries.”⁹⁸ Moreover, this change in mandates and extending the scope of activities to macroeconomic reforms were supported by the US, which was presented by what was known as the “Baker Plan”. As at the WB/IMF meeting in 1985 James Baker, the US Treasury Secretary, in response to the Third World Debt crisis called on the “IMF, World Bank, and regional development banks to increase lending for structural adjustment.”⁹⁹ By overviewing this expansion in the activities of both the IMF and the WB, it is noticed that they are “engaged in activities that involve decisions and actions

⁹³ Daniel D. Bradlow, *Using a Shield as a Sword: Are International Organizations Abusing Their Immunity A Festschrift in Honor of Professor Henry J. Richardson III*, 31 TEMPLE INT. COMP. LAW J. 45–68 (2017), at 55, <https://heinonline.org/HOL/P?h=hein.journals/tclj31&i=51> (last visited 15/3/2021).

⁹⁴ Daniel D. Bradlow, *Id*, at 56.

⁹⁵ Daniel D. Bradlow, *Id*, at 56.

⁹⁶ Daniel D. Bradlow, *Id*, at 56.

⁹⁷ Daniel D. Bradlow, *Id*, at 56.

⁹⁸ Daniel D. Bradlow, *Id*, at 56.

⁹⁹ Sarah L.Babb, Bruce G. Carruthers, *supra* note 23, at 19.

that can directly influence the policies, projects and governance of their member states.”¹⁰⁰ In other words, they play a crucial role in the policy making and implementation process of their member countries, by which their actions and decisions directly affect citizens of these countries.¹⁰¹

The expansion in the IMF and the WB mandates was linked to that the problems faced by countries nowadays are interrelated. Problems include both domestic and international dimensions, as “problems have become trans-nationalized, a proper resolution to each problem, therefore, requires action on both the local and the global level.”¹⁰² For example, IFIs will not manage to solve monetary problems and poverty issues without simultaneously focusing on refugees’ problems, environmental degradation, and “the capacity of the state to effectively and equitably manage its resources, population policy, and human rights, including the status of women, indigenous people and minorities.”¹⁰³ So it was said that the WB and the IMF “responded to the intertwining of problems by broadening the scope of its activities.”¹⁰⁴ These institutions “have practically shifted their mandates from purely economic concerns in the immediate post-war period to wider development-oriented functions.”¹⁰⁵ The WB via its loan negotiations and debates became “an active participant in the policy making processes of its borrower countries.”¹⁰⁶ In the same vein, the IMF through implementing surveillance, technical assistance and financing operations exerts influence “over the policy making process in those member states that actually need, and think they might need, access to IMF financing.”¹⁰⁷ Thus, the fact of the “mission creep”¹⁰⁸ undertaken by the IMF and the WB has made these international organizations involved in what had

¹⁰⁰ Daniel D. Bradlow, *supra* note 93, at 56.

¹⁰¹ Daniel D. Bradlow, *supra* note 93, at 56.

¹⁰² Daniel D. Bradlow & Claudio Grossman, *supra* note 44, at 415.

¹⁰³ Daniel D. Bradlow & Claudio Grossman, *supra* note 44, at 414.

¹⁰⁴ Daniel D. Bradlow & Claudio Grossman, *supra* note 44, at 415-416.

¹⁰⁵ Mmiselo Freedom Qumba, *Balancing international financial institutions’ immunity with private individuals’ right to effective remedy*, 27 SOUTH AFR. J. INT. AFF. 89–112 (2020), at 94, <https://doi.org/10.1080/10220461.2020.1729853> (last visited 15/3/2021).

¹⁰⁶ Daniel D. Bradlow & Claudio Grossman, *supra* note 44, at 422.

¹⁰⁷ Daniel D. Bradlow & Claudio Grossman, *supra* note 44, at 422.

¹⁰⁸ Mmiselo Freedom Qumba, *supra* note 105, at 94.

previously been regarded as purely internal and domestic matters, resulting in the undermining of the principle of absolute sovereignty.¹⁰⁹

In addition to the intertwining of problems, the expansion in the WB mandate was justified in a famous legal opinion related to the prohibition of political activities in the WB by Ibrahim Shihata, Former Senior Vice President and Special Advisor to the WB President.¹¹⁰ He emphasized that the Bank is not authorized to interfere in the politics of its member or “to be influenced by a member’s political ideology or character or form of government.”¹¹¹ He further stipulated that loan proceeds should be utilized “‘with due attention to considerations of economy and efficiency’ and ‘without regard to political or other non-economic influences or considerations’.”¹¹² He demonstrated that the Bank should not consider any political factors during its decision making process except when “when such political factors lead to direct and obvious economic results relevant to the Bank’s work.”¹¹³ In this case the Bank will take them into account labeled under “economic considerations which only happened to have political causes or origins.”¹¹⁴ He has also addressed the assumption that the Articles of the WB assumed that a project’s feasibility will not be judged based on political considerations, but on technical and economic considerations.¹¹⁵ He clarified that by adopting a broad interpretation of economic considerations then they “extend to the manner in which the state manages its resources, and may thus become difficult to isolate from political considerations.”¹¹⁶ However, this legal opinion is considered a double edged weapon. On one hand, it justifies the interference in some of the domestic or political affairs of the borrower countries. On the other hand, this legal opinion stands against the position of IFIs when

¹⁰⁹ Daniel D. Bradlow & Claudio Grossman, *supra* note 44, at 422.

¹¹⁰ The World Bank, <https://documents1.worldbank.org/curated/en/266821572449833340/pdf/Ibrahim-F-I-Shihata-Senior-Vice-President-and-General-Counsel-of-the-World-Bank-1983-1998.pdf> (last visited 20/07/2021).

¹¹¹ The World Bank Legal Papers, Ibrahim F.I Shihata, Chapter 10: Issues of “Governance” in Borrowing Members – The Extent of their Relevance under the Bank’s Articles of Agreement, Martinus Nijhoff Publishers, pp 245-282, at 280.

¹¹² The World Bank Legal Papers, Ibrahim F.I Shihata, *Id*.

¹¹³ The World Bank Legal Papers, Ibrahim F.I Shihata, *Id*, at 280-281.

¹¹⁴ The World Bank Legal Papers, Ibrahim F.I Shihata, *Id*, at 281.

¹¹⁵ The World Bank Legal Papers, Ibrahim F.I Shihata, *Id*, at 261.

¹¹⁶ The World Bank Legal Papers, Ibrahim F.I Shihata, *Id*, at 261.

required to consider human rights in their policies, but they claim that their constituent instruments prohibits them from interfering in the political affairs of their member countries. The matter of human rights is further detailed in the section titled (IFIs and Human Rights).

To conclude, from a theoretical point of view the purpose of establishment of the IMF is useful and essential to provide support for the global monetary system especially after the consequences of World War II. However, from a practical real life point of view, the IMF has been an institution holding a lot of controversies, particularly regarding the financial assistance it provides and the conditionality accompanying it. This drives us to the next chapter discussing the accountability of the IMF, from an international perspective, for the negative consequences that could be incurred in the borrower country due to the implementation of IMF policies.

III. Accountability of the International Monetary Fund

International organizations as the IMF “have become critical, even indispensable players in modern international relations and international law.”¹¹⁷ This is because they are vested huge power by which they interfere in global economy and accordingly their policies implemented in the borrower countries affect millions of people. So the crucial question that arises is how could these institutions be held accountable in case private individuals are harmed by their policies? To answer this question from an international perspective we must consider three issues. First, we must explore the reasons that call for the accountability of the IMF and the WB. Second, it is essential to assess the efficiency of the already available internal review mechanisms provided by the WB and the IMF. Third, we must examine the international responsibility of the IMF from three perspectives which are; their standing from customary international law, their level of adherence to human rights and lastly the legal framework for establishing the IMF responsibility.

A. Reasons for Accountability:

As previously mentioned, in light of the ILA view of accountability of IOS it briefly means that IOS as the IMF should bear the duty to account for its exercise, these exercises include the policies accompanying the financial assistance provided to the borrower countries in the form of conditionality. The IMF’s responsibility arises in case they violated their international obligations and it may even be held liable if their policies caused harm even if implemented within a lawful framework. This paper sheds the light on the debatable issue of conditionality of the IMF, which continuously includes austerity measures. A study for different types of government programs over a period of 10 years found that the IMF underestimates the harms resulting from austerity measures accompanying conditionality and overlooked the negative consequences and damage resulting from decreasing public health budgets.¹¹⁸ Another study demonstrated that in

¹¹⁷ Mmiselo Freedom Qumba, *supra* note 105, at 89.

¹¹⁸ Margot E. Salomon, *Of Austerity, Human Rights and International Institutions*, EUROPEAN LAW JOURNAL, Vol 21, Issue 4, pp 521–545 (2015), at 531, <https://onlinelibrary.wiley.com/doi/abs/10.1111/eulj.12138> (last visited 21/5/2021).

the period between 2006 and 2010 “nine of the 18 countries in an IMF case study sample were subject to program conditionality”¹¹⁹ that resulted in affecting the prices of products consumed by the poor.¹²⁰ The problem is that the IMF tries to flee from the accountability by claiming that its conditionality covers the design of the program that cover macroeconomic and structural policies as well as the “tools used to monitor progress towards the goals outlined by the country in cooperation with the IMF.”¹²¹ So from the IMF’s perspective the borrower country is responsible for “selecting, designing, and implementing the policies that will make the IMF supported program successful.”¹²² Consequently, the problem is in establishing the line of responsibility.¹²³ This leads to the importance of stating the reasons behind the need to hold the IMF accountable for its policies.

The wide scopes of activities of the IMF and the WB, where their decisions have a direct impact on individuals and communities, have raised the issue of accountability of these institutions. There are a lot of scholars forming a large scale in the literature urging “for greater transparency, legitimacy, accountability, and democracy of global governance,”¹²⁴ for International Economic Institutions, which include the IMF and the WB. It is worth mentioning, that when the IMF and the WB were demanded to increase their focus on human rights issues, this was met by denial based on two grounds from their view.¹²⁵ First, they claimed that according to their constituent documents they were not entitled “to take human rights considerations into account while designing their policies and programs.”¹²⁶ Second, the WB alleged that “there is an explicit prohibition on interference in the political affairs of any member of the organization.”¹²⁷ While, the IMF

¹¹⁹ Margot E. Salomon, *Id*, at 531.

¹²⁰ Margot E. Salomon, *Id*, at 531.

¹²¹ Margot E. Salomon, *Id*, at 528.

¹²² Margot E. Salomon, *Id*, at 528.

¹²³ Margot E. Salomon, *Id*, at 522.

¹²⁴ Susan Park, *supra* note 6, at 14.

¹²⁵ 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 Critique*, 12 UC DAVIS J. INT. LAW POLICY 331–408 (2005), at 350, <https://heinonline.org/HOL/P?h=hein.journals/ucdl12&i=337> (last visited 15/3/2021).

¹²⁶ Namita Wahi, *Id*, at 351.

¹²⁷ Namita Wahi, *Id*, at 351.

interpreted article IV (3) (b) of its Articles of Agreement which states that “these principles shall respect the domestic social and political policies of members, and in applying these principles the Fund shall pay due regard to the circumstances of members,”¹²⁸ as prohibiting it from “being influenced by political (that is non-economic) considerations in its dealings with its member states.”¹²⁹ However, these arguments have been highly criticized and did not gain acceptance among critics. Because these organizations impose conditionality to accept funding the borrower countries that are not related to economic issues like “governance, corruption, budgetary allocations, and the relationship between the state and markets.”¹³⁰ So it is out of question that these institutions are not concerned with social and political matters.

The interference of the IMF and the WB in the domestic affairs of the borrower countries along with the unwelcoming attitude of these organizations to be held accountable, in case their decisions had a negative impact on individuals, have increased the controversy of the accountability issue for these organizations. One of the rules for a successful market system is that decision making is linked to risk.¹³¹ However, IFIs decisions are delinked from financial responsibilities. Although, these institutions determine their client’s policies, they reject to share the risks resulting from these policies.¹³² Moreover, they “insist on full repayment, even if damages caused by their staff occur.”¹³³ Not only do IFIs flee from accountability in case of negative consequences of their decisions, but also in certain cases they might gain from these errors “by extending new loans necessary to repair damages done by prior loans.”¹³⁴ For example, Brazil has obtained a loan from IBRD amounting \$240 million, which has resulted in considerable environmental

¹²⁸ International Monetary Fund, *supra* note 49.

¹²⁹ Namita Wahi, *supra* note 125, at 351.

¹³⁰ Namita Wahi, *supra* note 125, at 351 .

¹³¹ S.M. Murshed & Kunibert Raffer (eds), *Chapter 10: International Financial Institutions and Accountability: The Need for Drastic Change*, Trade, Transfers, and Development, Problems and Prospects for the Twenty First Century, Edward Elgar Publishing Ltd, Aldershot (UK) 1993, pp. 151-166, at 152, <https://homepage.univie.ac.at/kunibert.raffer/ifiacc.pdf> (last visited 16/3/2021).

¹³² S.M. Murshed & Kunibert Raffer (eds), *Id.*

¹³³ S.M. Murshed & Kunibert Raffer (eds), *Id.*

¹³⁴ S.M. Murshed & Kunibert Raffer (eds), *Id.*

damage.¹³⁵ Ironically, the Bank officials admitted that they erred and to repair the damages resulting from the first loan, they lent Brazil another \$200 million.¹³⁶ The final outcome was that Brazil's external debts increased by \$440 million, while the IBRD increased its income.¹³⁷ In addition to the delinking between decisions of IFIs and its risk, another controversy is the means by which efficiency of a loan or program is measured. Logically, the mechanisms by which effects are measured provide different results.¹³⁸ It is said that the IMF comes up with different assessments of programs effects than what observers conclude, as the Fund prefers to render positive results.¹³⁹ It is obvious that IFIs oppose being held accountable for their decisions to protect themselves from any losses, but the issue is that such protection is "done at the expense of particularly poor clients, whose scarcity of experts has often made them extremely dependent on solutions elaborated by IFI staff."¹⁴⁰

The rise in the demand for accountability of the WB and the IMF was built on specific rationale and principles. The most essential reason for the calls of accountability is that the WB and the IMF are "considered to be more powerful than non-economic international organizations as a result of their activities in spreading globalization."¹⁴¹ These institutions are powerful because they deal with macroeconomic matters and interfere in the domestic affairs of states which are in need for funding. So they act in a superior way with the borrower countries. But interestingly, that was the same reason that the IMF and the WB presented to escape accountability. Accountability is usually accompanied by the principle of transparency, where pertinent information about the project for which project-affected people demand accountability must be disclosed.¹⁴² However, the WB and the IMF have followed a different path regarding accountability and transparency as they "justified their lack of information disclosure on the basis of the

¹³⁵ S.M. Murshed & Kunibert Raffer (eds), *Id*, at 157.

¹³⁶ S.M. Murshed & Kunibert Raffer (eds), *Id*, at 157.

¹³⁷ S.M. Murshed & Kunibert Raffer (eds), *Id*, at 157.

¹³⁸ S.M. Murshed & Kunibert Raffer (eds), *Id*, at 159.

¹³⁹ S.M. Murshed & Kunibert Raffer (eds), *Id*, at 159.

¹⁴⁰ S.M. Murshed & Kunibert Raffer (eds), *Id*, at 162.

¹⁴¹ Susan Park, *supra* note 6, at 15.

¹⁴² Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 205.

nature of their work with sensitive macroeconomic and financial policy questions of member states.”¹⁴³ Another reason for the importance of accountability is that these financial institutions have weighed voting system, which gives “powerful states more influence and therefore more interest in utilizing these institutions.”¹⁴⁴ The IMF and the WB voting system is based on “each member’s capital subscription to the financial resources of the organization.”¹⁴⁵ These institutions “weigh each member’s voting power according to the size of its capital subscription.”¹⁴⁶ This means that the “United States, Japan, Germany, France and Britain hold most votes and therefore have greater sway.”¹⁴⁷ Accordingly, not all member countries stand on the same footing. Richer countries have a huge impact on these institutions and could easily influence their decisions and policies by the weight of their voting power. It is argued that the mentioned powerful states, who have most of the voting power and influence over these institutions became less accountable for their decision making within the IMF and the WB over time “as the costs of implementing their demands have shifted to borrower states who have less voting power.”¹⁴⁸ Not only there are reasons for urging accountability of the WB and the IMF, but also there are principles and objectives aimed to be reached in this regard. First, accountability of these institutions is to promote more transparency in their operations.¹⁴⁹ Second, accountability is needed to allow more access to information and to permit “beneficiary participation in designing and implementing projects.”¹⁵⁰ Third, accountability is aimed to reach an independent investigation of the claims of project-affected people.¹⁵¹ Last but not least, accountability is necessary to increase these institutions credibility.¹⁵²

¹⁴³ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 183.

¹⁴⁴ Susan Park, *supra* note 6, at 15.

¹⁴⁵ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 184.

¹⁴⁶ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 184.

¹⁴⁷ Susan Park, *supra* note 6, at 17 .

¹⁴⁸ Susan Park, *supra* note 6, at 17.

¹⁴⁹ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 203.

¹⁵⁰ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 203.

¹⁵¹ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 203.

¹⁵² Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 203.

The expansion of the IMF and the WB mandates and the importance to hold these institutions accountable for their decisions, in case it caused any harm in the borrower country, raises the question of what are the current available legal remedies in international law.

B. Internal Review Mechanism at the World Bank and the International Monetary Fund:

The legal remedy provided by an international organization, specifically the IMF and the WB differs according to the harmed party's relation with the organization. In this regard, we must differentiate between four main relations, namely; employees working at these organizations, creditors, suppliers and consultants of the IO, consumers, and finally private individuals and communities. First, in case of employees of an IO who want to seek an effective remedy for an employment- related claim, they may resort to the administrative tribunals in the IO.¹⁵³ Second, creditors, suppliers, and consultants of an IO may seek remedy based on their contractual relationship with the IO, where most of these contracts include an arbitration clause, if the matter was not settled via negotiations.¹⁵⁴ Third, consumers similar to the situation of the creditors and suppliers rely on their contractual rights in case of disputes with the IO.¹⁵⁵ However, in case of disputes settlement mechanism there is a difference between the WB and the IMF in this regard. The WB loan agreements encompass an arbitration clause, while the IMF's financial transactions with its member states are not based on contracts.¹⁵⁶ Accordingly, the IMF lacks a dispute settlement mechanism, so disputes are settled through negotiations or at the Executive Board level. In the latter case, the "Board member representing the member state or the member state itself will present its case in the Board discussion."¹⁵⁷ The fourth category of relationship with the IO is the most controversial one, which is concerned with private individuals and communities. This category includes non-state actors who do not have a contractual relationship with the organization. For example,

¹⁵³ Daniel D. Bradlow, *supra* note 93, at 63.

¹⁵⁴ Daniel D. Bradlow, *supra* note 93, at 63.

¹⁵⁵ Daniel D. Bradlow, *supra* note 93, at 63.

¹⁵⁶ Daniel D. Bradlow, *supra* note 93, at 63.

¹⁵⁷ Daniel D. Bradlow, *supra* note 93, at 63.

groups alleging that they have been harmed by the IMF conditionality or communities which claim that they have been harmed by WB funded projects.¹⁵⁸ Third parties fall out of the scope of the contractual relationship between the borrower country and the IO, so “individuals are outside the system of this contractual agreement.”¹⁵⁹ The controversy occurs because most of IOS activities “affect life and work of private parties,”¹⁶⁰ yet the “real question of accountability towards people who are affected by MDB’s projects has become sidelined.”¹⁶¹

Consequently, to have a more detailed vision for the controversy of harmed private individuals and communities, it is essential to observe the current available legal remedies for these people, in particular, offered by the IMF and the WB.

1. World Bank Inspection Panel:

The WB inspection panel is considered a benchmark in the path of IOS with regard to available legal remedies and dispute settlement mechanisms. For that reason, it is important to shed the light on the causes of its establishment, its scope and the critique addressed towards it.

a. Establishment of the WB Inspection Panel:

The incident that triggered the establishment of the WB inspection panel was the Sardar Sarovar Dam and Canal projects on the Narmada River in India, which was known as ‘Narmada projects’. This project was funded by the WB and “involved the forced relocation and resettlement of more than 120,000 people and resulted in significant environmental harm.”¹⁶² The project would result in that thousands of people will lose

¹⁵⁸ Daniel D. Bradlow, *supra* note 93, at 64.

¹⁵⁹ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 218.

¹⁶⁰ Niels Blokker, *International Organizations: the Untouchables?*, 10 INT. ORGAN. LAW REV. 259–275 (2014), at 261, <http://search.ebscohost.com/login.aspx?direct=true&db=poh&AN=97018606&site=ehost-live> (last visited 16/3/2021).

¹⁶¹ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 219.

