Introduction

1 INTERNATIONAL FINANCIAL INSTITUTIONS, THEIR MEMBER STATES AND THE CLAIM FOR HUMAN RIGHTS RESPONSIBILITY

1.1 *The World Problem*

All year long, representatives of the member States of international financial institutions[1] sit at the latter's decision-making bodies[2] to approve projects and programmes aimed at furthering global development. Through the loans thereby made available, dams and oil pipelines are built, public administrations are reformed, general balance of payments support is provided, and programmes for the promotion of basic service delivery, such as health, education or water supply, are implemented.[3] Ultimately, all such cooperative

[1] The expression 'international financial institutions' is used in this book to generally refer to organisations with a developmental or monetary mandate, aimed at offering qualifying member States a range of financial instruments, technical expertise and advisory services. Although they differ in membership, in their specific functions or operational focus, all international financial institutions serve a public purpose, related either to general development goals or to macroeconomic policy. Except for the International Monetary Fund (IMF), most examples referred to in this book relate to the operations of institutions with a developmental mandate (and not, for example, to funds dedicated to a special sector such as the International Fund for Agricultural Development (IFAD)). These are at times termed 'multilateral development banks' and include institutions such as the World Bank (WB) and regional banks such as the Asian Development Bank (AsDB) or the smaller Black Sea Trade and Development Bank (BSTDB). See: M. Ragazzi, 'International Financial Institutions', in *Max Planck Encyclopedia of Public International Law*, last updated May 2014; and D. Bradlow, 'International Law and the Operations of the International Financial Institutions', in D. Bradlow and D. Hunter (eds.), *International Financial Institutions and International Law* (2010) 2, 3.

[2] The expression Executive Board or Board of Executive Directors will be used in generic terms to refer to the decision-making body of an international financial institution. In some cases, this organ can be termed differently: in the Council of Europe Development Bank, for example, it is termed Administrative Council.

[3] This financing assistance is granted in terms that allow international financial institutions to exert significant influence upon the borrower States' governance and policy-making structures (D. Bradlow, 'Developing Countries Debt Crises, International Financial Institutions, and International Law:

undertakings are presumed to nurture the needs of individuals in developing countries.[4]

Reality, however, is sometimes at odds with such a view of a better world, in that institutionalised forms of multilateral development cooperation do not automatically contribute to the promotion of, and respect for, human rights. As has been noted, '[m]any activities undertaken in the name of "development" have subsequently been recognized as ill-conceived and even counter-productive in human rights terms'.[5] This counter-productivity can come about where the best policies and practices are set in place.[6] Given the prominent role of States as

Some Preliminary Thoughts', 51 GYIL (2008) 111, 140) and thereby, to keep a strong hold over the latter's independence to use the loans received (A. Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts', 7 IOLR (2010) 63, 69).

[4] Taking the WB as an example, its main purposes, as currently defined, are to 'end extreme poverty by decreasing the percentage of people living on less than $1.90 a day to no more than 3%' and 'promote shared prosperity by fostering the income growth of the bottom 40% for every country' (see the WB's website: www.worldbank.org/en/about/what-we-do, last consulted 15 October 2018). See also the description of the Bank's purposes contained in Article I of the International Bank for Reconstruction and Development Articles of Agreement, 2 UNTS 134, 27 December 1945 (IBRD Articles of Agreement). The achievement of poverty alleviation through the promotion of economic growth and social equity undoubtedly entails important human rights dimensions and is inextricably linked to the notion that global development is necessarily a sustainable process. See, inter alia: outcome document of the United Nations Conference on Sustainable Development, 'The Future We Want', annexed to the Resolution adopted by the General Assembly on 27 July 2012, UN Doc. A/RES/66/288.

With regard to the IMF, although it is generally mandated under Article I of its Articles of Agreement (2 UNTS 39, 27 December 1945) to promote macroeconomic stabilisation and surveillance, which point to the exclusive consideration of economic or financial factors in its work, para. (ii) does refer to the 'promotion and maintenance of high levels of employment and real income'. The scope of the Fund's mandate has in reality been widened so as to embrace human rights-related aspects: firstly, its financial assistance policies include variables such as 'good governance', equity, the role of women and environmental protection – all of which are deemed to serve the purposes of long-term economic growth (see: M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (2003) 170–86); secondly, the IMF provides support to low-income countries via, inter alia, concessional financial support through the Poverty Reduction and Growth Trust (PRGT) (see: IMF Factsheet, 'IMF Support for Low-Income Countries' (2018), available at: www.imf.org/en/About/Factsheets/IMF-Support-for-Low-Income-Countries, last consulted 15 October 2018); and thirdly, increased attention has been paid within the IMF to its role in social protection (see: Independent Evaluation Office of the IMF (IEO), 'The IMF and Social Protection' Issues Paper for an Evaluation by the Independent Evaluation Office (2016)). Next to this, it has been noted that the IMF's debt financing activities can contribute to the establishment of conditions for the realisation of human rights, provided certain requisites are met. See: UN Human Rights Council, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, *Guiding Principles on Foreign Debt and Human Rights*, UN Doc. A/HRC/20/23 (2011) 3 (*UN Guiding Principles on Foreign Debt and Human Rights*).