¹⁶² Benjamin K. Sovacool, Andria Naudé Fourie & May Tan-Mullins, *Disequilibrium in Development Finance: The Contested Politics of Institutional Accountability and Transparency at the World Bank Inspection Panel*, vol 50 no 4 DEV. CHANGE, PP. 867–895 (2019), at 875, <https://doi.org/10.1111/dech.12427> (last visited 16/3/2021).

their homes and “vast areas of forest and agricultural land would be inundated.”¹⁶³ In spite that the construction of this dam was considered “one of the largest water projects in human history,”¹⁶⁴ yet it would result in “expropriation of approximately 117,000 hectares of land”¹⁶⁵ along with the forced removal of thousands of people.

Despite that civil society groups had very serious concerns about the social and the environmental negative consequences of this project, the WB continued to fund it throughout the 1980s.¹⁶⁶ In 1984, the Bank agreed to fund the project with \$450 million.¹⁶⁷ Due to continued opposition where “Indian and international civil society groups mobilized in protest,”¹⁶⁸ because the Bank did not consider the “environmental and social degradation, rehabilitation, resettlement and violations of indigenous people’s rights.”¹⁶⁹ From this point, NGOs increased their demands for “an independent mechanism that would respond to and investigate complaints from project-affected people.”¹⁷⁰ In response to the protests and civil society pressure, the World Bank agreed to establish an independent commission to review the Narmada project in 1991,¹⁷¹ known as the Morse commission.¹⁷² The commission have stipulated that there are “serious compliance failures and documented devastating human and environmental consequences of the violations.”¹⁷³ The commission found that the Bank “disregarded its policies on

¹⁶³ Mark T. Buntaine, *Accountability in Global Governance: Civil Society Claims for Environmental Performance at the World Bank*, INTERNATIONAL STUDIES QUARTERLY, Vol 59 Issue 1, pp 99–111 (2015), at 102, <https://academic.oup.com/isq/article-lookup/doi/10.1111/isqu.12145> (last visited 26/04/2021).

¹⁶⁴ Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, VA. J. INT’L L., VOL 34, ISSUE 3, pp.553–614 (1993), at 563, <https://heinonline.org/HOL/P?h=hein.journals/vajint34&i=565> (last visited 26/04/2021).

¹⁶⁵ Daniel D. Bradlow, *Id.*

¹⁶⁶ Benjamin K. Sovacool, Andria Naudé Fourie & May Tan-Mullins, *supra* note 162, at 875.

¹⁶⁷ Daniel D. Bradlow, *supra* note 164.

¹⁶⁸ Mark T. Buntaine, *supra* note 163.

¹⁶⁹ Mithilesh Kumar, *The World Bank and Human Rights*, World Affairs: The Journal of International Issues, Vol 20. No. 1, pp 110-125 (2016), at 110, <https://www.jstor.org/stable/10.2307/48505267> (last visited 26/04/2021).

¹⁷⁰ Benjamin K. Sovacool, Andria Naudé Fourie & May Tan-Mullins, *supra* note 162, at 875.

¹⁷¹ Mark T. Buntaine, *supra* note 163.

¹⁷² Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability Boundaries in the Field of Human Rights*, HARV. HUM. RTS. J., VOL 15, pp 205–226 (2002), at 217, <https://heinonline.org/HOL/P?h=hein.journals/hhrj15&i=209> (last visited 26/04/2021).

¹⁷³ Mithilesh Kumar, *supra* note 169.

involuntary resettlement and environmental assessment.”¹⁷⁴ The WB internal reports have shown that the Bank failed to “achieve its organizational goals of poverty alleviation and environmental protection.”¹⁷⁵ An internal review report of the WB issued in 1992 concluded that the WB was “suffering from a performance crisis with almost 40 percent of projects scoring unsatisfactory ratings.”¹⁷⁶ It further stipulated that the Bank “failed to complete, or require the borrower to complete, the environmental impact studies required by Bank procedures.”¹⁷⁷ Moreover, in 1993 both the Center for International Environmental Law and the Environmental Defense Fund presented to “a U.S. Congressional committee a detailed proposal for an independent appeals board”¹⁷⁸ to allow affected persons to implement the Bank’s environmental policies. In the same year, the US Congress “identified the creation of an Inspection Panel as a key condition for continued funding of the Bank’s concessional loan fund.”¹⁷⁹ Accordingly and in response to the increased civil society pressures and member states demands for the WB to address the issue of its lack of accountability for those affected by its action, the WB established its inspection panel in 1993.¹⁸⁰ It was established to provide a resort to people affected by WB funded projects to raise their claims about their environmental and social concerns caused by these projects.¹⁸¹ There is a view considering that the establishment of this panel is a revolutionary act in the law and practice of international organizations because it disrupted the normal channels of accountability in international law.¹⁸² In other words, its establishment was to “bridge a gap between international institutions and private individuals,”¹⁸³ as the panel was the first mechanism that entailed the right to citizens to

¹⁷⁴ Dana L. Clark, *supra* note 172.

¹⁷⁵ Benjamin K. Sovacool, Andria Naudé Fourie & May Tan-Mullins, *supra* note 162, at 875.

¹⁷⁶ Benjamin K. Sovacool, Andria Naudé Fourie & May Tan-Mullins, *supra* note 162, at 875.

¹⁷⁷ Daniel D. Bradlow, *supra* note 164.

¹⁷⁸ David Hunter, *Contextual Accountability, the World Bank Inspection Panel, and the Transformation of International Law in Edith Brown Weiss’s Kaleidoscopic World Symposium: Modernizing International Environmental Law: Honoring the Work of Professor Edith Brown Weiss*, 32 GEORGET. ENVIRON. LAW REV. vol 32 no 3, pp 439–466 (2019), at 444, <https://heinonline.org/HOL/P?h=hein.journals/gintenlr32&i=448> (last visited 17/3/2021).

¹⁷⁹ David Hunter, *id.*

¹⁸⁰ Susan Park, *supra* note 6, at 13-14.

¹⁸¹ David Hunter, *supra* note 178, at 440.

¹⁸² David Hunter, *supra* note 178, at 440.

¹⁸³ Mmiselo Freedom Qumba, *supra* note 105, at 100.

bypass their national governments and file complaints against the WB.¹⁸⁴ Thus, the state representatives of the Board of the WB are no longer the “sole channel for discourse between the Bank and those communities and people affected by Bank projects.”¹⁸⁵

b. Scope of the Panel:

The WB inspection panel is considered the first of this kind of mechanism. It is regarded as “a watershed moment in international legal jurisprudence”¹⁸⁶ because it creates a new forum which allows private actors, who are in a non-contractual relationship with the WB, to hold it directly accountable for consequences of its failure.¹⁸⁷ The inspection panel is a “permanent, quasi-independent body that receives complaints about violations of Bank policies directly from local people affected by Bank’s financed projects.”¹⁸⁸ Due to the novelty of the mechanism, several aspects had to be defined like the scope and mandate of this panel, the eligible complaint requester, basis of the complaint, and composition of the panel.

The mandate of the WB inspection panel is limited to the “examination of the World Bank compliance with its policies and procedures, it allows third parties to participate in the decision making process of the organization for the first time.”¹⁸⁹ So, the panel provides people directly and adversely affected by the WB funded projects with a mechanism to request the Bank to act in compliance with its policies and procedures.¹⁹⁰ Moreover, the WB had specified that the eligible requester to submit a claim of compliance to the panel “must be an affected party in the territory of the borrower which is not a single individual (i.e., a community of persons such as an organization, association, society or other grouping of individuals).”¹⁹¹ Another crucial aspect that the

¹⁸⁴ Mmiselo Freedom Qumba, *supra* note 75, at 100.

¹⁸⁵ David Hunter, *supra* note 178, at 440.

¹⁸⁶ Benjamin K. Sovacool, Andria Naudé Fourie & May Tan-Mullins, *supra* note 162, at 868.

¹⁸⁷ Benjamin K. Sovacool, Andria Naudé Fourie & May Tan-Mullins, *supra* note 162, at 868.

¹⁸⁸ Dana L. Clark, *supra* note 172.

¹⁸⁹ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 188.

¹⁹⁰ David Hunter, *supra* note 178, at 445.

¹⁹¹ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 208.

inspection panel specified is the basis of complaint. The WB inspection panel has detailed such basis where it stated that the affected party:

must demonstrate that its rights or interest have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.¹⁹²

In this context, it is obvious that the WB inspection panel requires a causal link between the material damage suffered by the requester of the complaint and the Bank's failure to comply with its policies and procedures. Accordingly, the complaint must establish the link between the harm suffered and the Bank's failure to adhere to operational policies and procedures.¹⁹³ So the inspection panel's role is emphasized in addressing actual or potential harm that has been suffered by local populations.¹⁹⁴ Furthermore, this requirement has been explicitly confirmed in the Second Review of the WB inspection panel, which concluded that the panel will only investigate material adverse effect which was caused due to the Bank's total or partial failure with its policies and procedures.¹⁹⁵ It is said that this causal link requirement acts as relieve "from potential liability for damage arising from activities that are otherwise lawful or involve no wrongful acts."¹⁹⁶

Last but not least, the composition of the panel was thought to achieve its independence. It is composed of three members "from different nationalities who have independence from the Bank's management"¹⁹⁷ by directly reporting to the Board of Executive Directors, along with a panel's secretariat to support the panel's investigation.¹⁹⁸ Accordingly, the panel is independent from the Bank Management which is assigned

¹⁹² Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 209-210.

¹⁹³ Daniel D. Bradlow, *supra* note 164, at 588.

¹⁹⁴ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 214.

¹⁹⁵ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 214.

¹⁹⁶ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 214.

¹⁹⁷ Mark T. Buntaine, *supra* note 163.

¹⁹⁸ David Hunter, *supra* note 178, at 445.

with promoting and developing Bank financed projects.¹⁹⁹ Another step towards independence of the panel is that its members are required to neither have served the Bank in any capacity for the two years preceding their selection nor can they work for the Bank again after serving on the Panel for a five year term.²⁰⁰

There is also a specific process for the investigation claims submitted by eligible requesters. It starts when the panel receives a complete request for inspection, which it then forwards to the Bank's Management and waits for the authorization of the Executive Directors. Once the authorization is received the panel "enjoys broad investigatory powers, including access to all Bank staff, documents, and the project site."²⁰¹ After completion of the investigation process, the panel issues its report to evaluate the Bank's compliance with its policies and procedures, which the Management must respond to and submit its recommendations and report to the Executive Directors.²⁰² Finally, the outcome of the panel, Management and Executive Directors must be published.²⁰³ However, it is worth noting that the establishment of the WB inspection panel was unwelcomed by the Bank management, where a scholar mentioned that "Bank management resented the panel's scrutiny and strongly resisted being held accountable."²⁰⁴ Furthermore, the management tended to deny the occurrence of policy violations, not only to escape responsibility, but also to blame the borrowing government for these violations.²⁰⁵ In addition, the Bank's management challenged eligibility of the claimants and "proposed actions plans as alternatives to panel investigations."²⁰⁶ Obviously, the Panel and Bank's staff relationship is strained because the staff does not want to be held accountable. The Bank staff and management consider the panel "as captured by civil society organizations who seek to second guess their professional judgement."²⁰⁷

¹⁹⁹ David Hunter, *supra* note 178, at 445.

²⁰⁰ Mark T. Buntaine, *supra* note 163.

²⁰¹ David Hunter, *supra* note 178, at 446.

²⁰² David Hunter, *supra* note 178, at 445.

²⁰³ David Hunter, *supra* note 178, at 445.

²⁰⁴ Benjamin K. Sovacool, Andria Naudé Fourie & May Tan-Mullins, *supra* note 162, at 878.

²⁰⁵ Benjamin K. Sovacool, Andria Naudé Fourie & May Tan-Mullins, *supra* note 162, at 878.

²⁰⁶ Benjamin K. Sovacool, Andria Naudé Fourie & May Tan-Mullins, *supra* note 162, at 878.

²⁰⁷ David Hunter, *supra* note 178, at 446-447.

c. Inspection Panel Shortcomings:

Despite the seemingly positive role of the WB inspection panel and being the first remedy mechanism among IOS, it has been highly criticized for not meeting the expected standards of transparency, independence and adequacy. The main criticism addressed towards the inspection panel is that it does not have the power of enforcement, lacks the power to exercise oversight over the implementation of remedial measures and lacks “the ability to assess whether Management’s proposed remedial measures satisfy the concerns of the claimants and/or bring the project into compliance.”²⁰⁸ Thus, the lack of an enforcement provision leaves it “up to the Bank and borrowers to heed up the panel’s recommendations.”²⁰⁹ So the inspection panel lacks a system of redress, because even if the people have rights derived from the policies of the Bank, they are usually denied effective remedy.²¹⁰

This leads to the second shortcoming of the inspection panel which is that the panel’s restricted authority “undermines any consequences from accountability.”²¹¹ The problem lies in the limited mandate of the panel, as it is limited to conducting investigations and reporting the findings of non-compliance of the Bank’s policies and procedures to the Board of Directors, which later on becomes publically announced.²¹² These policies and procedures “pertain to how the Bank makes and implements decisions, rather than to the actual content of the decisions.”²¹³ This limited mandate extended further as the panel cannot review non-compliance with Guidelines and Best Practices, where it has been explicitly excluded from the panel’s constituent resolution.²¹⁴ In addition, the panel is unauthorized to consider violations of international law.²¹⁵ The panel may neither implement recommendations nor may it require a specific action from the Bank’s staff to

²⁰⁸ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 219.

²⁰⁹ Susan Park, *supra* note 6, at 20.

²¹⁰ Dana L. Clark, *supra* note 172, at 220.

²¹¹ David Hunter, *supra* note 178, at 459.

²¹² David Hunter, *supra* note 178, at 459.

²¹³ Daniel D. Bradlow, *supra* note 164, at 607.

²¹⁴ Namita Wahj, *supra* note 125, at 357.

²¹⁵ Namita Wahj, *supra* note 125, at 357.

have an action plan or to respond to the findings.²¹⁶ The power to authorize or deny an investigation conducted by the panel lies within the authority of the Board of Directors.²¹⁷ Furthermore, even if the investigation is authorized the findings are submitted to the same Board of Executive Directors.²¹⁸ Accordingly, the panel has limited power to grant relief as “it is up to the Board, after reviewing the panel’s report of its investigations, to announce whether remedial measures will be undertaken.”²¹⁹ This means that the panel cannot impose sanctions, nor recommend changes in future cases based on lessons learnt and cannot provide remedy for affected people as the investigation report is left to the Bank staff and Board of Directors discretion.²²⁰ This is linked to the bank’s interference problem as the Bank “tends to be defensive, denying violation of policies, challenging claimants’ eligibility, and in some cases challenging the panel’s findings.”²²¹ The Panel being solely limited to advisory powers leads to the fact that Bank staff may marginalize the role of the Panel, if the staff considers that the Panel is too responsive for the interest of the complainants.²²²

From another perspective, the panel has been criticized for having various links with the Bank that might compromise its independence.²²³ These links are that first, the panel is located at the Bank’s headquarters in Washington DC.²²⁴ Second, despite the panel’s budget is distinct from the Bank, “but these funds are drawn from bank resources.”²²⁵ Third, the panel is assisted by the Bank’s administrative staff and an executive secretary that gets chosen by the Bank’s president after consultation with the bank’s executive directors.²²⁶ Consequently, the panel is not independent in the strict legal sense.²²⁷

²¹⁶ David Hunter, *supra* note 178, at 459.

²¹⁷ Mmiselo Freedom Qumba, *supra* note 105, at 100.

²¹⁸ Mmiselo Freedom Qumba, *supra* note 105, at 101.

²¹⁹ Namita Wahi, *supra* note 125, at 359.

²²⁰ David Hunter, *supra* note 178, at 459.

²²¹ Namita Wahi, *supra* note 125, at 358.

²²² Daniel D. Bradlow, *supra* note 164, at 574.

²²³ Mmiselo Freedom Qumba, *supra* note 105, at 100.

²²⁴ Mmiselo Freedom Qumba, *supra* note 105, at 100.

²²⁵ Mmiselo Freedom Qumba, *supra* note 105, at 100.

²²⁶ Mmiselo Freedom Qumba, *supra* note 105, at 100.

²²⁷ Mmiselo Freedom Qumba, *supra* note 105, at 100.

Another major shortcoming is that procedures of the panel in receiving complaints are only partially fair.²²⁸ On one hand, the complaining party may present information to support the complaint.²²⁹ On the other hand, the complaining party is not “necessarily given an opportunity to respond to the evidence and arguments presented by the IO’s management.”²³⁰ Because the Board and Management “retain final decision making powers,”²³¹ as the panel cannot provide remedy because it only has “investigatory and/or advisory powers, and their findings and recommendations are non-binding.”²³² Moreover, the complaining party has no right to appeal the panel’s recommendations or the Board’s decisions.²³³ In a similar vein, there is unequal access to panel procedures.²³⁴ Because it is criticized that although the Bank management has “the opportunity to provide recommendations to rectify the policy violations, the claimants do not have a similar right to suggest remedial measures.”²³⁵ To conclude, a former WB inspection panel member said that the panel “was unable to fulfill some of the central hopes of those who initiated it,”²³⁶ in reference to the impartiality of the panel’s procedures and its lack of independence from the Bank’s management. It has been suggested that the panel “should move towards effective problem solving and greater accountability.”²³⁷

2. IMF Independent Evaluation Office:

The IMF has no inspection panel as the WB, but it has established an independent evaluation office. Its establishment was a response to the outbreak of ‘IMF riots’ that took place during the period between the 1970s to the 1990s, in addition to the Asian financial crisis.²³⁸ The IMF was criticized that its loan conditionality was “instrumental in furthering economic crisis and social unrest in borrowing states, contributing to a loss of

²²⁸ Daniel D. Bradlow, *supra* note 93, at 66.

²²⁹ Daniel D. Bradlow, *supra* note 93, at 66.

²³⁰ Daniel D. Bradlow, *supra* note 93, at 67.

²³¹ Daniel D. Bradlow, *supra* note 93, at 67.

²³² Daniel D. Bradlow, *supra* note 93, at 67.

²³³ Namita Wahi, *supra* note 125, at 358.

²³⁴ Namita Wahi, *supra* note 125, at 358.

²³⁵ Namita Wahi, *supra* note 125, at 358.

²³⁶ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 207.

²³⁷ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 219.

²³⁸ Susan Park, *supra* note 6, at 16.

institutional legitimacy for the organization.”²³⁹ The establishment of the office was to assess the Fund’s effectiveness and to promote the IMF’s external credibility.²⁴⁰ In spite that the independent evaluation office accepts the submission of suggestion for evaluations to the office, “its intended purpose was never to be a dispute resolution mechanism for other stakeholders.”²⁴¹

C. International Responsibility of the IMF as an International Organization:

After laying out the available so-called remedies currently offered by the WB and the IMF, it is essential to evaluate the reasons behind the absence of any other remedy channels for private individuals, groups and communities who are negatively affected by these organizations. In this respect, the light will be shed on the standing of IOS from customary international law, specifically regarding the right to remedy. Also, the level of adherence of IFIs to human rights consideration will be considered. Finally, the legal framework for establishing the IMF responsibility will be examined.

1. Controversy of Customary International Law and IOS:

The aim of establishment of IOS in the first place was to maintain peaceful and cooperative relations between states from political and economic perspectives. Although, it is assumed that the citizens of these states are the main target, who should benefit from the organizations’ policies and benefit from funds in case of IFIs. Ironically, private individuals are the only stakeholders who are left without any mechanism in case they are harmed from the IFIs decisions. The lack of adequate internal mechanisms in the WB and the IMF that may provide individuals with the right to complaint and seek remedy, along with the immunity granted to IOS behind which they flee accountability before domestic courts, have ripped private individuals from their right to seek remedy when harmed. The controversial aspect in this respect is where does IOS stand from customary international law?

²³⁹ Susan Park, *supra* note 6, at 16.

²⁴⁰ Susan Park, *supra* note 6, at 16.

²⁴¹ Mmiselo Freedom Qumba, *supra* note 105, at 102.

There is an argument that contends that IOS are not bound by customary international law. This argument started by claiming that the WB “standards are not international law and thus any non-compliance does not implicate the right to remedy.”²⁴² The argument’s basis is that the Bank’s performance standards were not negotiated with the intention to create a binding treaty.²⁴³ These standards are merely regulations of an IO to govern “the organization’s behavior and the behavior of those entities that want to borrow from it.”²⁴⁴ They are not considered custom or general principles of law, so they are not international law as defined by the ICJ Statute.²⁴⁵ In addition, it is argued that the WB inspection panel framework falls outside the scope of article 38 of the ICJ Statute and public international law, considering the Bank’s safeguard policies as soft law.²⁴⁶ Article 38 states that the ICJ will decide on disputes based on: (1) international conventions (2) international custom (3) general principles of law recognized by civilized nations (4) judicial decisions and teachings.²⁴⁷ It is worth mentioning that IFIs have also tried to escape responsibility by incorporating a disclaimer provision in their agreements “whereby the organization disavows any liability.”²⁴⁸ In this regard, private individuals may raise claims “against the host government within domestic judicial processes, to do so is to substitute the responsibility of an international organization for that of the host state.”²⁴⁹ This argument is derived from the notion that IOS were originally dealing with member states only and private individuals were out of the scope of this relationship, because member states were considered representatives of the rights of their citizens in IOS.²⁵⁰

There is a well-mounted counter argument that challenges the basis of the above mentioned argument. IOS “have their own independent legal personality and status as

²⁴² David Hunter, *supra* note 178, at 462.

²⁴³ David Hunter, *supra* note 178, at 462.

²⁴⁴ David Hunter, *supra* note 178, at 462.

²⁴⁵ David Hunter, *supra* note 178, at 462.

²⁴⁶ David Hunter, *supra* note 178, at 442.

²⁴⁷ Statute of the International Court of Justice, <https://www.icj-cij.org/en/statute> (last visited 25/04/2021).

²⁴⁸ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 194.

²⁴⁹ Eisuke Suzuki & Suresh Nanwani, *supra* note 7, at 194.

²⁵⁰ Mmiselo Freedom Qumba, *supra* note 105, at 90-91.

subjects of international law.”²⁵¹ This is based on the fact that IOS have rights and duties incorporated in their constitutive instruments under international law.²⁵² Moreover, an international legal personality “is an indispensable requirement for an entity which aspires to be an active participant in the international legal system.”²⁵³ For example, they have the capacity to sue by issuing a claim in the territory of a member state and on the international scale they are bound by treaties to which they are a party and by their articles of agreement.²⁵⁴ In addition, the advisory opinion of the ICJ on the interpretation of 25 March 1975 between *WHO and Egypt of ICJ report of 1980* stated that:

International Organizations are subjects of international law, and as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.²⁵⁵

Similarly, in the advisory opinion of the ICJ on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the court mentioned that

The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence.²⁵⁶

Accordingly, IOS are bound by customary international law. And since the “right to effective remedy enjoys universal acceptance with the requisite of state practice and opinion juris.”²⁵⁷ Furthermore, the right to remedy is stipulated in several international instruments²⁵⁸ as the Universal Declaration on Human Rights,²⁵⁹ International Covenant

²⁵¹ Mmiselo Freedom Qumba, *supra* note 105, at 90.

²⁵² Mmiselo Freedom Qumba, *supra* note 105, at 90.

²⁵³ Mmiselo Freedom Qumba, *supra* note 105, at 90.

²⁵⁴ Mmiselo Freedom Qumba, *supra* note 105, at 90.

²⁵⁵ Report of the International Law Commission on the Work of its Sixty-Third Session, Draft Articles on the Responsibility of International Organizations, with commentaries, *supra* note 13, at 53. Also, see Mmiselo Freedom Qumba, *supra* note 105, at 96.

²⁵⁶ Draft Articles on the Responsibility of International Organizations with commentaries, at 9, https://legal.un.org/ilc/texts/instruments/word_files/english/commentaries/9_11_2011.DOC (last visited 25/04/2021).

²⁵⁷ Mmiselo Freedom Qumba, *supra* note 105, at 96.

²⁵⁸ Mmiselo Freedom Qumba, *supra* note 105, at 97.

²⁵⁹ Article (8) of the Universal Declaration on Human Rights stated that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted

on Civil and Political Rights,²⁶⁰ International Covenant on Economic, Social and Cultural Rights,²⁶¹ International Covenant on the Elimination of all forms of Racial Discrimination,²⁶² in addition to regional human rights treaties as the American Convention on Human Rights. For example, Article (8) of the Universal Declaration of Human Rights stated that “everyone has the right to an effective remedy.”²⁶³ Meanwhile, article (10) of the same Declaration demonstrated that “everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations.”²⁶⁴ Also, there is no state that objected to the principle of the right to remedy as seen as a principle of customary international law.²⁶⁵ Not only has this right been part of state practice, but also fulfilled the requirement of being a legal obligation (*opinio juris*), to be regarded as customary international law.²⁶⁶ So it is a “legally binding obligation on all subjects of international law, including IOS.”²⁶⁷ Even if it is alleged that IFIs are not signatories to the mentioned human rights conventions, it is proven that the right to remedy is a customary international right to private individuals and subjects of international law, including IFIs.²⁶⁸ Last but not least, article (3) of the International Law Commission’s Draft Articles on Responsibility of IOS states that “every internationally wrongful act of an international organization entails the international responsibility of

him by the constitution or by law.” See <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last visited 25/04/2021).

²⁶⁰ Article (2)(3) has stipulated a detailed process for the right to remedy which stated under article (2)(3) (a) that States parties to the Covenant must “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” See

<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last visited 25/04/2021).

²⁶¹ Principle 19 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights states that “States parties shall provide for effective remedies including, where appropriate, judicial remedies. See The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly, Vol. 9, No.2, 1987, pp 122- 135, at 125, <https://www.jstor.org/stable/762292> (last visited 25/4/2021).

²⁶² See article 11 of the International Covenant on the Elimination of all Forms of Racial Discrimination, <https://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf> (last visited 25/4/2021).

²⁶³ Daniel D. Bradlow, *supra* note 93, at 60.

²⁶⁴ Daniel D. Bradlow, *supra* note 93, at 60.

²⁶⁵ Daniel D. Bradlow, *supra* note 93, at 61.

²⁶⁶ Daniel D. Bradlow, *supra* note 93, at 61.

²⁶⁷ Daniel D. Bradlow, *supra* note 93, at 61.

²⁶⁸ Mmiselo Freedom Qumba, *supra* note 105, at 97.

that organization.”²⁶⁹ Moreover, a principle has been established in this regard in the advisory opinion by the ICJ on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, where the Court mentioned that

[...] the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity....The United Nations may be required to bear responsibility for the damage arising from such acts.²⁷⁰

Despite that the right to remedy is a well-established principle under customary international law and guaranteed by several international instruments, yet the IMF and the WB are reluctant to adhere to this principle. So the question that arises afterwards is what is the relation between IFIs; as the WB and the IMF, and human rights?

2. IFIs and Human Rights:

It is presumed that the financial assistance granted by IFIs as loans by the IMF or developmental projects supported by the WB are to improve the economic condition of the borrower country and consequently private individuals would benefit, however, there is a strong argument that contends that conditionality accompanying loans given by the IMF negatively impacts private individuals, particularly affecting human rights. Yet, the argument is not solely regarding the conditionality but extends further to the position of the IFIs towards considering human rights in their policies and agreements with the borrower country.

a. Impact of IFIs Policies on the Borrower Country:

A shocking but true fact about the impact of the IMF on the borrower country was said by the Argentine President Nestor Kirchner while negotiating “his country’s way out of an imminent multi-billion dollar defaults due to the International Monetary Fund

²⁶⁹ Draft Articles on the Responsibility of International Organizations with commentaries, *supra* note 256, at 9.

²⁷⁰ Draft Articles on the Responsibility of International Organizations with commentaries, *supra* note 256, at 13.

(IMF)”²⁷¹ that if the full repayment was demanded, the cost would be “the hunger of the Argentine people.”²⁷² The default payment is just an example that reflects the extent to which the IMF could have a huge impact on the borrower country.

From the IMF’s perspective, the conditions imposed on the borrower country to obtain a loan are to achieve certain objectives as “making the fiscal and debt situation sustainable, improving competitiveness, and boosting economic growth.”²⁷³ These objectives are translated into certain measures required to be implemented by the borrower government as “privatization of public assets, public spending cuts (or ‘austerity), and structural reforms (such as changes to labor markets reforms, trade liberalization).”²⁷⁴ The problem is that the mentioned austerity measures required by IMF policies not only lead to “reducing national policy space and undermining national development agendas,”²⁷⁵ but also “have implications for the enjoyment of human rights.”²⁷⁶ Furthermore, it has been argued that the IMF conditionality has an adverse impact on the economic growth of the borrower country as the structural adjustment imposed by the IMF causes a lot of damage to the poor people in the society.²⁷⁷ This is because structural adjustments lead to reduction in the size of the ‘economic pie’ to be distributed, resulting in unequal distribution of the pie itself.²⁷⁸ So, “lower levels of economic development have been associated with reduces respect for human rights.”²⁷⁹

²⁷¹ Adam Mcbeth, *Breaching the Vacuum: A Consideration of the Role of International Human Rights Law in the Operations of the International Financial Institutions*, THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS, VOL 10, ISSUE 4, pp 385–404 (2006), at 385, <https://doi.org/10.1080/13642980600976484> (last visited 21/5/2021).

²⁷² Adam Mcbeth, *Id.*

²⁷³ Thomas Stubbs & Alexander Kentikelenis, *International Financial Institutions and Human Rights: Implications for Public Health*, PUBLIC HEALTH REVIEWS, Vol 38, Issue 27, 2017, pp1-17, at 2, <https://publichealthreviews.biomedcentral.com/articles/10.1186/s40985-017-0074-3> (last visited 21/5/2021).

²⁷⁴ Thomas Stubbs & Alexander Kentikelenis, *Id.*

²⁷⁵ Thomas Stubbs & Alexander Kentikelenis, *Id.*

²⁷⁶ Thomas Stubbs & Alexander Kentikelenis, *Id.*

²⁷⁷ M. Rodwan Abouharb & David L. Cingranelli, *IMF Programs and Human Rights, 1981–2003*, REV INT ORGAN, VOL 4, ISSUE 1, PP 47-72, (2008), at 52, <https://doi.org/10.1007/s11558-008-9050-5> (last visited 21/5/2021).

²⁷⁸ M. Rodwan Abouharb & David L. Cingranelli, *Id.*

²⁷⁹ M. Rodwan Abouharb & David L. Cingranelli, *Id.*

The huge intervention of the IMF and the WB in the borrower government's developmental plans and strategies via conditionality affects human rights of private individuals. For example, the WB might require huge alteration in a specific area to build a dam for instance, then the rights of the local people might be highly jeopardized, despite that building the dam might improve the human rights of other people.²⁸⁰

Similarly, the economic development required to be reached in the IMF objectives through cutting government spending or increase in the cost of accessing essential services violates the rights of people depending on those services, "even if the economic reforms lead to greater prosperity for the country as a whole."²⁸¹

These austerity measures negatively impact economic and social rights. From the point of view of the IMF conditionality secures investment that stabilizes the economy, but from the view of the harmed private individuals in the borrower country it aggressively impacts the exercise of socio-economic rights.²⁸² The cut in government spending such as welfare and social services along with the removal of government subsidies to utilities and services as water or health care could harm private individual human rights.²⁸³ This is proved by the UN Special Rapporteur on foreign debt and human rights after a mission to Greece in 2013 that:

Socioeconomic rights are under threat or being undermined by austerity measures that the Greek government has been required to implement since May 2010 in return for bailouts.²⁸⁴

Furthermore, the Special Rapporteur in the Realization of Economic, Social and Cultural Rights, Danilo Turk, who concluded that:

User fees and cost recovery for basic services (in which category he included education, basic health, water and sanitation) cause reduced demand for those services among the poor, leading to worse human rights outcomes.²⁸⁵

²⁸⁰ Adam Mcbeth, *supra* note 271, at 387.

²⁸¹ Adam Mcbeth, *supra* note 271, at 387.

²⁸² Margot E. Salomon, *supra* note 118, at 535.

²⁸³ Adam Mcbeth, *supra* note 271, at 388.

²⁸⁴ Margot E. Salomon, *supra* note 118, at 535.

²⁸⁵ Adam Mcbeth, *supra* note 271, at 398.

The field of human rights includes several rights, but the light will be shed on the impact of the IMF conditionality on the right to health. On one hand, under human rights law, states are obliged to provide the highest attainable standard of health by providing access to health care for those who are unable to pay like the poor, vulnerable and marginalized groups.²⁸⁶ On the other hand, the austerity measures imposed by the IMF as user fees for basic health care or safe and potable water affect the ability of the marginalized groups to access these services, which contradicts the state's obligation to ensure progressive realization of the right to health.²⁸⁷ The aim of applying such fees is to create additional resources and improve efficiency.²⁸⁸ However, in reality it undermines the right to health for the vulnerable groups because it reduces "their use of such services due to prohibitive costs and through impoverishment by the effects of unavoidable health expenses."²⁸⁹

Moreover, borrower governments are pressured by IMF conditionality to cut social spending to meet fiscal deficit targets, but this result in negative consequences on the affordability and accessibility of healthcare.²⁹⁰ This has been illustrated by a study on West African countries that found that "each additional IMF condition reduces government health expenditure per capita by 0.25%."²⁹¹ In addition, the UN Human Rights Council reported that the decrease in government spending due to IMF conditionality in Cyprus, Greece and Ireland resulted in "decrease in healthcare staff, reductions in the number of hospital beds, and increases in waiting times for medical procedures."²⁹² Furthermore, the condition of limiting the public sector wage bill impedes "a country's ability to hire, adequately remunerate, or retain healthcare professionals."²⁹³

²⁸⁶ Adam Mcbeth, *supra* note 271, at 398.

²⁸⁷ Adam Mcbeth, *supra* note 271, at 398.

²⁸⁸ Thomas Stubbs & Alexander Kentikelenis, *supra* note 273, at 6.

²⁸⁹ Thomas Stubbs & Alexander Kentikelenis, *supra* note 273, at 6.

²⁹⁰ Thomas Stubbs & Alexander Kentikelenis, *supra* note 273, at 6.

²⁹¹ Thomas Stubbs & Alexander Kentikelenis, *supra* note 273, at 6.

²⁹² Thomas Stubbs & Alexander Kentikelenis, *supra* note 273, at 6.

²⁹³ Thomas Stubbs & Alexander Kentikelenis, *supra* note 273, at 7.

Also, the conditions imposed by the IMF as currency devaluation and privatization of state owned enterprises could impair the people's right to health. First, currency devaluation is advocated by the IMF and the WB to "improve the external competitiveness of countries."²⁹⁴ Yet, currency devaluation "impedes access to imported medicines and medical equipment by raising the price of imports."²⁹⁵ Second, privatization is presented by the IMF as a method to raise funds for governments suffering from cash shortage.²⁹⁶ But at the same time privatization can result in losing a reliable public revenue source for the state to fund the health sector.²⁹⁷ Also, benefits provided by state-owned enterprises to healthcare coverage of employees could be withdrawn after privatizations affecting accessibility of healthcare.²⁹⁸

b. Argument of IFIs Adherence to Human Rights:

A controversial debate exists in the international sphere regarding the adherence of IFIs to human rights. There is a view that considers IFIs "beyond the reach of international human rights law,"²⁹⁹ while there is a strong counter argument for this.

(i) Position of IFIs:

By having a glimpse on history, IFIs have strongly resisted any suggestion to consider human rights in their operations. They consider themselves as economically focused organizations and demarcated themselves from institutions concerned with human rights as the International Labor Organization (ILO) and the United Nations.³⁰⁰ So, IFIs "asserted their right to operate in an isolated pocket of international law."³⁰¹ It is worth mentioning that the Commission on Human Rights invited the WB and the IMF to participate in the drafting process of the International Covenant on Economic, Social and

²⁹⁴ Thomas Stubbs & Alexander Kentikelenis, *supra* note 273, at 7.

²⁹⁵ Thomas Stubbs & Alexander Kentikelenis, *supra* note 273, at 7.

²⁹⁶ Thomas Stubbs & Alexander Kentikelenis, *supra* note 273, at 7.

²⁹⁷ Thomas Stubbs & Alexander Kentikelenis, *supra* note 273, at 7.

²⁹⁸ Thomas Stubbs & Alexander Kentikelenis, *supra* note 273, at 7.

²⁹⁹ Margot E. Salomon, *supra* note 118, at 532.

³⁰⁰ Adam Mcbeth, *supra* note 271, at 385-386.

³⁰¹ Adam Mcbeth, *supra* note 271, at 386.

Cultural Rights (ICESCR), but they declined the invitation by justifying that human rights falls outside their mandates defined in their Articles of Agreement.³⁰²

The WB and the IMF refuses to consider human rights based on the ground that there constituent instruments is limited to economic purposes and prohibited any interference in the political affairs of its members states. The IMF interpreted its Articles of Agreement as prohibiting it from considering any political non-economic matters.³⁰³ Similarly, the WB claims that article IV, section 10 of the IBRD Articles of Agreement known as ‘political prohibition’ provides that:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.³⁰⁴

So the existence of the political prohibition derived from their constitutive instruments led to the assumption that any issue “need to be labeled ‘political’ or ‘economic’ to determine whether they are lawfully within the scope of the Bank’s operations.”³⁰⁵ This has been even pushed further as an Assistant Director in the IMF’s Office in Europe highlighted that “human rights advocates should not expect the international financial institutions (IFIs) to impose human rights-related policy conditions on their member countries.”³⁰⁶ This was justified on the basis that IFIs lack the expertise required to judge human rights practices as well as “nothing prevents developing country governments

³⁰² Adam Mcbeth, *A Right By Any Other Name: The Evasive Engagement of International Financial Institutions with Human Rights*, *The George Washington International Law Review*, Vol 40, Issue 4, pp 1101-1156, (2008), at 1107, [https://advance-lexis-com.libproxy.aucegypt.edu/document/?pdmfid=1516831&crd=3884f511-be0e-42ec-93be-872458dd8653&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4YSR-ODCO-00CT-T025-00000-00&pdcontentcomponentid=12492&pdteaserkey=sr0&pdtab=allpods&ecom=1bvnk&earg=sr0&prid=0eff160c-d4dc-49f2-ac4a-fe108628dca3](https://advance.lexis-com.libproxy.aucegypt.edu/document/?pdmfid=1516831&crd=3884f511-be0e-42ec-93be-872458dd8653&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A4YSR-ODCO-00CT-T025-00000-00&pdcontentcomponentid=12492&pdteaserkey=sr0&pdtab=allpods&ecom=1bvnk&earg=sr0&prid=0eff160c-d4dc-49f2-ac4a-fe108628dca3) (last visited 21/5/2021).

³⁰³ See supra note 129.

³⁰⁴ Adam Mcbeth, *supra* note 302, at 1108.

³⁰⁵ Adam Mcbeth, *supra* note 302, at 1108.

³⁰⁶ M. Rodwan Abouharb & David L. Cingranelli, *supra* note 277, at 54.

under structural adjustment from incorporating human rights into their poverty reduction agreements.”³⁰⁷

In addition to the political prohibition claimed by IFIs in order not to consider human rights in their agreements and policies, they have also denied the application of human rights law on the ground that treaties related to human rights bind only state parties.³⁰⁸ This has been seconded by an IMF spokesperson before the United Nations Sub-Commission for the Promotion and Protection of Human Rights, where he declared that the IMF is not obliged to promote human rights globally due to the lack of mandate to promote these rights, while stressing “that the IMF is not bound by various human rights declarations and conventions.”³⁰⁹ Furthermore, IFIs claimed that they are independent legal persons distinct from state obligations regarding human rights.³¹⁰

(ii) The Counter-Argument:

There is a counter-argument against the one presented by IFIs to escape legal responsibility concerning complying with human rights. This counter-argument is construed on the need that IFIs must not only have obligations to respect basic human rights, but also refrain from taking any steps that might undermine the borrower country’s compliance with its national and international human rights obligations.³¹¹

First, the argument invoked by IFIs not to consider human rights based on political prohibition ground is invalid. The ‘political prohibition’ stated under their constitutive instruments was drafted at the time of their establishment in 1944 when they had a specific mandate as a “narrowly focused monetary institution providing foreign exchange to help member states overcome temporary balance of payments problems.”³¹² But today it is out of question that IFIs have went beyond their mandates and got involved in

³⁰⁷ M. Rodwan Abouharb & David L. Cingranelli, *supra* note 277, at 54.

³⁰⁸ Adam Mcbeth, *supra* note 302, at 1110.

³⁰⁹ M. Rodwan Abouharb & David L. Cingranelli, *supra* note 277, at 54.

³¹⁰ Adam Mcbeth, *supra* note 302, at 1111.

³¹¹ Margot E. Salomon, *supra* note 118, at 538.

³¹² Adam Mcbeth, *supra* note 302, at 1107.

significantly shaping the economic, social and domestic policies of their member states³¹³ under what is currently known as ‘mission creep’.³¹⁴ Accordingly, the WB and the IMF “have evolved significantly from their originally intended purposes and that both now engage broadly in area that significantly affect human rights.”³¹⁵ In addition to the mission creep debate, the economic reforms proposed by IFIs as privatization, cutting of government expenditure, and reducing welfare payments can result in restricting the accessibility of essential services that causes major social consequences as negatively affecting the realization of economic, social and cultural rights.³¹⁶ Consequently, “the untouchable ‘political’ policy area often has economic consequences.”³¹⁷ This is because most human rights-related issues encompass economic and non-economic consequences, so any human rights issue “could simultaneously constitute an economic consideration as well as an aspect of a nation’s political affairs or political character.”³¹⁸ Accordingly, the political prohibition “does not on any contemporary account entail a prohibition of human rights consideration,”³¹⁹ as factors including social, environmental and political elements may affect economic growth, thus requiring “proper consideration in the crafting of policies.”³²⁰ Furthermore, the function of the political prohibition in the Articles of Agreement was to ensure non-discrimination between states, as it was “intended to ensure that the IBRD used economic criteria in approving loans, rather than allowing the process to be used for political leverage.”³²¹ It is worth noting that Roberto Danino, former WB general counsel, highlighted that to the political prohibition matter should be interpreted in light of the WB objectives stated under article I of its Articles of

³¹³ Adam Mcbeth, *supra* note 302, at 1107.