[5] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 2 on International Technical Assistance Measures, UN Doc. E/1990/23 (1990) para. 7.

[6] UN Office of the United Nations High Commissioner for Human Rights, *UN Guiding Principles on Business and Human Rights* (2011) commentary to Principle 12, 24.

creators and participants in the boards of international financial institutions, the question arises of how their international responsibility may be engaged when things go wrong. For instance, is the Board of Executive Directors internationally responsible for approving a loan to a member State that is used for a project during the implementation of which human rights violations occur? This book will attempt to answer this sort of query, premised on the notion that, after adhering to international financial institutions, member States do not leave their international human rights obligations 'at home'.

Scenarios liable to trigger human rights concerns abound. As an example, the financial and economic crisis witnessed in Europe in the past years has had a sweeping impact on human rights (disproportionately affecting the most vulnerable), and the terms in which it has been managed by international institutions and their member States have contributed to a worse status quo in some countries.[7] With the imposition of austerity policies and conditionality upon indebted States as a response to recession, socioeconomic rights have suffered the most, in that debt service obligations are often fulfilled at the expense of social investment.[8] For instance, a study commissioned by the European Parliament[9] surveying the impacts in Portugal of austerity measures negotiated with the so-called Troika[10] traced severe interferences upon a wide range of human rights, among others, children's rights and notably the right to education,[11] the right to health and healthcare,[12] the right to work[13] and the right to pensions.[14] With particular regard to labour rights, a 2016 Report of Independent Expert Bohoslavsky shows how austerity-related labour law reforms, such as the flexibilisation of the labour market through deregulation, the downsizing of the public sector and the reduction of wages and work-related social benefits, have often resulted in the contravention of States' international human rights obligations, the erosion of labour rights and increased discrimination in the labour market towards

7 See, inter alia: UN Human Rights Council, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, UN Doc. A/HRC/31/60 (2016) 13–17 (UN Human Rights Council 2016 Report on Foreign Debt).

8 *UN Guiding Principles on Foreign Debt and Human Rights*, *supra* note 4, 3.

9 M. Canotilho, Study for the European Parliament LIBE Committee, 'The Impact of the Crisis on Fundamental Rights across Member States of the EU: Country Report on Portugal' (2015) (European Parliament Country Report on Portugal).

10 The Troika comprises the European Commission, the European Central Bank (ECB) and the IMF.

11 As noted, Portugal's expenditure on education has been significantly reduced – with children who have special needs or learning disabilities being particularly affected (see 20–5 of the European Parliament Country Report on Portugal, *supra* note 9).

12 Owing to the closure of hospitals and other health units, the rise in healthcare fees and the reduction of free transportation of non-urgent patients (ibid., 26–33).

13 The Report notes that this right has been the most affected one, on the basis of pay-cuts, reduction of severance payments and an expansion in working hours without additional pay (ibid., 34–40).

14 As reported, this right suffered pay-cuts and the rules for calculating the amount of pension became more severe (ibid., 41–3).

young and older persons and individuals belonging to marginalised social groups.[15] With such types of macroeconomic and structural policies being pursued, failures of the past seem to linger[16] – and this to the detriment of 'citizen solidarity', as observed by former IMF Managing Director Strauss-Kahn.[17]

The human rights implications of multilateral development bank operations are likewise extensive. Older accounts of WB-financed projects[18] have extensively condemned the environmental and social damages arising therefrom. These include broader claims of accelerated deforestation of the tropics and neglect for rural farmers in agriculture projects,[19] the forced resettlement of large numbers of people and inundation of areas of great environmental and scientific importance stemming from hydroelectric projects,[20] and more specific allegations such as that of arsenic poisoning deriving from a project intended to provide groundwater from tube wells.[21] Here, as elsewhere, the past seems to haunt the present, and, despite the

[15] UN Human Rights Council, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, UN Doc. A/HRC/34/57 (2016) especially 8–14.

[16] Consider, e.g., the East Asian crisis, where unemployment rates were seen to rise exponentially, reaching levels which were three to five times higher than they had been before the crisis, despite the IMF's interventions. See: J. Stiglitz, 'Democratizing the International Monetary Fund and the World Bank: Governance and Accountability', 16 *Columbia Academic Commons* (2003) 111, 112, 113, and the IMF's own assessment of its 2010 intervention in Greece, entitled 'Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement', IMF Country Report No. 13/156 (2013), asserting that 'the burden of adjustment was not shared evenly across society' (24), that its programme left 'taxpayers and the official sector on the hook' (28), and – on account of the deep recession and 'exceptionally high unemployment' – conceding that '[t]he program did not restore growth and regain market access as it had set out to do' (32).