³¹⁴ See ‘Mission Creep’ section in Chapter One, where it is fully detailed explaining how IFIs took a step away of the principle of sovereignty of states and interferes in the domestic affairs of the borrower country via conditionality of financial assistance.

³¹⁵ Adam Mcbeth, *supra* note 271, at 393.

³¹⁶ Adam Mcbeth, *supra* note 302, at 1108-1109.

³¹⁷ Adam Mcbeth, *supra* note 302, at 1109.

³¹⁸ Adam Mcbeth, *supra* note 271, at 393. Also, see *supra* note 104 regarding intertwining of problems that caused expansion in the scope of activities of the IMF and the WB.

³¹⁹ Margot E. Salomon, *supra* note 118, at 541.

³²⁰ Margot E. Salomon, *supra* note 118, at 541.

³²¹ Adam Mcbeth, *supra* note 302, at 1109.

Agreement, as he advocated that there are strong grounds for the WB to consider human rights as part of its economic decision making process.³²²

Second, the argument that IFIs are not signatories to international human rights treaties is not considered a leeway for IFIs to escape being obliged to consider human rights in its policies. Although, it is true that IFIs are not signatories to human rights treaties and do not have the ability to ratify them.³²³ However, most principles of international human rights treaties that revolve around the promotion of the dignity of the human person are considered customary international law, which could be violated by states and non-state actors alike.³²⁴ Despite the controversy of the adherence of non-state actors to customary international law, but by the minimum standard is that customary norms influence the interpretation of international instruments, including Articles of Agreement of IFIs.³²⁵ Furthermore, IFIs is composed of member states, which are at least obliged by some human rights in treaties they are signatories, which are derived from the UN Charter and customary international law.³²⁶ From these obligations is that a state must refrain from concluding any agreement that might impede the realization of its human rights obligations.³²⁷ In this respect, the Committee on Economic, Social and Cultural Rights in its General Comment on the right to water highlighted that:

³²² Adam Mcbeth, *supra* note 302, at 1109. Also, see, Antonio Morelli, *International Financial Institutions and their Human Rights Silent Agenda: A Forward-Looking View on the "Protect, Respect and Remedy" Model in Development Finance*, American University International Law Review, Vol 36, Issue 1, pp 52-101, (2021), at 67,

https://aucegypt.summon.serialssolutions.com/#!/search?bookMark=eNqNjs1Og0AUhWeBia36Djd1K8nM2Nbobslc4Ea4Q4Zpq6vGBS4aAwrlIXxRQV_A3ZeT87cUUdu1TSQWaqNlvN7Kl0uxHlaTIEqq7XohvokDejaBHJsCumLDCU1EXAcKu1mvwbCFkCN5yHelYfCU5aGGmgrkACZDtuYJDKTOH4y3ceHcM3EGe8IDOJ6zsKq8C5iEO_BYVxP8tnos0b6uoHqw51GwuMfCveVc_PcGr8XF-9vH0NyI6NyPzZW4TTEkefzZd19jM5yPp27s28lx1ButIH7UD_r-f64fGPtOJA (last visited 21/5/2021).

³²³ Adam Mcbeth, *supra* note 302, at 1110.

³²⁴ Adam Mcbeth, *supra* note 302, at 1110.

³²⁵ Adam Mcbeth, *supra* note 302, at 1110-1111. Also see, the section of the (Controversy of Customary International Law and IOS) under Chapter Three in this paper.

³²⁶ Adam Mcbeth, *supra* note 302, at 1111.

³²⁷ Adam Mcbeth, *supra* note 302, at 1111. For example, the ICESCR obliges under article 12 of the right to health obliges states to consider the right to health when concluding financial and facility agreement with IFIs as the WB and the IMF, to ensure the realization of the right to health and that nothing impedes such realization.

States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures.³²⁸

In spite that IFIs are non-state actors, but they are composed of member states and have an independent legal personality.³²⁹ This personality entails them to have rights and obligations under international law.³³⁰ Also, their Articles of Agreement are interpreted from the lens of international law like customary international law and the UN Charter.³³¹ So, if the acts of the IFIs are regarded as collective action of their member states, then states can neither escape their obligation to abide by customary international law nor its commitments derived from the UN Charter.³³² Derived from this approach IFIs should consider human rights, so that their member states won't be in violation of their international legal obligations.³³³ Moreover, article 35 of Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO) stated that

An obligation arises for a third State or a third organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or the third organization expressly accepts that obligation in writing. Acceptance by the third organization of such an obligation shall be governed by the rules of that organization.³³⁴

³²⁸ Adam Mcbeth, *supra* note 302, at 1112.

³²⁹ Adam Mcbeth, *supra* note 271, at 390.

³³⁰ Adam Mcbeth, *supra* note 271, at 390.

³³¹ Adam Mcbeth, *supra* note 271, at 390.

³³² Adam Mcbeth, *supra* note 271, at 390.

³³³ Adam Mcbeth, *supra* note 271, at 390.

³³⁴ Karin Oellers-Frahm & Andreas Zimmermann, *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, in *DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW* 144–148 (Karin Oellers-Frahm & Andreas Zimmermann eds., 2001), http://link.springer.com/10.1007/978-3-642-56626-4_9 (last visited 20/07/2021).

It could be argued that the IMF is neither a signatory to the ICESCR nor did the IMF provide an express consent as specified under article 35.³³⁵ However, the IMF is bound by the UN Charter which encompasses economic, social and cultural rights.³³⁶ The UN Charter enjoys hierarchical superiority so it controls the agreements concluded between the IMF and the borrowing country.³³⁷ Consequently, the IMF is indirectly bound by the ICESCR.³³⁸

In addition, the WB and the IMF concluded relationship agreement with the United Nations by which they are recognized as United Nations specialized agencies, so they are into a relationship with the central bodies of the UN.³³⁹ It is worth highlighting that such relationship agreement obliges the specialized agency “to assist in achieving the objectives of international economic and social cooperation”³⁴⁰ as defined in article 55 of the UN Charter, where “universal respect and observance of human rights”³⁴¹ are from the major goals of the mentioned article. Also, the “Charter identifies the promotion and encouragement of respect for human rights as one of the principal purposes of the UN.”³⁴² Thus, IFIs are obliged to contribute to and observe the universal respect of human rights.³⁴³

So, derived from the fact that IMF is a specialized agency of the UN and that the two main goals of the UN is to protect world peace and protect human rights.³⁴⁴ The IMF

³³⁵ Jason Morgan-Foster, *The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: The Argentine Case Revisited Student Note*, MICH. J. INT’L L., VOL 24, ISSUE 2, PP 577–646, at 629, (2002), <https://heinonline.org/HOL/P?h=hein.journals/mjil24&i=593> (last visited 15/07/2021).

³³⁶ Jason Morgan-Foster, *Id*, at 630.

³³⁷ Jason Morgan-Foster, *Id*, at 630.

³³⁸ Jason Morgan-Foster, *Id*, at 630.

³³⁹ Koen De Feyter, *The International Financial Institutions and Human Rights: Law and practice*, HUMAN RIGHTS REVIEW, VOL 6, ISSUE 1, pp 56–90 (2004), at 65, <http://link.springer.com/10.1007/s12142-004-1036-y> (last visited 21/5/2021).

³⁴⁰ Koen De Feyter, *Id*.

³⁴¹ Koen De Feyter, *Id*.

³⁴² Koen De Feyter, *Id*.

³⁴³ Koen De Feyter, *Id*.

³⁴⁴ M. Rodwan Abouharb & David L. Cingranelli, *supra* note 277, at 69.

should not undertake activities that undermine the parent's organizations' goals.³⁴⁵ Also, based on the fact that respect for some human rights is a necessary precondition for economic development, so if the IMF undermines human rights then it undermines promotion of economic development.³⁴⁶

3. Legal Framework for the Establishment of the IMF Responsibility:

a. ILC and ILA Articles:

The legal basis for the responsibility of the IMF as an international organization is detailed in the International Law Commission (ILC) draft articles on the responsibility of international organizations (DARIO), which has been adopted by the ILC in 2011. Article (3) of the DARIO stipulated that “every international wrongful act of an international organization entails the international responsibility of that organization.”³⁴⁷ Moreover, article (4) of the DARIO mentioned the elements that formulate the internationally wrongful act committed by the IO where it stated that

There is an internationally wrongful act of an international organization when a conduct consisting of act or omission (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization.³⁴⁸

Accordingly, the responsibility of an IO arise when these two elements are fulfilled; a breach of an international obligation and when this conduct is attributable to the IO. First, it is worth mentioning that the commentary of the DARIO clarified that the international responsibility of an IO arises when there is a breach of an obligation under international law, even if this conduct is not prohibited by international law.³⁴⁹ As the commentary

³⁴⁵ M. Rodwan Abouharb & David L. Cingranelli, *supra* note 277, at 69.

³⁴⁶ M. Rodwan Abouharb & David L. Cingranelli, *supra* note 277, at 69-70.

³⁴⁷ International Law Commission, Draft Articles on the Responsibility of International Organizations, pp 1-16, at 2, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf (last visited 14/07/2021).

³⁴⁸ International Law Commission, Draft Articles on the Responsibility of International Organizations, *Id*, at 2.

³⁴⁹ Report of the International Law Commission on the Work of its Sixty-Third Session, Draft Articles on the Responsibility of International Organizations, with commentaries, *supra* note 13, at 48.

provided an example stating that responsibility is established if “an international organization fails to comply with an obligation to take preventive measures in relation to an activity that is not prohibited.”³⁵⁰ This explains the use of the term “conduct” to cover both, acts and omissions. Also, article (10) clarified that a breach of an international obligation by an IO exists

When an act of an international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.³⁵¹

The formulation of the term “regardless of its origin” implies that the primary source of an international obligation could be based on any source of international law, like international treaties or customary international law.³⁵² Second, articles (6) and (7) of the DARIO discussed the attribution of conduct to the IO. Article (6) considered the conduct attributed to the IO when performed by an organ or agents of an IO, while article (7) discussed the attribution of conduct to the IO, if performed by organ of a state or organs or agents of an IO placed at the disposal of another IO.³⁵³ The commentary of the DARIO highlighted an important aspect where it mentioned that there might be dual or even multiple attribution of conduct. As it specifically stated that

Attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.³⁵⁴

³⁵⁰ Report of the International Law Commission on the Work of its Sixty-Third Session, Draft Articles on the Responsibility of International Organizations, with commentaries, *supra* note 13, at 48.

³⁵¹ International Law Commission, Draft Articles on the Responsibility of International Organizations, *supra* note 347, at 3.

³⁵² Mirka Moldner, *Responsibility of International Organizations – Introducing the ILC’s DARIO*, Max Planck Yearbook on United Nations Law, Vol 16 (2012), pp 281- 328, at 295, <https://heinonline.org/HOL/P?h=hein.intyb/maxpyb0016&i=297> (last visited 15/07/2021).

³⁵³ International Law Commission, Draft Articles on the Responsibility of International Organizations, *supra* note 347, at 3.

³⁵⁴ Report of the International Law Commission on the Work of its Sixty-Third Session, Draft Articles on the Responsibility of International Organizations, with commentaries, *supra* note 13, at 54. This is similar to the joint responsibility in the civil law, when the wrongful act, injury and causal link are attributed to several persons.

In addition to the ILC DARIO, the International Law Association, in May 1996, established a Committee on the Accountability of International Organizations, which has issued a report in this regard in its 68th Conference held in Taipei in 1998.³⁵⁵ This Committee mentioned that the relation between an IO and its members is governed by the international agreement establishing the organization and general principles of international law.³⁵⁶ The Committee has also considered “accountability of and towards international organizations as comprising three interrelated and mutually supportive components;”³⁵⁷ which are the following

- the extent to which international organisations, in the fulfillment of their responsibilities as established in their constituent instruments, are and should be subject to or exercising forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent *liability and/or responsibility*;
- tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule or norm of international and/or institutional law; (e.g. environmental damage as a result of lawful nuclear or space activities)
- responsibility arising out of acts or omissions which do constitute a breach of a rule or norm of international and/or institutional law (e.g. violations of human rights or humanitarian law, breach of contract, gross negligence, or as far as institutional law is concerned acts of organs *ultra vires* or violating the law of employment relations).³⁵⁸

The Committee has further elaborated that these three levels of accountability could be distinguished based on three principles. The principle of good governance applies to the first level, the precautionary principle governs the second level, while legal

³⁵⁵ Committee on Accountability of International Organisations, 68th Conference, Int'l L. Ass'n Rep. Conf, *supra* note 14, at 585.

³⁵⁶ Committee on Accountability of International Organisations, 68th Conference, Int'l L. Ass'n Rep. Conf. *supra* note 14, at 594.

³⁵⁷ Committee on Accountability of International Organisations, 68th Conference, Int'l L. Ass'n Rep. Conf. *supra* note 14, at 599.

³⁵⁸ Committee on Accountability of International Organisations, 68th Conference, Int'l L. Ass'n Rep. Conf. *supra* note 14, at 599-600.

responsibilities under domestic, regional and/or international law relates to the third level of accountability.³⁵⁹

In a similar vein, the ILA held another conference in Berlin in 2004 discussing the accountability of IOS from the perspective of providing the recommended rules and practices (RRP) “based upon principles, objectives and concepts that are common to all IOS.”³⁶⁰ The RRP encompass several principles like principle of good governance, procedural regularity, principle of objectivity and impartiality, principle of supervision and control and last but not least principle of due diligence.³⁶¹ The Committee has enumerated three main points concerning the principle of due diligence, which are

1. Member States as members of an organ of an IO, and organs and agents of an IO have a fundamental obligation to ensure the lawfulness of actions and decisions.
2. All organs and agents of an IO, in whatever official capacity they act, must comport themselves so as to avoid claims against the IO.
3. Members of an IO have a duty to exercise adequate supervision of the IO, i.e. to ensure that it is operating in a responsible manner so as to protect not only their own interests but also that of third parties.³⁶²

Furthermore, the Committee has shed the light on a crucial aspect which is that operational activities of an IO might be lawful under their constituent instruments while causing significant harm to third parties.³⁶³ In this regard, the Committee has provided certain practices that IOS should follow as “preventive of damage caused by lawful operational activities.”³⁶⁴ These practices include

1. Prior to engaging in operational activities, IO-s should assess the potential damage which these activities may cause. This assessment should be kept under review as the activity proceeds.
2. IO-s should take appropriate precautionary measures to prevent the occurrence of unnecessary damage caused by their operational activities or at any event to minimise the risk thereof.
3. IO-s should co-operate in good faith and, as necessary, seek the assistance

³⁵⁹ Committee on Accountability of International Organisations, 68, Int'l L. Ass'n Rep. Conf. *supra* note 14, at 610.

³⁶⁰ International Law Association Berlin Conference (2004), *supra* note 17, at 229.

³⁶¹ International Law Association Berlin Conference (2004), *supra* note 17, at 229-240.

³⁶² International Law Association Berlin Conference (2004), *supra* note 17, at 240.

³⁶³ International Law Association Berlin Conference (2004), *supra* note 17, at 249.

³⁶⁴ International Law Association Berlin Conference (2004), *supra* note 17, at 248.

of other IO-s or States in preventing unnecessary damage or at any event in minimising the risk thereof.³⁶⁵

The Committee has even demonstrated that a conduct of an IO might be in conformity with the constituent instrument of the organization, but still “this does not prevent them from being wrongful under international law because of their non-conformity with other applicable rules of international law.”³⁶⁶ An essential example was provided in this regard

IO-s may incur international legal responsibility if their use of force and their imposition of economic coercive measures are not in conformity with relevant rules of international law, and in particular the humanitarian law principles of proportionality and of necessity.³⁶⁷

After laying out the articles regulating the accountability of IOS adopted by the ILC and the ILA, the question that arises is what are the obligations related to human rights incumbent upon IOS, specifically IFIs when providing loans or assistance to the borrowing country?

b. Obligations of IFIs:

In the General Comment No.12 of the CESCR related to the right to adequate food under article 11 of the Covenant, the light was shed on the obligations imposed on State parties in this regard, which are applicable to any other human right: the obligations to respect, to protect and to fulfil.³⁶⁸ The obligation to fulfil encompasses the obligation to facilitate and to provide, which means that State parties must engage in activities that facilitate access and utilization of resources to achieve food security for people.³⁶⁹ The obligation

³⁶⁵ International Law Association Berlin Conference (2004), *supra* note 17, at 248.

³⁶⁶ International Law Association Berlin Conference (2004), *supra* note 17, at 257.

³⁶⁷ International Law Association Berlin Conference (2004), *supra* note 17, at 257.

³⁶⁸ Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, 20th Session, CESCR General Comment No.12: The Right to Adequate Food, 12 May 1999, pp.1-9, at 4, <https://www.refworld.org/docid/4538838c11.html> (last visited 15/07/2021). There is a debate that IFIs are not signatories to international treaties as the ICESCR, see the position of IFIs and its counter argument under the section of IFIs and Human Rights.

³⁶⁹ Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, 20th Session, CESCR General Comment No.12, *id*, at 4.

to respect entails that State parties must refrain from taking any measures that would result in preventing existing access to adequate food.³⁷⁰ Lastly, the obligation to protect means that State parties must take measures to “ensure that enterprises or individuals do not deprive individuals of their access to adequate food.”³⁷¹

There is a strong relation between these obligations and the structural adjustment programs provided by IFIs to the borrowing countries. On one hand, the structural adjustment paradigm “assumes that a country is trying to meet its ICESCR obligation by borrowing money.”³⁷² On the other hand, “the conditionalities on which the very money is borrowed go against human rights norms.”³⁷³ Because the IFIs plays two roles which are solving and creating human rights problems, then “some level of human rights duties must be shared by the IFI.”³⁷⁴ Although, States are obliged to respect, to protect and to fulfill human rights, the IFIs are only obliged to respect human rights.³⁷⁵ This is justified by two reasons. First, if the structural adjustment paradigm respect human rights and provide the required resources, then they will help the borrowing State to protect and to fulfill.³⁷⁶ Second, human rights are not explicitly stated under the constituent instruments of IFIs and the “promotion of human rights will require a much more active human rights policy operation than the institution have been set up to handle.”³⁷⁷

Moreover, article (22) of the ICESCR stated that

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures

³⁷⁰ Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, 20th Session, CESCR General Comment No.12, *Id*, at 4.

³⁷¹ Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, 20th Session, CESCR General Comment No.12: *Id*, at 4.

³⁷² Jason Morgan-Foster, *supra* note 335, at 631.

³⁷³ Jason Morgan-Foster, *supra* note 335, at 631.

³⁷⁴ Jason Morgan-Foster, *supra* note 335, at 631.

³⁷⁵ Jason Morgan-Foster, *supra* note 335, at 632.

³⁷⁶ Jason Morgan-Foster, *supra* note 335, at 632.

³⁷⁷ Jason Morgan-Foster, *supra* note 335, at 632.

likely to contribute to the effective progressive implementation of the present Covenant.³⁷⁸

The CESCR General Comment No.2 on the international technical assistance measures has clarified that the “specialized agencies” mentioned in article (22) includes the World Bank and the IMF.³⁷⁹ The Committee has observed the “necessary evil of the outside assistance,”³⁸⁰ where there is a negative impact on the ESCR due to the debt burden and adjustment programs which involve austerity measures, noting that these programs are unavoidable. Consequently, the Committee has urged States parties and UN agencies to protect ESCR by making

Particular effort to ensure that such protection is, to the maximum extent possible, built-in programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as “adjustment with a human face” or as promoting “the human dimension of development” requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation. In many situations, this might point to the need for major debt relief initiatives.³⁸¹

c. Attribution of Conduct:

The ILC DARIO has provided the legal framework for the responsibility of IOS, where one of the elements to hold the IO responsible was that the conduct must be attributed to the IO. Article (6) and article (7), respectively; stated that

The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law.³⁸²

³⁷⁸ International Covenant on Economic, Social and Cultural Rights, pp 1-8, at 7, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (last visited 15/07/2021).

³⁷⁹ Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, 20th Session, CESCR General Comment No.2: International Technical Assistance Measures, 2 Feb 1990, pp.1-4, at 1, <https://www.refworld.org/pdfid/47a7079f0.pdf> (last visited 15/07/2021).

³⁸⁰ Jason Morgan-Foster, *supra* note 335, at 587.

³⁸¹ Office of the High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, 20th Session, CESCR General Comment No.2, *supra* note 379, at 3.

³⁸² International Law Commission, Draft Articles on the Responsibility of International Organizations, *supra* note 347, at 3.

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.³⁸³

Despite the clarity of the text, there are no specific criteria to be followed in practice to link the effects in the borrower country to the austerity measures imposed in the form of conditionality in IMF loans. As the IMF's argument would be that the State has its own sovereignty and it applied the conditions in its own territory by its will. Despite this dilemma, there are ways that could establish this causal link. First, there are international legal precedents like the Independent Evaluation Office report issued by the IMF regarding the relation between Argentina's economic crisis and the IMF structural programs. Second, the view of scholars to the attribution of austerity measures to the IMF. Third, the international adhesion contract concluded between the IMF and the borrowing country.

First, the case of Argentina could be taken as a legal precedent on the international scale regarding the effects of the conditionality on the economic situation in Argentina and consequently on the people's human rights which are adversely affected by the recession of the economy. Briefly, Argentina had faced a series of events from 1991 till 2001, during that period it was engaged in several loans from the IMF. These loans were two Extended Fund Facility (EFFs) in 1992 and 1998, as well as two Standby Arrangements (SBAs) in 1996 and 2000.³⁸⁴ In April 1991, the IMF introduced the "Convertibility Plan", which was "designed to stabilize the economy through drastic, and almost irreversible, measures."³⁸⁵ The plan was to fix the peso at par with the US Dollar.³⁸⁶ Under the Convertibility Plan, "Argentina saw a marked improvement in its economic

³⁸³ International Law Commission, Draft Articles on the Responsibility of International Organizations, *supra* note 347, at 3.

³⁸⁴ The Role of the IMF in Argentina, 1991-2002, Issues Paper/Terms of Reference for an Evaluation by the Independent Evaluation Office (IEO), July 2003, pp 1-18, at 1, <https://www.imf.org/External/NP/ieo/2003/arg/index.htm> (last visited 15/07/2021).

³⁸⁵ The Role of the IMF in Argentina, 1991-2002, *id*, at 3.

³⁸⁶ The Role of the IMF in Argentina, 1991-2002, *id*, at 3.

performance,”³⁸⁷ where stabilization was reached and the “economy grew at an average rate of 6 percent per year through 1997.”³⁸⁸ However, in 1998 the economic growth started to slow down,³⁸⁹ and the country faced a severe and prolonged recession.³⁹⁰ In 2000, “Argentina began to experience severely diminished access to capital markets,”³⁹¹ along with “grave concerns about the country’s exchange rate and debt sustainability.”³⁹² So there were negotiations between Argentina and the IMF to receive further assistance from the IMF, upon which Argentina submitted a Letter of Intent (LOI) and Memorandum of Economic Policies (MEP) having its main theme revolving around fiscal austerity measures.³⁹³ However, in 2001 Argentina had still been facing economic problems where it suffered from political instability and complete loss of market access.³⁹⁴ The country’s debt has reached US \$132 Billion, in one day in 2001 US \$ 1.3 Billion fled Argentine Banks, in 2002 unemployment increased 25 percent, industrial output decreased 15 percent, prices of a “basic basket” groceries increased 50 percent, all of this led to that 50 percent of the population lives in poverty.³⁹⁵ In the end of 2001, the IMF decided to suspend disbursements to Argentina due to noncompliance with the IMF conditionality accompanying the IMF program.³⁹⁶ However, there were concerns raised by some observers about the “effectiveness and quality of financing and policy advice provided by the IMF.”³⁹⁷ So the Independent Evaluation Office (IEO) started to explore this matter. The IEO divided its examination into two distinct phases. The first phase is the pre-crisis from 1991-2000, where they examined these issues: the Convertibility Regime, the fiscal policy, external debt inflows, structural reform, institutional and political factors, vulnerabilities in the banking system, official financing, regional and

³⁸⁷ THE IMF AND ARGENTINA, 1991-2001, Evaluation Report (The International Monetary Fund-Independent Evaluation Office), Shinji Takagi & International Monetary Fund eds., pp 1-122, at 3, 2004, <https://www.imf.org/external/np/ieo/2004/arg/eng/pdf/report.pdf> (last visited 15/07/2021).

³⁸⁸ The Role of the IMF in Argentina, 1991-2002, *supra* note 384, at 3.

³⁸⁹ THE IMF AND ARGENTINA, 1991-2001, Evaluation Report, *supra* note 387, at 3.

³⁹⁰ The Role of the IMF in Argentina, 1991-2002, *supra* note 384, at 3.

³⁹¹ The Role of the IMF in Argentina, 1991-2002, *supra* note 384, at 3.

³⁹² THE IMF AND ARGENTINA, 1991-2001, Evaluation Report, *supra* note 387, at 3.

³⁹³ Jason Morgan-Foster, *supra* note 335, at 598.

³⁹⁴ The Role of the IMF in Argentina, 1991-2002, *supra* note 384, at 3.

³⁹⁵ Jason Morgan-Foster, *supra* note 335, at 590.

³⁹⁶ The Role of the IMF in Argentina, 1991-2002, *supra* note 384, at 4.

³⁹⁷ The Role of the IMF in Argentina, 1991-2002, *supra* note 384, at 1.

global factors and lastly transparency and data dissemination.³⁹⁸ The second phase is the crisis and its immediate aftermath, 2000-2002, where they explored the December 2000 decision to provide exceptional access, the program review in May 2001, the September 2001 decision to augment the package and the December 2001 decision to withhold further disbursements.³⁹⁹ The IEO examined all of this and issued an evaluation report comprised of more than a hundred pages, where it stated ten lessons to be “learned and incorporated into revised policies and procedures.”⁴⁰⁰ These lessons are related to “surveillance and program design, crisis management, and the decision-making process.”⁴⁰¹ Moreover, the evaluation report has offered six sets of recommendation derived from the lessons learned “to improve the effectiveness of IMF policies and procedures, in the areas of crisis management, surveillance, program relationship, and the decision-making process.”⁴⁰²

Not only have the Argentine people been suffering from deteriorating economic conditions, but also their ESC rights have been negatively affected as the country has been unable to fulfill its international obligations in this regard due to lack of resources. So the question that arises, is the IMF responsible? The simple answer, by applying the elements of responsibility stipulated in ILC DARIO, would be that the element of violation is satisfied as the IMF violated the principle of due diligence and precautionary principle and the element of attribution could be satisfied if we considered the evaluation report as the material form for the attribution of conduct. Despite all of this, “the IMF has publicly denied all the responsibility for the Argentine crisis.”⁴⁰³ Furthermore, the evaluation report just examined the problem, its causes and suggested lessons and recommendations to be taken into consideration by the IMF in further policies. Yet, no one suffered except the Argentine people whom their rights have been violated without

³⁹⁸ The Role of the IMF in Argentina, 1991-2002, *supra* note 384, at 8-9-10.

³⁹⁹ The Role of the IMF in Argentina, 1991-2002, *supra* note 384, at 10-11.

⁴⁰⁰ THE IMF AND ARGENTINA, 1991-2001, Evaluation Report, *supra* note 387, at 6.

⁴⁰¹ THE IMF AND ARGENTINA, 1991-2001, Evaluation Report, *supra* note 387, at 6.

⁴⁰² THE IMF AND ARGENTINA, 1991-2001, Evaluation Report, *supra* note 387, at 6-7.

⁴⁰³ Jason Morgan-Foster, *supra* note 335, at 591.

providing them any compensation or remedy. It is worth mentioning that there are several other cases similar to the Argentine case, even if not as severe as Argentina, with no evaluation reports, so how could attribution of conduct be established? This drives us to the second way.

Second, the bargaining power of the IMF when concluding a contract with the borrower country plays an imperative role in favor of the IMF. Taking Argentina as an example, the sequence of the bargaining power goes as follows:

- (1) Argentina attempts to meet the obligations it has to its citizens under the ICESCR.
- (2) To do that, the government needs two things, policies and money.
- (3) The Argentine government attempts to choose policies consistent with the Covenant and borrow the money from the IME
- (4) The IMF refuses to loan the money unless Argentina adopts the IMF's policies over its own. Such policies, including the zero-deficit law, cuts to social security, and provincial cuts are *inconsistent* with Argentina's obligations under the ICESCR.
- (5) The IMF has superior bargaining power, being the LLR.
- (6) Because of this superior bargaining power of the IMF, Argentina is forced to accept the terms that violate the ICESCR.⁴⁰⁴

So a scholar presented a sequence that could be followed to link the violation of the ESC rights of the Argentine people to the conduct of the IMF. He stated that if Argentina had not attempted or taken the initiative to apply policies consistent with the ESC rights and “thus step three never actually occurred the causal link to the IMF would be lost.”⁴⁰⁵ The scholar based this criterion on the fact that several Argentine governments attempted to implement policies consistent with the ICESCR while negotiating with the IMF. The attempted policies included for example, supporting local industries by supporting freedom of economic discrimination, where foreign investors enjoyed a lot of advantages that can harm local ones. Also, price control policies, wage increase, and increase expenditure for housing.⁴⁰⁶ For example, the IMF refused to lend Argentine during Isabel

⁴⁰⁴ Jason Morgan-Foster, *supra* note 335, at 619-620.

⁴⁰⁵ Jason Morgan-Foster, *supra* note 335, at 620.

⁴⁰⁶ Jason Morgan-Foster, *supra* note 335, at 620-621.

Peron's government in 1974, as the government supported wage increase and had policies regarding social spending.⁴⁰⁷ Accordingly, we could consider this a legal precedent and apply this criterion to other borrower countries by analogy to the Argentine case. For example, the IMF refused to lend Egypt during Nasser's era,⁴⁰⁸ as President Nasser's government wanted the loan to build the High Dam, but the conditionality accompanying the loan included austerity measures that Nasser refused to abide by at that time, so the IMF refused to lend Egypt. Moreover, during President Sadat's era when the government was negotiating with the IMF to take a loan to pay its external debt, the IMF required the implementation of austerity measures. For example, to increase the prices of basic goods as bread, sugar, rice and gas. This resulted in huge demonstrations by civilians and the government had to draw back the price increase policies. So when Egypt applied for the EFF in November 2016, taking into consideration the IMF's history with Egypt, the government had to accept the austerity measures required to be implemented in the form of the loan conditionality. These leads to the third way for the attribution of conduct to the IMF, which is examining the type of contract concluded between the IMF and the borrower country.

Third, the type of contract concluded between the IMF and the borrower country is considered an international adhesion contract.⁴⁰⁹ This is because the IMF has an absolute high bargaining power and is considered a lender of last resort (LLR).⁴¹⁰ The problem is that when the borrower country resorts to the IMF, its economic condition is in a very deteriorating condition, where outside assistance is the only option to improve its condition and the IMF is almost the only institution that would have enough money to lend the borrower country.⁴¹¹ So the need of the country for money is accompanied by lack of free consent to the conditionality of the structural adjustment program provided

⁴⁰⁷ Jason Morgan-Foster, *supra* note 335, at 620-621. See also, S.M. Murshed & Kunibert Raffer (eds), *supra* note 131, at 160.

⁴⁰⁸ S.M. Murshed & Kunibert Raffer (eds), *supra* note 131, at 160,

⁴⁰⁹ Jason Morgan-Foster, *supra* note 335, at 594.

⁴¹⁰ Jason Morgan-Foster, *supra* note 335, at 586.

⁴¹¹ Jason Morgan-Foster, *supra* note 335, at 586.

by the IMF.⁴¹² From a theoretical point of view, all states are equal and stand on an equal footing from the IMF, but in reality there is a strong relationship between the influence of the IMF and the identity of the borrower country, as the IMF has great influence over policies of poor countries than over rich ones.⁴¹³ If the borrower country enjoys a healthy economy or is rich to the extent that it does not need the IMF resources, then this country is free to accept or reject the IMF perspectives.⁴¹⁴ Meanwhile, poor countries or ones that are already using or expecting to use IMF resources cannot treat IMF's views dispassionately.⁴¹⁵ Consequently, countries with low bargaining power are forced to accept the "terms offered by the IMF, regardless of their consistency with ESC rights, because they have no other source of equivalent fund."⁴¹⁶ This creates the dilemma of the attribution of conduct to the IMF, as usually States have the primary responsibility to protect human rights of their citizens against any abuses, but the structural adjustment programs create a different scenario where it would be "unjust and ineffective to hold the State solely responsible because of its unequal bargaining power in relation to IFIs."⁴¹⁷ Although IFIs are not obliged to play a leading role in protecting victims of human rights, however; they are obliged to "ensure that their operations do not exacerbate problematic human rights situations."⁴¹⁸ It is worth mentioning that the Argentine delegate when was asked about the rights of the Argentine people before the ESCR Committee in 1999 he mentioned that

[My] Government, like so many others, was trying to adapt to the current global situation and open up the country's economy, which it could not do without loans. The international financial institutions, such as the IMF, imposed certain conditions on the country when loans were being negotiated, especially in the fields of employment and social security. It would therefore be helpful if the

⁴¹² Jason Morgan-Foster, *supra* note 335, at 586.

⁴¹³ Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights Symposium*, *Transnational Law & Contemporary Problems*, vol. 6, no. 1, 1996, pp. 47-90, at 70, <https://heinonline.org/HOL/P?h=hein.journals/tlcp6&i=73> (last visited 1/3/2021).

⁴¹⁴ Daniel D. Bradlow, *supra* note 43, at 70.

⁴¹⁵ Daniel D. Bradlow, *supra* note 43, at 70.

⁴¹⁶ Jason Morgan-Foster, *supra* note 335, at 587.

⁴¹⁷ Jason Morgan-Foster, *supra* note 335, at 623.

⁴¹⁸ Daniel D. Bradlow, *supra* note 43, at 86.

Committee would share its criticisms, suggestions and concerns not only with delegations, but with institutions like the IMF as well.⁴¹⁹

Not only is the attribution of conduct a debatable issue regarding IOS, but also the debate extends to member states in the IOS. The Board of Directors and the Board of Governors are vested great powers in the IMF, where they enjoy full-decision making powers.⁴²⁰ The Board of Directors or the Board of Governors are considered representatives of their own States, so they are obliged to adhere to “their international human rights obligations in the policies they pursue that impact on the exercise of those rights in recipient countries.”⁴²¹ The vote of the State representative is considered a state act, which is governed by human rights law and general law on state responsibility.⁴²²

There is an argument that decisions taken by the organs of the IO “can be attributed to the organization but not to the states that participated in the organs.”⁴²³ However, the counter-argument is based on two matters. First, there must be a distinction between act of the state and act of the IO.⁴²⁴ The Centre for International Environmental Law demonstrated that the issue is the responsibility of the state for its own act, not the attribution of the IO’s act to the state.⁴²⁵ Second, the assumption that the international personality of the IO excludes state responsibility creates a “legal limbo, one where states control the international organization but are immune from legal responsibility for the consequences of such control.”⁴²⁶ Member states are an additional layer in the legal scenario of IOS, as they lie behind the legal shell of the IO.⁴²⁷ There must a separation between the institutional legal order of the organization and general international law,

⁴¹⁹ Jason Morgan-Foster, *supra* note 335, at 618.

⁴²⁰ Margot E. Salomon, *supra* note 118, at 536.

⁴²¹ Margot E. Salomon, *supra* note 118, at 536.

⁴²² Margot E. Salomon, *supra* note 118, at 536.

⁴²³ Margot E. Salomon, *supra* note 118, at 536.

⁴²⁴ Margot E. Salomon, *supra* note 118, at 536.

⁴²⁵ Margot E. Salomon, *supra* note 118, at 536.

⁴²⁶ Margot E. Salomon, *supra* note 118, at 536.

⁴²⁷ Catherine Brolmann, *Member States and International Legal Responsibility*, INTERNATIONAL ORGANIZATIONS LAW REVIEW, VOLUME 12, ISSUE 2, PP 358–381, (July 2015), at 359, <http://search.ebscohost.com/login.aspx?direct=true&db=poh&AN=115557573&site=ehost-live> (last visited 20/07/2021).

since IOS are attributed a separate legal identity, where the metaphor “institutional veil” is used.⁴²⁸ The institutional veil helps to view the “position of member states as well as their relation “with the organization from the outside perspective of general international law, rather than from within the institutional order of the organization.”⁴²⁹ Accordingly, there could be joint responsibility between the member state and the IO. On one hand, responsibility of the state is to recognize “the acts of its organs, such as an executive director that votes to approve a project.”⁴³⁰ On the other hand, the responsibility of the IO is “for the acts of its organs, as the board of directors that approves a project.”⁴³¹ It is worth noting that the example is referring to the voting powers of the Board of Governors and Board of Directors due to the huge power vested in them, especially with the weighed voting system in the IMF. An example that shows that the weighed voting systems plays an imperative role in the IMF is the loan that was approved by the IMF in November 1982 to be given to South Africa amounting \$1.1 billion.⁴³² This decision was remarkable as the UN General Assembly opposed this loan “by a vote of 121 to 3 just two weeks earlier,”⁴³³ because the international community was against apartheid.⁴³⁴ But the US, the UK and West Germany supported the loan, where they “collectively owned over 30 percent of the voting power at the IMF.”⁴³⁵ Surprisingly, “a coalition of Western countries with 51.6 percent of the votes at the IMF pushed the loan through.”⁴³⁶ So, the votes constituting a minority in the General Assembly became a majority in the IMF.⁴³⁷

The ILC DARIO have also referred to this matter in article 61 which states that

A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has

⁴²⁸ Catherine Brolmann, *Id*, at 359 -360.

⁴²⁹ Catherine Brolmann, *Id*, at 361.

⁴³⁰ Margot E. Salomon, *supra* note 118, at 537.

⁴³¹ Margot E. Salomon, *supra* note 118, at 537.

⁴³² Rob Clark, *Quotas Operandi: Examining the Distribution of Voting Power at the IMF and World Bank*, THE SOCIOLOGICAL QUARTERLY, VOLUME 58, ISSUE 4, PP 595–621 (2017), at 595, <https://doi.org/10.1080/00380253.2017.1354735> (last visited 20/07/2021).

⁴³³ Rob Clark, *Id*, at 595.

⁴³⁴ Rob Clark, *Id*, at 595.

⁴³⁵ Rob Clark, *Id*, at 595.

⁴³⁶ Rob Clark, *Id*, at 595.

⁴³⁷ Rob Clark, *Id*, at 595.

competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.⁴³⁸

Accordingly, the argument that a member state should not bear international responsibility when it aids an IO when it acts according to the rules of the IO, does not mean that the "state is free to ignore its other international obligations, for example in the area of human rights."⁴³⁹ Moreover, the member state "would incur responsibility for a breach of those obligations as part of the law on state responsibility."⁴⁴⁰ The obligations incurred upon the member states extended even further to oblige the member state to refrain to make decisions within the IO that are contrary to human rights obligations, at least to which the member states with majority voting rights have subscribed to.⁴⁴¹

In conclusion, there is a complicated dilemma for the accountability of IFIs. Their extended mandates known as 'mission creep' resulted in extending their policies to millions of private individuals, who may suffer from the negative consequences of these policies and face the issue of the lack of any resort for remedy. So, IOS as the IMF where it impacts the exercise of human rights should "have their relevant human rights duties clearly spelled out."⁴⁴² The lack of effective internal mechanism for legal remedies along with the unclear standing from the well-established principle of the right to remedy under customary international law and non-adherence to human rights help these institutions to flee accountability. It must be taken into account that "a host of factors including social, environmental and political elements that may affect economic growth and thus require proper consideration in the crafting of policies."⁴⁴³ The intervention of the IFIs in the socio-economic rights and political rights of private individuals in developing countries has left the harmed individuals to one resort which is directing claims against the

⁴³⁸ International Law Commission, Draft Articles on the Responsibility of International Organizations, *supra* note 382.

⁴³⁹ Margot E. Salomon, *supra* note 118, at 537.

⁴⁴⁰ Margot E. Salomon, *supra* note 118, at 537.

⁴⁴¹ Margot E. Salomon, *supra* note 118, at 537.

⁴⁴² Margot E. Salomon, *supra* note 118, at 541.

⁴⁴³ Margot E. Salomon, *supra* note 118, at 541.

borrower government, as the duty bearers under human rights treaties.⁴⁴⁴ Meanwhile, IFIs “wearing their ‘non-state’ actor hats, have been able to claim that they possess no legal obligations in the area of human rights.⁴⁴⁵ This drives us to search for remedies within the domestic law for private individuals.

⁴⁴⁴ Margot E. Salomon, *supra* note 118, at 531.

⁴⁴⁵ Margot E. Salomon, *supra* note 118, at 531.

IV. Available Remedies within Domestic Law

From an international perspective, private individuals who suffer from negative effects of IMF decisions, have no resort to hold it, as an IO, liable for its actions, hence this creates the need to focus on the available remedies for private individuals within the domestic law in Egypt. The controversial question in this regard is how private individuals can challenge the negative consequences they suffer from the IMF decisions within the Egyptian domestic law. In this regard, the Extended Fund Facility 'EFF' given to Egypt from the IMF in 2016 will be taken as example. On one hand, examining the EFF conditionality and objectives as well as its effects on the economy and private individuals will provide a clear understanding of how IMF decisions could have a huge impact on the borrowing country. The light will be shed in particularly on the effect of the EFF on the right to health stipulated under article (12) of the International Covenant on Economic, Social and Cultural Rights. On the other hand, the search for remedies will be via focusing on the Egyptian civil society activities and the Egyptian judiciary, specifically the State Council and the Supreme Constitutional Court.