[17] In an open letter addressed to Germany in 2015, drawing on the Greek bailout deal, Dominique Strauss-Kahn affirms that 'the demon that makes us repeat our errors of the past is never far away . . . In counting our billions instead of using them to build . . . in preferring to humiliate a people because they are unable to reform, and putting resentments – however justified – before projects for the future, we are turning our backs on what Europe should be, we are turning our backs on Habermas' citizen solidarity.' The letter may be found at: http://en.protothema.gr/former-imf-chief-d-strauss-kahns-inspirational-address-to-germans/, last consulted 15 October 2018. The IMF's failure to apply lessons from past crises, notably the Asian one, was corroborated in a recent study of the IEO. See: Report of the Independent Evaluation Office of the IMF, 'The IMF and the Crises in Greece, Ireland, and Portugal' (2016) 38. It is of note that the imposition of strict conditionality by the IMF is not required by its Articles of Agreement, as observed by J. M. Boughton, 'Many Borrowers; How Many Sizes? IMF Lending and Program Design', in *Tearing Down Walls: The International Monetary Fund 1990–1999* (2012) 193.

[18] The WB refers generally to the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), to the exclusion of the International Centre for the Settlement of Investment Disputes.

[19] B. M. Rich, 'The Multilateral Development Banks, Environmental Policy, and the United States', 12 Ecology LQ (1984–5) 681, 689 et seq.

[20] Ibid., 701, 702.

[21] L. A. Kornhauser, 'Incentives, Compensation and Irreparable Harm', in A. Nollkaemper and D. Jacobs (eds.), *Distribution of Responsibilities in International Law* (2015) 144–8.

improvement of the Bank's operational policies,[22] still today 'far too many violations' of the rights to water and sanitation stemming from large-scale development projects are brought to the attention of the Special Rapporteur on the right to food,[23] to name but one example. While projects involving infrastructure, extractive industries and energy stand out as the types of project that lead to most complaints against international financial institutions, even those that are explicitly tailored to produce direct social benefits have raised serious human rights concerns.[24] This is exemplified by the 'villagization' initiative in Ethiopia, where the WB's Promoting Basic Services Program, aimed at supporting education, health, water, sanitation, rural roads and agriculture extension services, has allegedly been linked to 'arbitrary arrests and detention, forced evictions, beatings, torture, killings . . . and inadequate access to food, health care and water'.[25]

In sum, international financial institutions deal with a multitude of matters, ranging from taxation to environmental protection, which almost unavoidably interfere with the enjoyment of human rights – often economic, social and cultural rights. As will be argued in this book, it is essential to ensure that the human rights impacts of all such operations satisfy proportionality tests and that development processes are equipped with procedural safeguards for an effective protection of the rights of their beneficiaries.

1.2 *The Book's Focus*

The abovementioned examples evince the pertinence of judging the impact of international financial institution operations against human rights standards.[26] At the same time, they bring to the fore complex questions when it comes to

[22] For a good synthesis of how the WB's operational policies have evolved, see: N. Bugalski, 'The Demise of Accountability at the World Bank?', 31(1) Am U L Rev (2016) 1, 5–9.

[23] UN Human Rights Council, Report of the Special Rapporteur on the right to food, Hilal Elver, *Access to Justice and the Right to Food: The Way Forward*, UN Doc. A/HRC/28/65 (2014) para. 31.

[24] C. Daniel, K. Genovese, M. van Huijstee and S. Singh (eds.), 'Glass Half Full? The State of Accountability in Development Finance' (2016) 36 ('Glass Half Full Report'), available at: www.ciel.org/wp-content/uploads/2016/01/IAM_DEF_WEB.pdf, last consulted 15 October 2018.

[25] Human Rights Watch, 'Abuse-Free Development: How the World Bank Should Safeguard Against Human Rights Violations' (2013) 1–3, 36, 38 (hereinafter 'HRW Abuse-Free Development Report'). This case led to the submission of a Request to the WB Inspection Panel by the state of Gambella's Anuak Indigenous Peoples. In its Investigation Report, *Ethiopia: Promoting Basic Services Phase III Project (P128891)*, Report No. 91854-ET, 21 November 2014, the panel conceded, inter alia, that the programme's design had not sufficiently assessed and mitigated the risks deriving from Ethiopia's resettlement operations, particularly in the delivery of agricultural services to the Anuaks, thereby producing grave impacts upon the villagers' livelihood and their food security (see: paras. 214–22).