A. Egypt's EFF from the IMF in 2016:

Egypt was and is still a developing country, but the political unrest Egypt has faced in 2011 resulted in various negative consequences on the economy, which even worsened its developmental level. There has been instability in the country's authorities; executive, legislative and judicial which caused sort of chaos in the country's security level. This created a repelling environment for foreign investment, impeded the development of domestic investment and "foreign exchange shortages and the overvalued currency hampered the manufacturing sector."⁴⁴⁶ Moreover, the tourism sector has suffered from huge losses. Accompanied by weak revenues, macroeconomic vulnerabilities and slow growth rate, Egypt was in need for an effective reform policy, which in the view of the Egyptian authorities had to be supported by a fund from the IMF. On August 11, 2016 and upon the request of the Egyptian authorities there has been a mission sent by the IMF

⁴⁴⁶ IMF Press Release No. 16/501, *supra* note 1.

to Egypt to explore the economic reform policy and to discuss the financial assistance that shall be provided by the IMF in this regard.⁴⁴⁷ On November 11, 2016 the Executive Board of the IMF approved granting Egypt an EFF on a tenor of three years amounting \$US 12 billion, which ended in July, 2019.

1. Objectives and Conditionality of the EFF:

This EFF is like a two sided coin, one side states the IMF objectives for granting it and the other side enumerates the conditions. The main objectives of the fund include, first: exchange rate, monetary and financial sector policy where the CBE liberalized the foreign exchange system to increase international reserve which had declined after 2011, attract investment and promote competition.⁴⁴⁸ Second, fiscal policy, social protection and public financial management concerned with increasing tax revenues and decreasing expenditure.⁴⁴⁹ Third, structural reforms and inclusive growth directed to increase job opportunities for women and youth.⁴⁵⁰ So, the EFF aimed to “help Egypt restore macroeconomic stability and promote inclusive growth,”⁴⁵¹ via decreasing public debt and budget deficit, creating competitive environment and increasing job opportunities. Although, the elements of the EFF appear to improve the macroeconomic imbalances Egypt has been suffering from, its conditionality presents the manipulative role of the IMF. There were four central conditions that took place and caused several consequences with long lasting effect on the Egyptian economy and people. These conditions were the devaluation of the Egyptian pound, introducing value-added tax (VAT), reduction of energy subsidies and optimization and containing the public sector wage bill. They were referred to as “key policy measures”⁴⁵² aiming to reduce fiscal deficit, decline public debt, restore confidence in the economy and eliminate foreign exchange shortages.⁴⁵³ On July

⁴⁴⁷ IMF Press Release No. 16/375, 11 Aug 2016, [https://www.imf.org/en/News/Articles/2016/08/11/09/49/pr16375-Egypt-IMF-Reaches-Staff-Level-Agreement-on-a-Three-Year-US\\$12-Billion-Extended-Fund-Facility](https://www.imf.org/en/News/Articles/2016/08/11/09/49/pr16375-Egypt-IMF-Reaches-Staff-Level-Agreement-on-a-Three-Year-US$12-Billion-Extended-Fund-Facility) (last visited 12/12/2019).

⁴⁴⁸ IMF Press Release No. 16/501, *supra* note 1.

⁴⁴⁹ IMF Press Release No. 16/501, *supra* note 1.

⁴⁵⁰ IMF Press Release No. 16/501, *supra* note 1.

⁴⁵¹ IMF Press Release No. 16/501, *supra* note 1.

⁴⁵² IMF Press Release No. 16/501, *supra* note 1.

⁴⁵³ IMF Press Release No. 16/501, *supra* note 1.

24 2019, the executive board of the IMF completed its fifth and final review on Egypt's economic reform program and approved the disbursement of the last fund installment amounting \$US 2 billion.⁴⁵⁴ Mr. David Lipton, the Managing Director and Chairman of the Board of the IMF have said "Egypt has successfully completed the three-year arrangement under the EFF and achieved its main objectives. The macroeconomic situation has improved markedly since 2016."⁴⁵⁵ He also added that "critical macroeconomic reforms have been successful in correcting large external and domestic imbalances, achieving macroeconomic stabilization and a recovery in growth and employment, and putting public debt on a clearly declining trajectory."⁴⁵⁶

2. Brief on the Economic Consequences of the EFF in Egypt:

Although the concluding comments of the IMF after the fund has ended gives a promising impression that the economic situation has improved, but the EFF conditions resulted in devastating effects on the economy. The external public debt has dramatically increased to US \$106220.80 million in the third quarter of the FY 2018/2019 accompanied by debt service during this period amounting US \$3045 million, compared to external public debt amounting US \$46067.1 million in 2014.⁴⁵⁷ Prices of goods and services have faced unprecedented increase; meanwhile the salaries and pensions remained the same. A WB report issued in April, 2019 stated "inflation still exceeds 12 percent and might face further upward pressure as energy subsidies continue to be phased out."⁴⁵⁸ The Egyptian market is still not a favorable environment for investment which is one of the direct causes for "the double-digit youth unemployment, declining labor force participation rates, and high level of informal employment."⁴⁵⁹ Another WB report published in April 30, 2019 mentioned that "some 60 percent of Egypt's population is

⁴⁵⁴ IMF, Press Release No.19/300, Egypt-IMF Executive Board Completes Fifth Review under the Arrangement under Extended Fund Facility (EFF), 24 Jul 2019, <https://www.imf.org/en/News/Articles/2019/07/24/pr19300-egypt-imf-executive-board-completes-fifth-review-under-arrangement-under-eff> (last visited 29/03/2021).

⁴⁵⁵ IMF, Press Release No.19/300, *Id.*

⁴⁵⁶ IMF, Press Release No.19/300, *Id.*

⁴⁵⁷ Central Bank of Egypt, <https://www.cbe.org.eg/> (last visited 29/03/2021).

⁴⁵⁸ World Bank, *supra* note 3.

⁴⁵⁹ World Bank, *supra* note 3.

either poor or vulnerable.”⁴⁶⁰ Furthermore, the cutting of expenditure and decreasing in government subsidies affected the allocation of resources for health and education. This was highlighted by the WB report which stated “debt servicing is expected to remain a burden on the budget, therefore hindering larger social spending, notably on health and education,”⁴⁶¹ and further stipulated that “socio-economic hardship is exacerbated by poor public services, which suffer from low budget allocations.”⁴⁶² The Egyptian Finance Minister Mohamed Maait has recently said that “The programme has been very harsh. The heroes are the Egyptian people who have paid the price for the very difficult reforms and wanted to see the country change,”⁴⁶³ while he was referring to the EFF granted in 2016. This drives us to the rights of the Egyptian people which have been hindered by the declining economic situation, for example the rights stated under the ICESCR as right to education, right to health, right to live an adequate life, right to live in dignity and many others. However, the scope of this paper is limited to the right to health of the Egyptian people. The matter of health plays a pivotal role to all human beings regardless of age, gender, nationality, social or financial standard. Its importance is derived from the fact that it is a fundamental right that enables a person to exercise various other rights.⁴⁶⁴

3. Right to Health under Article (12) of the International Covenant on Economic, Social and Cultural Rights:

Although the right to health was mentioned in several international instruments, the most comprehensive article for this right was stated under article (12) of the ICESCR. This article was further detailed in general comment number (14) held by the Committee on Economic, Social and Cultural Rights ‘CESCR’ in 2000 titled the ‘Substantive Issues arising in the Implementation of the ICESCR’ regarding article (12). As mentioned

⁴⁶⁰ World Bank, <https://www.worldbank.org/en/news/press-release/2019/04/30/world-bank-group-to-extend-current-strategy-in-egypt-to-maintain-momentum-on-reforms> (last visited 12/12/2019).

⁴⁶¹ World Bank, *supra* note 3.

⁴⁶² World Bank, *supra* note 3.

⁴⁶³ Euromoney, Egypt hopes to secure new IMF by March, says finance minister, 25 Oct 2019, <https://www.euromoney.com/article/b1hr139z1htyq4/egypt-hopes-to-secure-new-imf-agreement-by-march-says-finance-minister> (last visited 29/03/2021).

⁴⁶⁴ United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, 22nd session, General Comment No.14 (2000), at 1.

earlier, right to health is a fundamental human right that is essential for the exercise of other human rights, that justifies the great attention given to this right on the domestic and the international levels. The CESCR stipulated that article 12.1 mentions that every individual has the right to enjoy the “highest attainable standard of physical and mental health”, while article 12.2 mentions the steps that States parties must take to fully realize this right, noting that the article shed the light on mental health, which is usually ignored. Article (12) had not only specified the right to health, but also extended to include the socio-economic factors related to health and the underlying determinants of health as “food and nutrition, housing, access to safe and potable water, adequate sanitation, safe and healthy working conditions and a healthy environment.”⁴⁶⁵ It is worth mentioning that the CESCR emphasized that the right to health is not an equivalent for the right to be healthy. For example, states are not responsible for genetic factors or an individual’s unhealthy lifestyle that would make him/her susceptible to ill health or diseases. So, the right to health revolves around freedoms; that a person has the right to control one’s health and body and being free from interference as well as entitlements; which includes a system of health protection to enjoy the highest attainable standard of health based on the principle of equal opportunity.⁴⁶⁶ Furthermore, the CESCR in its comment number 14 specifically enumerated the elements of the right to health, its specific legal obligations and its core minimum obligations.

First, right to health is composed of four elements, namely; availability, accessibility, acceptability and quality. Availability means that a State party must ensure that health-care facilities, goods, services, programs and the underlying determinants of health are available in sufficient quantity. However, this element varies upon the developmental level of the State.⁴⁶⁷ Accessibility implies that everyone must have access to the health care without discrimination. There are four interrelated aspects in this regard; non-discrimination, physical accessibility, economic accessibility and information accessibility. They all revolve around the idea that health facilities, goods, services and

⁴⁶⁵ United Nations Economic and Social Council, *Id*, at 2.

⁴⁶⁶ United Nations Economic and Social Council, *Id*, at 2.

⁴⁶⁷ United Nations Economic and Social Council, *Id*, at 4.

the underlying determinants of health are within the safe physical reach of everyone without discrimination including vulnerable and marginalized groups as ethnic minorities, indigenous people, women, children, adolescents, older persons, disabled and persons with HIV/AIDS as well as being affordable whether the individual resorted to public or private health sector, based on the principle of equity, without burdening the poor households with health expenses if compared to the rich ones.⁴⁶⁸ Also, gives individuals the right to seek, receive and impart information related to health, without affecting the principle of confidentiality. The third element is acceptability where the State must ensure that health facilities, goods and services are based on medical ethics and culturally appropriate.⁴⁶⁹ The fourth element is quality which states that health facilities, goods and services are scientifically and medically appropriate, which includes; skilled medical personnel, scientifically approved and valid drugs, hospital equipment, safe and potable water and adequate sanitation.⁴⁷⁰

Second, the States parties are obliged to respect, protect and fulfil the right to health. The obligation to respect demonstrates that States must refrain from denying equal access to everyone, abstain from any discrimination whether in State policy or practices related to women's health, refrain from marketing unsafe drugs or applying coercive medical treatment unless on exceptional basis like control of communicable diseases, refrain from limiting access to contraceptives or misrepresent health-related information like sexual education, refrain from unlawfully polluting air, water and soil and finally to refrain from limiting access to health care as a punitive measure.⁴⁷¹ Furthermore, State parties are obliged to protect the right to health from third party interference, like the duty to adopt legislation to ensure equal access of the services provided by third parties, for example ensure that privatization of the health sector does not affect the elements of the right to health.⁴⁷² Also, States must protect individuals from harmful social and traditional practices that affect pre- and post- natal care and family planning and marginalized

⁴⁶⁸ United Nations Economic and Social Council, *Id*, at 4.

⁴⁶⁹ United Nations Economic and Social Council *Id*, at 5.

⁴⁷⁰ United Nations Economic and Social Council, *Id*, at 5.

⁴⁷¹ United Nations Economic and Social Council, *Id*, at 10.

⁴⁷² United Nations Economic and Social Council, *Id*, at 10.

groups. This obligation extended further to include that States must carefully consider the right to health when concluding international agreements or when States are members of international financial institutions as the IMF and WB, by which the agreements wouldn't negatively impact the right to health.⁴⁷³ The obligation to fulfil is the acts of commission that a State party must do to fulfil the right to health by facilitating, providing and promoting this right. In other words, it requires States to "to adopt appropriate administrative, budgetary, judicial, promotional and other measures to fully realize the right to health."⁴⁷⁴ For example, by recognizing the right to health by adopting a national health policy, ensuring provision of health care, providing sexual and reproductive health services, training of doctors, sufficient number of hospitals, provision of health insurance system whether public, private or mixed, promoting medical research and health education and adopting measures against environmental and occupational health issues.⁴⁷⁵

Third, States parties must implement and prioritize the core minimum obligation to realize the right to health. These are enumerated by the CESCR, which are; accessibility with no discrimination, especially vulnerable groups, accessibility to food with adequate nutrition, accessibility to basic shelter, housing, water and sanitation, providing essential drugs and adopting a national public health strategy.⁴⁷⁶ It also includes ensuring reproductive, maternal and child health care, providing immunization against infectious diseases, preventing, treating and controlling epidemic and endemic diseases, providing education and access to information and providing training for health personnel.⁴⁷⁷

Finally, it is worth mentioning that article (2) of the ICESCR is closely linked to the right to health. Article (2.1) mentions that States parties should progressively achieve rights under the Covenant to the maximum of its available resources by taking steps individually and via international assistance and cooperation. So, States parties must take

⁴⁷³ United Nations Economic and Social Council, *Id*, at 12.

⁴⁷⁴ Office of United Nations High Commissioner for Human Rights and WHO, Fact Sheet No.31, The Right to Health, at 27.

⁴⁷⁵ United Nations Economic and Social Council, *supra* note 464, at 11.

⁴⁷⁶ United Nations Economic and Social Council, *supra* note 464, at 13.

⁴⁷⁷ United Nations Economic and Social Council, *supra* note 464, at 13.

deliberate, concrete and targeted steps towards the progressive full realization of the right to health, noting that retrogressive measures are not allowed unless justified by the State.

4. Negative Impact of the EFF on the Right to Health in Egypt:

The question that arises is how is the poor economic condition that Egypt has suffered from due to the EFF from the IMF, as previously stated, negatively affected the right to health of the Egyptian people which they are entitled to by article (12) of the ICESCR? The answer is that the deteriorating economic condition affected some of the underlying determinants of health and some of the elements of the right to health; accessibility and availability. So the EFF hindered Egypt's economic ability to realize some of the core minimum obligation required in this regard.

a. Accessibility:

(i) Transportation Price Increase:

One of the conditions imposed by the IMF in relation to the EFF was cutting energy subsidies aiming to reduce budget deficit and to protect the budget from sudden changes in the international oil and gas prices, where the IMF mentioned in a press release in November, 2016 that "The fuel price increase announced on November 3 were an important step in that direction."⁴⁷⁸ Yet, these subsidy cuts resulted in a sudden huge increase in the prices of fuel, water, electricity and public transportation. It's been stated that the price on metro tickets in May, 2018 increased by 300%,⁴⁷⁹ noting that the Greater Cairo metro network "is the backbone of mass transportation in the capital with a daily transportation capacity of over 3.7 million passengers,"⁴⁸⁰ and price of gasoline increased 50% in June, 2018.⁴⁸¹ Also, prices of taxis increased as "The government-approved taxi fares have increased four times since the float of the Egyptian pound, most recently in July 2019 following fuel price increases. The current starting fare of EGP 7 is 280% of

⁴⁷⁸ IMF Press Release No. 16/501, *supra* note 1.

⁴⁷⁹ The Tahrir Institute for Middle East Policy, *Assessing Egypt's Economic Reform*, 30 Oct 2018, at 18, <https://timep.org/reports-briefings/assessing-egypts-economic-reform/> (last visited 29/03/2021).

⁴⁸⁰ American Chamber of Commerce in Egypt, *Recent and Upcoming Legislation*, <https://www.amcham.org.eg/publications/egypt-business-climate/issue/2/Recent-and-Upcoming-Legislation> (last visited 29/03/2021).

⁴⁸¹ The Tahrir Institute for Middle East Policy, *supra* note 479, at 18.

the pre-float fare, with a new rate of EGP 3.6 per subsequent kilometer about 230% higher than the pre-float rate.”⁴⁸² This has directly affected people’s access to health care facilities and services, if two aspects are examined. First, according to Egypt’s demographic nature, most of the vulnerable and marginalized groups live in governorates far from Cairo like Upper Egypt where they suffer from high poverty rates, unemployment, lack of social services, lack of insurance, spread of harmful traditional practices and less access to education. Second, most of the public hospitals are located in Cairo and especially the ones that provide good level of health care facilities, goods and services like the new cancer hospital, if compared to the rest of the governorates. This means that the increase in the prices of transportation tickets whether metro, train and taxis affected the accessibility element of the right to health regarding physical and economic accessibility, where the poor economic conditions of people and marginalized groups will impede them from travelling to access health facilities. This doesn’t only affect those living in governorates far from Cairo, but also affects those living in Cairo but live far from hospitals and require taking more than a single transportation to reach their medical destination.

(ii) **Medicine and Ambulance Price Increase:**

As a consequence of the high inflation rate in Egypt which “stood at 24.3 per cent in December 2016”⁴⁸³ resulting from the conditions of the EFF, the prices of medicine accordingly increased. The currency devaluation in November, 2016 has affected the pharmaceutical industry where “Egypt announced price increases for a number of products in February 2017, covering 15% of domestically manufactured medicines and 20% of imported medicines.”⁴⁸⁴ Furthermore, this increase occurred “after the cost of production increased by 100 per cent. It had already been raised 20 per cent in May 2016

⁴⁸² American Chamber of Commerce in Egypt, *supra* note 480.

⁴⁸³ Centre for Economic and Social Rights, *Egypt’s IMF deal, a huge price tag for human rights*, Feb 2017, <https://www.cesr.org/egypt-new-imf-deal-comes-huge-price-tag-human-rights> (last visited 29/03/2021).

⁴⁸⁴ Oxford Business Group, *The Report-Egypt 2018, Health & Education Chapter, A growing population creates obstacles to improving health care access in Egypt*, 7 Mar 2018, <https://oxfordbusinessgroup.com/overview/universal-care-growing-population-creates-challenges-government-pushes-ahead-promises-improve-health> (last visited 29/03/2021).

and the government's latest proposal is for an automatic increase every six months."⁴⁸⁵ Moreover, the increase in the import cost affected the access to the subsidized infant milk.⁴⁸⁶ This increase affects the economic accessibility for health care goods as medicines, as the prices became too high for the people to afford buying them, violating the principle of equity as the increased health expenses disproportionately burdens poor households if compared to rich ones. This is proved by the existing discrepancy between rural and urban regarding economic access and quality of health care, especially in Upper Egypt, as according to the USAID "low-income women are 20% less likely to receive regular antenatal care than high-income women, while mortality rates for children under five are 19 deaths per 1000 live births for the wealthiest quintile compared to 42 deaths for the poorest,"⁴⁸⁷ which is one the core minimum obligations required to be fully realized.

Another negative impact is the recent increase in the public ambulance fees. According to the Egyptian Ambulance Organization board members meeting held on the 24th of August, 2019 an increase in the fees of ambulance services was approved. Although, the Organization affirmed that the "transportation of emergency cases, premature babies, and patients between public hospitals will remain free of charge,"⁴⁸⁸ yet the fees for non-emergency transportation between governorates increased to 5 EGP/km and does not exceed 5,000 EGP, as well as the fees for renting an oxygen tank became 2,700 EGP per unit and the refill is for 100 EGP.⁴⁸⁹ Dr. Mohamed Gad, Head of the Egyptian Ambulance Organization justified this increase in non-emergency services by the fact that the fees list has not been changed since 2009 and that the consumption price of the ambulance cars have increased due to the increase in car prices, fuel and car maintenance, so fees

⁴⁸⁵ Centre for Economic and Social Rights, *supra* note 483.

⁴⁸⁶ Centre for Economic and Social Rights, *supra* note 483.

⁴⁸⁷ Oxford Business Group, *supra* note 484.

⁴⁸⁸ Daily News Egypt, Egyptian Ambulance Organization increases fees of non-emergency call outs, 28 Aug 2019, <https://www.dailynewssegypt.com/2019/08/28/egyptian-ambulance-organization-increases-fees-of-non-emergency-call-outs> (last visited 29/03/2021).

⁴⁸⁹ Daily News Egypt, *Id.*

increase was required to overcome inflation in other factors related to the car.⁴⁹⁰

Accordingly, devaluation of the Egyptian pound and cutting in energy subsidies as fuel adversely affected the economic accessibility of individual to health care services as the ambulance.

(iii) Inflation and Poverty:

The combination of the four main conditions of the EFF; introducing VAT, cutting energy subsidies, devaluation of the Egyptian pound and optimization of the public sector wage bill, have created a very aggravating economic situation for the middle class and the poor people. The government introduced a 13% VAT for the FY 2016/2017, which later rose to 14% for FY 2017/2018.⁴⁹¹ This has led to dramatic increase in prices of goods and services, which “directly affects the cost of living and impacts poorer households disproportionately.”⁴⁹² This has led to higher living costs, where the poorest people suffer the most, as between July 2014 and May 2019, general inflation rose by more than 100%, meanwhile fruits and vegetable prices rose by more than 203%.⁴⁹³ Another issue is that cutting subsidies has been implemented before the government had the technical capacity to adopt any social protection program to protect the poor from the sudden increase in prices, so “in the absence of an adequate social safety net the living standards of the millions of Egyptian households already living in poverty are likely to drop even further, while a huge number of middle class households will be at risk of falling into poverty.”⁴⁹⁴ Moreover, the condition of containing the wage bill has even worsened the situation as according to a WB report “between 2016 and 2018, nominal wage growth fell below inflation. Official estimates reported that the share of the population living below the national poverty line in FY18 increased to 32.5 percent, from

⁴⁹⁰ El Watan News, Ambulance Organization: increase in its service fees, 31 Aug 2019, <https://www.elwatannews.com/news/details/4318906> (last visited 14/12/2019).

⁴⁹¹ Centre for Economic and Social Rights, *supra* note 483.

⁴⁹² Centre for Economic and Social Rights, *supra* note 483.

⁴⁹³ Egypt: Rights, Regression and Repression- Factsheet for Pre-sessions (UPR) | Egyptian Initiative for Personal Rights, at 2, <https://eipr.org/en/press/2019/10/egypt-rights-regression-and-repression-factsheet-pre-sessions-upr> (last visited 31/03/2021).

⁴⁹⁴ Centre for Economic and Social Rights, *supra* note 483.

27.8 in 2015, with the highest poverty rates still in rural Upper Egypt.”⁴⁹⁵ Accordingly, the increase in prices following the introduction of VAT has accelerated the increase in inflation rate; meanwhile individuals’ wages remained the same or at least has not been increased to overcome the inflation. This negatively impacts the economic accessibility to the right to health, as people’s adequate standard of living has fallen. In addition, it violated the principle of non-discrimination and equal treatment as the poor, especially the marginalized ones like in Upper Egypt, are not economically capable of accessing health facilities, goods and services, if compared to the richer individuals, noting that they cannot afford private insurance and the public insurance still falls behind the required levels to cover the whole population. It is worth noting that such embedded inequalities undermine the right to health of poorer women and girls, as the “financial barrier continue to limit poorer women’s access to quality prenatal care and basic healthcare of their children.”⁴⁹⁶

b. Availability:

Egypt has a huge population which requires the health care sector to have sufficient quantity of health facilities, services and goods. It has been stated that “in Egypt the ratio of hospital beds to people is already low by international standards, and the personnel compared to the number of beds is lower ...Egypt’s physician density at 0.81 physicians per 1000 people.”⁴⁹⁷ Moreover, in the next ten years Egypt demands 6000 doctors across all governorates each year, while Greater Cairo requires 1100, meanwhile; there is shortage in the number of nurses due to low payments and lack of social respect for the job.⁴⁹⁸ According to CAPMAS statistics, the total number of patients in outpatient clinics and reception at public and central hospitals in 2016 across all governorates reached 64,781,014, while the total number of doctors, dentists, pharmacists and nurses working at the Ministry of Health and Population and bodies related to it in 2016 reached

⁴⁹⁵ World Bank, The World Bank in Egypt-Overview, 1 Oct 2019, <https://www.worldbank.org/en/country/egypt/overview> (last visited 29/03/2021).

⁴⁹⁶ Egyptian Initiative for Personal Rights, *Supra* note 493, at 4.

⁴⁹⁷ Oxford Business Group, *supra* note 484.

⁴⁹⁸ Oxford Business Group, *supra* note 484.

355,281.⁴⁹⁹ Another CAPMAS survey stated that “fewer than 1,700 public and private hospitals served 100 million people, while the number of doctors in Egypt is growing, access to patients is still a problem, and hospitals need ways to bridge the gap.”⁵⁰⁰ There is a disproportionate ratio in number of patients, medical team and hospitals leading to limited availability of health care to people. Furthermore, the devaluation of the Egyptian pound accompanied by huge EFF debt service that is paid in dollars, adversely affected the economic and social rights as the debt servicing ties up resources that could be used to fulfill the government’s constitutional obligations to progressively realize the right to health.⁵⁰¹ In the same vein, the correlation between the weak Egyptian pound, increase in inflation and restrictions upon importation caused shortage in essential items resulting in “severe crisis in the price and availability of medication, as well as a deterioration in healthcare services caused by shortages in medical supplies.”⁵⁰² This results from the fact that Egypt depends on import of certain goods that go into the production of local drugs,⁵⁰³ causing either shortage in medicine or increase in its prices. All of this has resulted in Egypt’s inability to fully realize the element of availability of the right to health, in terms of sufficient quantity of hospitals, clinics, trained medical personnel with competitive salaries and essential drugs. As percentage of health expenditure to state public expenditure has been on a declining slope from FY 2014/15 till FY 17/18,⁵⁰⁴ considered a retrogressive measure without government’s justification.

c. Underlying Determinants of Health:

The underlying determinants of health are on the same importance level as health care facilities, goods and services. Although, Egypt subsidizes certain food items, the

⁴⁹⁹ CAPMAS, Egypt in Figures 2018, <http://www.sis.gov.eg/UP/Egypt%20in%20Figures%202018/egypt-in-numbers2018.pdf>, at 177-178 (last visited 14/12/2019).

⁵⁰⁰ American Chamber of Commerce in Egypt, Emerging Trends-Healthy Investment, April 2018, <https://www.amcham.org.eg/publications/business-monthly/issues/268/April-2018/3717/> (last visited 14/12/2019).

⁵⁰¹ Centre for Economic and Social Rights, *supra* note 483.

⁵⁰² Centre for Economic and Social Rights, *supra* note 483.

⁵⁰³ Brookings, *Egypt’s IMF Program: Assessing the Political Economy Challenges*, 30 Jan 2018, <https://www.brookings.edu/research/egypts-imf-program-assessing-the-political-economy-challenges> (last visited 13/12/2019).

⁵⁰⁴ CAPMAS, *supra* note 499, at 185.

International Food Policy Research Institute (IFPRI) identified Egypt's food subsidy program as a fundamental part of the undernutrition problem as subsidized items like bread, sugar, edible oil and rice are high in calories but low in nutritional value.⁵⁰⁵ Furthermore, there has been a dramatic increase in the prices of food and beverage after the devaluation of the pound and applying the VAT, where the prices were 29.3% higher in December 2016 than 2015.⁵⁰⁶ A WB report demonstrated that there has been "food price shocks"⁵⁰⁷ due to inflation and energy and utility price increases. This negatively affected the access to food "for the most marginalized households, with particular impacts on children."⁵⁰⁸

Even the government's measures to improve the access of the poor to food were of limited effect as Takaful and Karma program and smart card holders being granted increased subsidy. Because this didn't yet cover the inflated prices of essential goods and a lot of poor, illiterate and undocumented Egyptians weren't able to apply for smart cards.⁵⁰⁹ Another issue is the EFF conditionality of cutting subsidies led to 46.5% increase in piped water prices;⁵¹⁰ which led to a hike in the sewage fees to "75% of the water price for residential use and 98% for businesses."⁵¹¹ In addition, the increase in electricity prices after subsidy cuts, which rose by 21% for households and 42% for factories,⁵¹² have logically led to an increase in hospital fees, which highly depend on electricity for proper functioning of health care services. Consequently, the socio-economic factors related to the right to health, as food and nutrition as well as access to safe and potable water and adequate sanitation, which create the environment for people to live a healthy life, have been negatively impacted by inflation and subsidy cuts.

⁵⁰⁵ Oxford Business Group, *supra* note 484.

⁵⁰⁶ Centre for Economic and Social Rights, *supra* note 483.

⁵⁰⁷ World Bank, *supra* note 3.

⁵⁰⁸ Egyptian Initiative for Personal Rights, *supra* note 493, at 5.

⁵⁰⁹ Brookings, *supra* note 503.

⁵¹⁰ The Tahrir Institute for Middle East Policy, *supra* note 479, at 18.

⁵¹¹ American Chamber of Commerce in Egypt, *supra* note 480.

⁵¹² The Tahrir Institute for Middle East Policy, *supra* note 479, at 18.

To conclude, when the Egyptian authorities resorted to the IMF in 2016 to save the deteriorating economic condition following the political unrest, they were aiming to pave the way for economic reform. However, the EFF conditions, being rushed and cumulative, as cut in public spending and subsidies, pound devaluation, aggressive introduction of VAT and stagnation of wages led to inflation, high poverty rates, high import costs and dramatic increase in living costs. Egypt failed to protect the right to health from third party intervention which is the IMF. As the EFF conditions directly hit Egypt's ability to progressively fully realize the right to health as the conditions' short comes along with the debt servicing burden has impeded larger social spending on the health sector and hindered the people's economic and physical accessibility to good quality of health care facilities, goods and services due to lack of sufficient quantity, quality and affordability and violated the principle of non-discrimination as richer households benefit more from private health care. It is worth noting that the 2014 Constitution provided guarantees for the economic, social and cultural rights but the austerity measures of the IMF left the country to suffer from staggering levels of socioeconomic inequality.⁵¹³ The IMF "misplaced revenue-raising approach"⁵¹⁴ has reduced the government's ability to allocate resources for the realization of economic and social rights, where the burden of cost-cutting was laid on the poorest citizens.⁵¹⁵

This has directly affected the realization of the right to health, as the public spending on health has decreased. Although, the 2014 Constitution requires the allocation of 3% of the gross national product for the health sector, statistics have marked that the "public expenditure on health declined between 2015 and 2018 to 1.34%."⁵¹⁶ These conditions accompanied by low health insurance coverage "threatens the right to health of the most marginalized Egyptians."⁵¹⁷

⁵¹³ Egyptian Initiative for Personal Rights, *supra* note 493, at 1.

⁵¹⁴ Egyptian Initiative for Personal Rights, *supra* note 493, at 2.

⁵¹⁵ Egyptian Initiative for Personal Rights, *supra* note 493, at 2.

⁵¹⁶ Egyptian Initiative for Personal Rights, *supra* note 493, at 3.

⁵¹⁷ Egyptian Initiative for Personal Rights, *supra* note 493, at 3.

B. Available Remedies within Egyptian Domestic Law:

After laying out the economic condition in Egypt after applying the conditionality of the IMF accompanying the EFF of 2016, the question is what are the available domestic remedies for private individuals who are harmed by this economic condition and specifically affecting their right to health? The answer to this question lies in examining the extent of justiciability of this right within the domestic jurisdiction in Egypt. In this regard, the light should be shed on two spheres. The first sphere is the immunity granted to IFIs from jurisdiction before domestic courts as well as the framework of the legal basis of the right to health in Egyptian laws and the procedural requirements for filing a case. Second, the legal precedents established by the Egyptian judiciary. These precedents could be viewed from the activity of the Egyptian civil society and decisions of specific courts, which are the State Council Courts, the Court of Cassation and the Supreme Constitutional Court. Although, there are no recent published cases regarding litigation for the consequences of the 2016 EFF conditionality, yet examining the precedents of the mentioned courts provides a clear understanding of where the judiciary stands in this matter.

1. Immunity of International Organizations:

International organizations were established in the post-World War II era. Due to the novelty of these organizations, they were expected “to play new roles in international affairs and could be vulnerable for pressure from and to interference of their member states.”⁵¹⁸ From this point, the concept of immunity of international organizations evolved. So it was thought that the most suitable mean to protect these organizations from any pressure was to provide “them, their officials, their property, and their records immunity from the jurisdiction of their member states when performing their mandated functions.”⁵¹⁹ It is crucial to observe that the immunity granted to these organizations is

⁵¹⁸ Daniel D. Bradlow, *supra* note 93, at 53.

⁵¹⁹ Daniel D. Bradlow, *supra* note 93, at 53.

functional immunity from the jurisdiction of their member states.⁵²⁰ This type of immunity implies that IOS including IFIs as the WB and the IMF are “legally immune from proceedings in the domestic courts of their member states,”⁵²¹ during the course of their functions stated in their constitutive instruments.

There are several reasons for granting IOS functional immunity. First, is to extend “international goodwill and comity enjoyed by states to organizations,”⁵²² which are formed of states. This is to ease the realization of the objectives of member states in these organizations. Second, it is “awkward to drag an organization consisting of foreign states to the courts of one of the states.”⁵²³ Third, immunity granted in this context is considered of functional necessity and its absence may hinder the operations of the organizations.⁵²⁴ In other words, functional immunity guarantees the independence of these organizations from the interference of states.⁵²⁵ Fourth, this immunity is to protect the organization from “perceptions of prejudice and bad faith in national courts,”⁵²⁶ where a member state could have undue influence over the organization based on its territory. This is a situation that might not be acceptable by other member states. Also, to protect the organization from “baseless actions brought from improper motives.”⁵²⁷ In addition, even if it is accepted that the organization submit to jurisdictions of various courts, this will cause legal uncertainty as different courts will come up with different rulings due to different legal systems and traditions leading to a conflict of decisions on the obligations of the organizations.⁵²⁸ Consequently, the theory of jurisdictional immunity of IOS is based on

⁵²⁰ Mmiselo Freedom Qumba, *supra* note 105, at 91.

⁵²¹ Mmiselo Freedom Qumba, *supra* note 105, at 91.

⁵²² Mmiselo Freedom Qumba, *supra* note 105, at 93.

⁵²³ Mmiselo Freedom Qumba, *supra* note 105, at 93. See International Law Commission, Fourth Report on Relations between States and International Organizations, Status, Privileges and Immunities of International Organizations, at 157, <http://www.un.org/law/ilc/index.htm> (last visited 26/04/2021).

⁵²⁴ Mmiselo Freedom Qumba, *supra* note 105, at 93. Also, see Josef L. Kunz, *Privileges and Immunities of International Organizations*, AMERICAN JOURNAL OF INTERNATIONAL LAW, VOL 41, ISSUE 4, pp 828–862 (1947), at 839, https://www.cambridge.org/core/product/identifier/S0002930000184131/type/journal_article (last visited 26/04/2021). Article 105 of the UN Charter states that “such privileges and immunities as are necessary for the fulfillment of its purposes.”

⁵²⁵ Mmiselo Freedom Qumba, *supra* note 105, at 93.

⁵²⁶ Mmiselo Freedom Qumba, *supra* note 105, at 93.

⁵²⁷ Niels Blokker, *supra* note 160, at 272.

⁵²⁸ Mmiselo Freedom Qumba, *supra* note 105, at 93.

the assumption that the organization cannot operate in the common interest of all member states, if it is controlled by the jurisdiction of a member state.⁵²⁹ The rationale behind this theory is to reach independence from national governments.⁵³⁰

International Organizations derive their immunity from their constitutive instruments. For example, article (IX) (8) (i) of the IMF Articles of Agreement explicitly stated that the IMF “shall be immune from legal process with respect to acts performed by them in their official capacity except when the Fund waives this immunity.”⁵³¹ Similarly, the IBRD of the WB Group enjoys immunity according to its founding treaty, where Article VII of its Articles of Agreement stipulated that the “IBRD shall have immunity to enable it to fulfill its functions.”⁵³² It is noticed that IOS usually accompany the immunity provision with a waiver exception stated in their constituent document. This is called “constitutive waiver” which is a waiver that exists based on a provision in the constituent instrument of an IO to permit suits against the organization in domestic courts.⁵³³ However, this waiver is governed by the provision, which might limit the waiver to specific types of suits and to specific domestic courts.⁵³⁴ Moreover, a waiver is, by definition, a unilateral act, which means that only the holder of the right can waive it voluntarily.⁵³⁵ So it lies within the absolute discretion of the organization to waive its immunity and submit itself to suits. The problem that arises is that if the organization did not waive its immunity, this will surely lead to abuse of immunity and denial of justice.⁵³⁶

The dilemma of abuse of immunity is governed by article (24) of the Convention on the Privileges and Immunities of the Specialized Agencies. This Convention did not define the abuse of immunity.⁵³⁷ The article stated that:

⁵²⁹ Namita Wahi, *supra* note 125, at 368.

⁵³⁰ Namita Wahi, *supra* note 125, at 368.

⁵³¹ International Monetary Fund, *supra* note 49, at 27.

⁵³² Mmiselo Freedom Qumba, *supra* note 105, at 92.

⁵³³ Namita Wahi, *supra* note 125, at 369.

⁵³⁴ Namita Wahi, *supra* note 125, at 369.

⁵³⁵ Mmiselo Freedom Qumba, *supra* note 105, at 98.

⁵³⁶ Mmiselo Freedom Qumba, *supra* note 105, at 98.

⁵³⁷ Mmiselo Freedom Qumba, *supra* note 105, at 99.

The state and the IO should try and resolve the matter through consultations. If this does not result in a satisfactory outcome, the question whether the abuse has occurred shall be submitted for an advisory opinion of the International Court of Justice (ICJ). If the ICJ finds abuse, the state shall have the right, after notification, to deny the IO the benefits of the privilege or immunity that has been abused.⁵³⁸

The core problem with this article is that it did not provide private individuals the right to directly challenge IFIs through any channel, emanating from the traditional perspective of public international law that individuals are not subjects to international law.⁵³⁹ The article limited its scope to states and IOS to solve disputes via consultation and the ICJ in case of abuse.⁵⁴⁰ It is out of question that states will be reluctant to challenge IFIs on behalf of their citizens, as this “may jeopardize the granting of loans and grants from the same institutions.”⁵⁴¹

Accordingly, IFIs immunity is limited to functional immunity not an absolute one. They are also required to waive this immunity in case it impeded the cause of justice.⁵⁴² But again the problem lies in the discretion of the IFIs to take a positive initiative.⁵⁴³ The problem also gets more complicated when some domestic legislation grant immunity to IFIs. For example, the International Organizations Immunity Act (IOIA) issued by the USA, which applies to IFIs, entails that “all organizations declared by the president to be IOS shall enjoy the same immunity from suit as is enjoyed by foreign governments.”⁵⁴⁴

Theoretically and based on IFIs constitutive instruments, they are granted functional immunity, but in practice they enjoy absolute immunity from jurisdiction of national courts.⁵⁴⁵ This means that private individuals are abandoned without providing any remedy via any mechanism. The expansion in the IFIs mandates without a relative

⁵³⁸ Mmiselo Freedom Qumba, *supra* note 105, at 99. See article VII-Section 24 of the Convention on the Privileges and Immunities of the Specialized Agencies, http://portal.unesco.org/en/ev.php-URL_ID=48887&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited 26/04/2021).

⁵³⁹ Mmiselo Freedom Qumba, *supra* note 105, at 99.

⁵⁴⁰ Mmiselo Freedom Qumba, *supra* note 105, at 99.

⁵⁴¹ Mmiselo Freedom Qumba, *supra* note 105, at 99.

⁵⁴² Mmiselo Freedom Qumba, *supra* note 105, at 93.

⁵⁴³ Mmiselo Freedom Qumba, *supra* note 105, at 93.

⁵⁴⁴ Mmiselo Freedom Qumba, *supra* note 105, at 93.

⁵⁴⁵ Mmiselo Freedom Qumba, *supra* note 105, at 96.

expansion in its accountability led to tension between the organization's immunity and the right of private individuals for remedy.⁵⁴⁶ Thus, "immunity remains a silver bullet protecting IFIs against questions of justice from private individuals affected by IFI's operations."⁵⁴⁷

2. Legal Basis of the Right to Health in Egypt:

The legal basis of the right to health is divided into two dimensions; the legal texts and the procedural conditions. Due to the importance of the right to health for all human beings, this right has not only been stated under international human rights instruments, but has also been stipulated in domestic laws. Article 18 of the 2014 Egyptian Constitution has stated the right to health and detailed the obligations incurred upon the state in fulfillment of this right. The article stated

Every citizen is entitled to health and to comprehensive health care with quality criteria. The state guarantees to maintain and support public health facilities that provide health services to the people, and work on enhancing their efficiency and their fair geographical distribution. The state commits to allocate a percentage of government expenditure that is no less than 3% of Gross Domestic Product (GDP) to health. The percentage will gradually increase to reach global rates. The state commits to the establishment of a comprehensive health care system for all Egyptians covering all diseases. The contribution of citizens to its subscriptions or their exemption therefrom is based on their income rates. Denying any form of medical treatment to any human in emergency or life-threatening situations is a crime. The state commits to improving the conditions of physicians, nursing staff, and health sector workers, and achieving equity for them. All health facilities and health related products, materials, and health-related means of advertisement are subject to state oversight. The state encourages the participation of the private and public sectors in providing health care services as per the law.⁵⁴⁸

The above article has drawn the guidelines required, to be followed by the state, to ensure the fulfillment of the right to healthcare, which could be summarized in five main points.

⁵⁴⁶ Mmiselo Freedom Qumba, *supra* note 105, at 107.

⁵⁴⁷ Mmiselo Freedom Qumba, *supra* note 105, at 107.

⁵⁴⁸ Egypt's Constitution of 2014, Article 18- Right to Healthcare, https://www.constituteproject.org/constitution/Egypt_2014.pdf (last visited 05/04/2021).

First, the constitution granted the right to all citizens and conditioned the services provided to be of quality. Second, there is an obligation on the government to allocate a percentage of the government expenditure to health. Third, the state is obliged to create a health care system to all citizens, while protecting emergency cases. Fourth, create better conditions for all medical staff to ensure the efficiency of the healthcare services provided to the citizens by these professions. Last but not least, the health sector is subject to the supervision of the state.

In addition to the protection of the right to healthcare under the constitution, this right has been highlighted in the ICESCR under article 12.⁵⁴⁹ Egypt has signed this Covenant in 1967 and ratified it in 1982.⁵⁵⁰ It is worth noting that based on article 93 of the 2014 Egyptian constitution; this Covenant has the force of law within the Egyptian legal system, as the article states that

The state is committed to the agreements, covenants, and international conventions of human rights that were ratified by Egypt. They have the force of law after publication in accordance with the specified circumstances.⁵⁵¹

Consequently, based upon the Egyptian constitution and the ICESCR, which Egypt is a party to, it is found that Egypt has paid due attention to the importance of this right and formulated a solid legal basis for the protection of this right.

The second dimension for the legal basis of the right to health is the procedural aspect. In this regard, it is important to examine who has the right to file a case claiming the breach of his/her right before the State Council courts or before the Supreme Constitutional Court. Article 12 of the Egyptian State Council law number 47 for the year 1972 has stated that claims will not be accepted, if submitted by persons who have no personal

⁵⁴⁹ International Covenant on Economic, Social and Cultural Rights, article 12, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (last visited 8/4/2021).

⁵⁵⁰ United Nations Human Rights Office of the High Commissioner, OHCHR Dashboard, <https://indicators.ohchr.org/> (last visited 06/04/2021).

⁵⁵¹ Egypt's Constitution of 2014, *supra* note 548, Article 93.

interest in such claim.⁵⁵² Accordingly, the law limited the right to claim the breach of the right to health to the person or group of persons whom their right has been directly breached.

Meanwhile, the Supreme Constitutional Court has its own law number 48 for the year 1979, which specifies the mechanism by which cases are filed before this court under articles (29), (31) and (32).⁵⁵³ These articles have mentioned four cases under which claims could be filed. Article (29) mentioned two of these cases where the Supreme Constitutional Court would have judicial supervision over the constitutionality of law and regulations. The first case if one of the courts while adjudicating a case considers the unconstitutionality of a law or a regulation, then it stops the case and files it to the SCC to examine it. The second case if one of the litigants to a case claimed the unconstitutionality of a law or a regulation, then the court has the right to consider this claim, stop the adjudication process and provide the concerned litigant with a period of three months to file the claim of the unconstitutionality before the SCC. Article (31) stated that any concerned person has the right to present a claim before the SCC to decide upon the competent court to adjudicate a case, in case there is a dispute upon the competent court. Lastly, article (32) has given any concerned person the right to file a case before the SCC when there are two final contradicting decisions for the same case issued by two different courts.

In this respect, there are legal texts stipulating the right to health of Egyptian citizens and specifying the obligations incurred upon the state to fulfill this right. Furthermore, there are courts to adjudicate cases related to this right, whether to present a claim before the State Council appealing an administrative decree issued by the government or to present a case to consider the constitutionality of a law or a regulation that might form a breach for the right to healthcare as stated under the constitution. Thus, the extent of

⁵⁵² Egyptian State Council Law, no. 47, year 1972, article 12, <https://manshurat.org/node/7274> (last visited 06/04/2021).

⁵⁵³ Supreme Constitutional Court Law, no. 48, year 1979, <https://manshurat.org/node/63719> (last visited 06/04/2021).

justiciability of the right to health could be observed from the angle of legal precedents by Egyptian courts.

3. Egyptian Civil Society and State Council Decisions:

The activity of the civil society in Egypt will be examined via two organizations, which are: the Egyptian Initiative for Personal Rights ‘EIPR’ and the Egyptian Center for Economic and Social Rights ‘ECESR’. First, the EIPR has been established in 2002 and it is concerned with strengthening and protecting rights and freedoms in Egypt “through research, advocacy and supporting litigation in the fields of civil liberties, economic and social rights, and criminal justice.”⁵⁵⁴ Second, the ECESR is a nongovernmental legal institution, which was established in 2009.⁵⁵⁵ Its mission is to work “through litigation, research, data providing and campaigning to patronize and protect economic and social rights and expand their domain.”⁵⁵⁶

The EIPR has been concerned with the health program since 2008 to realize and protect the right to health in Egypt.⁵⁵⁷ From its approaches in this regard is the decision to litigate against government decisions that may impede the protection and realization of the right to health. However, litigation is not an easy resort as “legal pathways are long, costly and have limited enforcement capacities.”⁵⁵⁸ However, litigation is still perceived as an essential approach that “human rights organizations adopt in their attempts to protect and guarantee the realization of the rights by the state.”⁵⁵⁹

⁵⁵⁴ Who We Are | Egyptian Initiative for Personal Rights, <https://eipr.org/en/who-we-are> (last visited 30/03/2021).

⁵⁵⁵ About Us | Egyptian Center for Economic and Social Rights, (2010), <https://ecesr.org/en/771365-2/about-us/> (last visited 30/03/2021).

⁵⁵⁶ Egyptian Center for Economic and Social Rights, *Id.*

⁵⁵⁷ Ayman Sabae, *Four Strategic Pathways for the Realization of the Right to Health Through Civil Society Actions; Challenges and Practical Lessons Learned in the Egyptian Context*, HEALTH HUM. RIGHTS , Vol 16 No 2 (2014), pp 104–115 , at 105, <https://www.jstor.org/stable/healhumarigh.16.2.104> (last visited 30/03/2021).

⁵⁵⁸ Ayman Sabae, *Id.*, at 105.

⁵⁵⁹ Ayman Sabae, *Id.*, at 105.

The outcome of litigation is not always guaranteed to be in favor of the plaintiff who requires the realization of the right to health, so it is worth presenting two cases, each with a different outcome. The first case is considered the successful form of litigation which was the case of the Health Insurance Holding Company. In 2007, the Egyptian Prime Minister Ahmed Nazif issued decree number 637/2007 for the establishment of the “Healthcare Holding Company”.⁵⁶⁰ The problem in this decree is that it transferred the ownership of all hospital and facilities owned by the Health Insurance Organization ‘HIO’, which is a publicly owned insurance entity funded by contributions deducted from public employees, to this new company.⁵⁶¹ So the government shifted the HIO into a private company instead of improving its services.⁵⁶² Thus, the EIPR backed by 50 civil society organizations appealed the mentioned decree on three grounds. These grounds are that the decree went beyond the scope of the Prime Minister’s competency, was not presented to the parliament and that it is considered a direct violation for Egypt’s obligation to realize the right to health.⁵⁶³ This made the decree unconstitutional and an infringement to the ICESCR and the African Charter on Human and Peoples’ Rights, where Egypt is a signatory to both conventions.⁵⁶⁴ The Egyptian Administrative Court issued a historical decision in favor of the EIPR’s appeal, which resulted in an essential consequence.⁵⁶⁵ The ruling limited the government’s ability to justify its decisions based on the notion of limited resources.⁵⁶⁶ As the court mentioned that the right of policy makers in adopting new policies is “conditional upon its abiding by law governing public property and citizens’ rights to accessible, affordable services.”⁵⁶⁷ The second case was not successful as the first one. The case was that the Minister of Health issued decree number 373/2009 to issue a new system for medicines’ pricing in Egypt.⁵⁶⁸ This system based the pricing of medicine on “generic and patented medications in other countries,

⁵⁶⁰ Ayman Sabae, *Id*, at 105.

⁵⁶¹ Ayman Sabae, *Id*, at 105.

⁵⁶² Ayman Sabae, *Id*, at 105.

⁵⁶³ Ayman Sabae, *Id*, at 105.

⁵⁶⁴ Ayman Sabae, *Id*, at 105.

⁵⁶⁵ Ayman Sabae, *Id*, at 105.

⁵⁶⁶ Ayman Sabae, *Id*, at 105.

⁵⁶⁷ Ayman Sabae, *Id*, at 106.

⁵⁶⁸ Ayman Sabae, *Id*, at 106.

instead of setting the medication price according to the actual national cost of production.”⁵⁶⁹ This system was in favor of pharmaceutical companies and acted against the rights of citizens for the access of affordable medicines. The administrative court in 2010 ruled in favor of EIPR’s appeal, but the higher court accepted the government’s appeal and validated the minister’s decision.⁵⁷⁰

In addition to the above mentioned cases related to the right to health, there are other cases filed before the State Council for the electricity price increase, which could indirectly affect the right to health of citizens. In 2014, a plaintiff filed a case before the administrative court requiring cancellation of the Prime Minister’s decree number 1257/2014, which stipulated gradual increase in electricity prices over a period of five years starting from 2014 till 2018, as this increase would impede the plaintiff’s rights stated in the constitution.⁵⁷¹ The court rejected the plaintiff’s request on the basis that the administrative entity has the sole discretion to set the prices of electricity.⁵⁷² A similar case was filed by the ECESR, but the ruling is unpublished by the Center. The case was filed by ECESR on behalf of a citizen in 2012 against the Cabinet’s decision to increase electricity prices by 7% with a future target rate of 15%.⁵⁷³ The ECESR appeal basis was that the increase in electricity prices

added to that the cost of the other general services like Telephone, Gas, Water and Transportation, as well as commodity prices for family living and Health cost, which clearly shows that any increases in the prices of public services would constitute a large economic strain on the family and deprive them of the possibility of achieving a balance between acquired income and a decent living hood. The rising prices of electricity and taxes would force households to abandon part of the food consumption or needed health service in order to pay the bills, especially in view of the low wages and pensions in the society, and the absence of a minimum wage that commensurate with the consumer basket and the

⁵⁶⁹ Ayman Sabae, *Id*, at 106.

⁵⁷⁰ Ayman Sabae, *Id*, at 106.

⁵⁷¹ State Council, Administrative Court, *Legal Principles issued by Administrative Courts Circuits*, Oct 2014 - Sept 2015, pp 1-554, at 338.

⁵⁷² State Council, *Id*, at 338.

⁵⁷³ ECESR Contests Cabinet Decision to Increase Electricity Prices | Egyptian Center for Economic and Social Rights, (2012), <https://ecesar.org/en/2012/12/09/ecesar-contests-cabinet-decision-to-increase-electricity-prices/> (last visited 30/03/ 2021).

average sustenance ratio in the society, which means that new electricity prices, and by extension rest of the services, will increase the gap – that is already widened – between wages and prices.⁵⁷⁴

The above mentioned cases demonstrate the appeals against administrative decisions issued by the government, but what is the possibility for citizens to challenge an international agreement concluded by the State like the EFF concluded between Egypt and the IMF. In this context, two aspects must be examined; the State Council law and precedents issued by administrative courts.

The State Council law no.47 issued in 1972 states the competence of the State Council courts under article 10. This article enumerated 14 cases of competence, all of which revolve around the right of citizens and public servants to appeal against administrative decisions. Yet, article 11 of the mentioned law limited the scope of the State Council by explicitly stating that State Council courts have no jurisdiction to review requests or appeals related to acts of sovereignty. So does the international agreement between Egypt and the IMF as an IO considered an act of sovereignty by Egypt or not? Despite the clarity of the text of the law, the problem is that there is no clear definition or an exhaustive list for the acts that are to be considered acts of sovereignty. In this respect, there are some court rulings that drew a framework to define the acts that could fall under the category of acts of sovereignty.

The Egyptian Court of Cassation, the Supreme Constitutional Court and the Higher Administrative Court have clarified in their rulings the criteria upon which acts of sovereignty could be determined. The Court of Cassation in its ruling number 11513 issued in the judicial year number 84 in the commercial circuit held on 12 March 2019 stipulated the conditions that an act must fulfill to be considered an act of sovereignty, which could be summarized in three aspects.⁵⁷⁵ First, the act must be issued in a political context to satisfy political considerations. Second, it should be issued by the executive

⁵⁷⁴ Egyptian Center for Economic and Social Rights, *Id.*

⁵⁷⁵ Egyptian Court of Cassation, Appeal no.11513 for the Judicial Year no 84, https://www.cc.gov.eg/judgment_single?id=111391661&ja=262396 (last visited 30/03/2021).

authority as the State's ruling body. Third, the aim of the act must be for a public interest, respects the constitution, supervises the State's relations with other States, and to ensure the State's internal and external safety. The Supreme Constitutional Court adopted the same criteria in its ruling number 48 for the judicial year number 4, held on 21 January 1984. The ruling demonstrated that the agreement concluded between Arab states for the establishment of Arab army is considered an act of sovereignty, by which it has no jurisdiction over it.⁵⁷⁶ Furthermore, the same court in its ruling for case number 12 for judicial year 39 held on 7 March 2018 stated that international agreements concluded between the State (Egypt) and other subjects of public international law, whether states or international organizations is considered a political act.⁵⁷⁷ Persuaded by the above mentioned criteria and court rulings, the Higher Administrative Court established a legal principle regarding international agreements. It demonstrated that international agreements fall under the category of acts of sovereignty; accordingly they are out of the scope of judicial jurisdiction.⁵⁷⁸ However, the administrative decrees issued by the state in application for the terms of the agreement and affected the citizens of the state falls under judicial jurisdiction.⁵⁷⁹

4. The Supreme Constitutional Court:

It is pivotal to observe the mechanism by which the Supreme Constitutional Court 'SCC' interpret law, in particularly where it stands from international law and international treaties to which Egypt is a party. The 2014 constitution stated under article (151) that:

The President of the Republic represents the state in foreign relations and concludes treaties and ratifies them after the approval of the House of

⁵⁷⁶ Manshurat, <https://manshurat.org/node/63911> (last visited 30/03/2021).

⁵⁷⁷ State Council, Higher Administrative Court, *Legal Principles established by the Higher Administrative Court in Quarter of a Century (1/10/1991 – 30/9/2016)*, Part 1, pp 1-813, at 474-475.

⁵⁷⁸ State Council, *Id*, at 479.

The mentioned principle is principle number 49 in part 1 – section 40, on page 479, based on appeal number 943 & 1640 for judicial year number 40, held on 3 December 1994.

⁵⁷⁹ State Council, *Id*, at 479.

Representatives. They shall acquire the force of law upon promulgation in accordance with the provisions of the Constitution.⁵⁸⁰

Moreover, article (93) under the same constitution

Expressly recognizes the force of law for all agreements, covenants and international human rights conventions that were ratified by Egypt only after official publication.⁵⁸¹

However, the constitution did not provide a constitutional mechanism to guarantee that international human rights law is applied in the domestic legal system.⁵⁸² As neither did the 2014 Constitution nor the previous constitutions “require the SCC to follow a particular technique in constitutional interpretation.”⁵⁸³ Yet, it is worth mentioning that the SCC, through a number of high-profile opinions, has taken concrete steps in considering the standards of international human rights law.⁵⁸⁴ The SCC has taken into consideration a wide array of international law sources in its decision making, including multilateral international human rights conventions, customary international law, and general principles of law recognized by civilized nations.⁵⁸⁵ This is useful to “reduce clashes between domestic constitutional law and international law,”⁵⁸⁶ as well as “to ensure consistency between constitutional interpretation and international human rights system.”⁵⁸⁷

Derived from the approach adopted by the SCC in its constitutional interpretation to consider international law and treaties, three cases could be presented in this regard. First, the SCC in its ruling for case number (8) for the year (1995), when interpreting article 40 of the 1971 Constitution related to the equality in the rights and obligations between all

⁵⁸⁰ Islam Ibrahim Chiha, *Constitutionalisation of International Human Rights Law in the Jurisprudence of the Egyptian Supreme Constitutional Court*, ARAB LAW Q. , Vol 32, No.3, pp.242–262 (2018), at 244, https://brill-com.libproxy.aucegypt.edu/view/journals/alq/32/3/article-p242_2.xml (last visited 31/03/2021).

⁵⁸¹ Islam Ibrahim Chiha, *Id*, at 246.

⁵⁸² Islam Ibrahim Chiha, *Id*, at 243.

⁵⁸³ Islam Ibrahim Chiha, *Id*, at 248.

⁵⁸⁴ Islam Ibrahim Chiha, *Id*, at 243.

⁵⁸⁵ Islam Ibrahim Chiha, *Id*, at 243.

⁵⁸⁶ Islam Ibrahim Chiha, *Id*, at 243.

⁵⁸⁷ Islam Ibrahim Chiha, *Id*, at 243.

citizens, considered the UN Declaration on the Rights of Disabled Persons. The ruling allowed the government to allocate 5% for disabled persons in governmental institutions.⁵⁸⁸ The SCC ruling stated that:

While the international law norms adopted by the General Assembly do not have any binding force that could grant them an affirmative effect into the Egyptian legal system, acknowledging them in internal legal systems should be regarded as a moral and a political obligation that all states must fulfill.⁵⁸⁹

The second case is number (34) for the year (1996), where the SCC stipulated that article (2) and (16) of the Law number (48 of 1982) is constitutional.⁵⁹⁰ This law “prohibited the discarding of solid, gaseous or liquid waste into the Nile.”⁵⁹¹ The Court based its decision on the right to development provided under several international instruments as the International Covenant for Civil and Political Rights and the UN Declaration for the Right to Development.⁵⁹² Furthermore, the third case is the SCC ruling in case number (40) for the year (1995), where the court considered article 3(1) of Law no. (99) for (1992) as unconstitutional, because it discriminated between students of public and private educational institutions.⁵⁹³ The court interpreted article (18) of the 1971 Constitution, which provides the constitutional right to education, in the light of international instruments that guarantee the right to education as the ICESCR.⁵⁹⁴

It is worth mentioning that in some cases where courts adjudicated in cases with conflict between national and international law, they applied the more recent one.⁵⁹⁵ An example for this case is the Supreme Emergency Court ruling in 1986 regarding railroad workers strike.⁵⁹⁶ Article (124) of the Egyptian Penal Code adopted in 1937 criminalized strikes

⁵⁸⁸ Islam Ibrahim Chiha, *Id*, at 252.

⁵⁸⁹ Islam Ibrahim Chiha, *Id*, at 252.

⁵⁹⁰ Islam Ibrahim Chiha, *Id*, at 253.

⁵⁹¹ Islam Ibrahim Chiha, *Id*, at 253.

⁵⁹² Islam Ibrahim Chiha, *Id*, at 253.

⁵⁹³ Islam Ibrahim Chiha, *Id*, at 255.

⁵⁹⁴ Islam Ibrahim Chiha, *Id*, at 255.

⁵⁹⁵ Islam Ibrahim Chiha, *Id* at 246.

⁵⁹⁶ Islam Ibrahim Chiha, *Id*, at 246.

by public officials and those working for governmental institutions.⁵⁹⁷ Meanwhile, article 8(d) of the ICESCR, which was ratified by Egypt in 1982, guaranteed the right to strike.⁵⁹⁸ The mentioned court considered the ICESCR article as it superseded the penal code and had equal authority in the domestic legislation.⁵⁹⁹

Thus, the SCC considers international law in its constitutional interpretation to ensure the harmony between domestic and international law. In addition, this approach minimizes the possibility of invoking state responsibility for breaching its international obligations.⁶⁰⁰

In light of the above, it could be concluded that there are available remedies within the domestic legal system in Egypt in case there is a breach of the right to health. The basis of these remedies are legal texts in the constitution and international instruments that Egypt is a party to and obtain the force of law as stated under the constitution. On the other, the courts are considered the tool by which this right is shielded. However, the courts are not always taking the side of the citizen claiming the breach of his right. Yet, this does not deny the fact that the courts consider this right in other cases and takes the initiative to protect it.

⁵⁹⁷ Islam Ibrahim Chiha, *Id*, at 246.

⁵⁹⁸ Islam Ibrahim Chiha, *Id*, at 246.

⁵⁹⁹ Islam Ibrahim Chiha, *Id*, at 246.

⁶⁰⁰ Islam Ibrahim Chiha, *Id*, at 259.

V. Conclusion

The IMF was primarily established to help countries facing balance of payment problems to stabilize their economy and to take concrete steps towards economic reform. However, due to extending their mandates and applying harsh conditionality on the borrowing country, their policies have caused harm to some economies.

The EFF given to Egypt in 2016 is a clear example for the negative effect of conditionality on the economic reform process, due to implementation of aggressive austerity measures. The devastating effect on the economy has limited the government's ability to allocate sufficient resources for the health sector. This resulted in adversely affecting the right to health of Egyptian citizens guaranteed by the constitution and by article 12 of the ICESCR. The increase in inflation and poverty affected the accessibility of the right to health. The private individual is the one who suffers the most from the deteriorating economic circumstances resulting from policies accompanying the EFF of the IMF. The effect is further worsened by the lack of available remedies for private individuals.

From an international perspective, the IMF flees accountability for its policies. First, there is no adequate internal mechanism for legal remedies. Second, the IMF cannot be brought before domestic courts as it enjoys immunity construed under its constitutive instrument. Third, the IMF, as other IFIs, refuses to abide by the right to remedy established under customary international law and are reluctant to consider human rights in their operations.

From a domestic perspective, private individual's only resort are domestic courts by appealing decrees issued by the government, which were issued in implementation of the conditionality of the IMF. So, the IMF escapes the responsibility and refuses to share the risk of the consequences of its policies with the borrowing government.