[26] That the operations and decisions taken within the remit of international financial institutions must be compatible with international human rights law has been extensively emphasized by legal scholars and practitioners. See inter alia: UN Human Rights Council, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, UN Doc. A/70/274 (2015); Letter of 28 Special Rapporteurs to the WB President Jim Yong Kim in the context of the process of review of the Bank's

determining which entity is to be held internationally responsible for human rights harm. The problem is general in nature, and essentially relates to the question of how to reorganise sites of power (and thereby ponder international responsibility) in a global governance structure whereby new actors have played increasingly influential roles.[27] It is thus conceivable to impute human rights responsibility to the various international legal subjects involved, i.e., to the borrowing State, to the international financial institution and to its member States. Recently, an argument of the sort was made by De Schutter and Salomon when analysing the Troika's imposition of macroeconomic adjustment conditions for the provision of financial assistance to Greece.[28]

The human rights responsibility of the borrower State is an obvious focus of attention: as a party to a range of human rights treaties, it has undertaken to protect the human rights of individuals under its jurisdiction and, thus, is not to ignore its obligations in the negotiation and conclusion of agreements with its creditors.[29] As a matter of fact, cases have recently been brought against Greece, with success, before the Council of Europe's European Committee of Social Rights, for having violated the right to social security through the adoption of austerity measures.[30] Part of Greece's defence was based on the argument that the restrictions upon social protection complained of had been effected due to its obligations vis-à-vis the Troika.[31] While the Committee rejected this argument,[32] it is true that, indeed, the responsibility of the European Commission, the ECB and the IMF may have also been at stake.

safeguard policies (2014), available at: www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf, last consulted 15 October 2018; UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Mission to the World Bank, Raquel Rolnik, UN Doc. A/HRC/22/46/Add.3 (2013); M. Salomon, 'Of Austerity, Human Rights and International Institutions', 21(4) Eur LJ (2015) 521; HRW Abuse-Free Development Report, *supra* note 25.

27 D. Held and A. Mcgrew, *Globalization / Anti-Globalization: Beyond the Great Divide* (2007) 2–4.

28 O. De Schutter and M. Salomon, Legal Brief Prepared for the Special Committee of the Hellenic Parliament on the Audit of the Greek Debt (Debt Truth Committee), 'Economic Policy Conditionality: Socio-Economic Rights and International Legal Responsibility: The Case of Greece 2010–2015' (2015) (hereinafter 'Legal Brief on the Case of Greece'). See also: M. Salomon, *supra* note 26, 537–40.

29 See, e.g.: Committee on the Elimination of Discrimination against Women, Concluding Observations on the seventh periodic report of Greece, UN Doc. CEDAW/C/GRC/CO/7 (2013) para. 6, referring to the detrimental effects of the measures taken by Greece, in cooperation with the EU and the IMF, to address the financial crisis and the country's persisting human rights obligations.

30 *Federation of pensioners IKA-ETAM* v. *Greece*, European Committee of Social Rights, Decision on the Merits, Complaint No. 76/2012, 7 December 2012. As noted in para. 7 of the decision, the complaint was one in a series of collective complaints regarding the same facts, namely those registered as Nos. 76/2012 to 80/2012.

31 Ibid., para. 10.

32 Ibid., paras. 50, 51, arguing that said international obligations do not remove domestic measures from the ambit of the European Social Charter.

This brings to the fore a parallel locus of responsibility: that of the international (financial) institution. The question has, yet again, recently been raised within the context of the European crisis, this time before the Court of Justice of the European Union (CJEU). It concerned the financial assistance facility provided to the Republic of Cyprus and the attendant responsibility of the European Commission and the ECB.[33] Focusing on the institutions' conduct, performed on behalf of the European Stability Mechanism (ESM),[34] the CJEU remarkably asserted that 'the Charter [of Fundamental Rights of the European Union] is addressed to the EU institutions, including . . . when they act outside the EU legal framework'.[35] These are certainly interesting developments. They are, however, quite specific to the EU context, notably, the obligations of EU institutions. Although it is widely accepted that international organisations are bound by international law, including international human rights law, it remains unclear which obligations under the latter field specifically apply to them. Thus far, lawsuits filed against international financial institutions for alleged human rights violations have proved unsuccessful.[36] More research is needed in this respect, in that much (in the size of another monograph) is still to be discussed: while international (financial) institutions are certainly responsible for their own conduct, the contours of invocation of said responsibility remain uncertain.

Despite the plurality of centres upon which responsibility for the protection of human rights may be imputed, this book will not address them all. It will rather focus on the member States of international financial institutions as global development actors in their own right. It will notably explore how the human rights framework shapes the creation and participation of member States in institutional operations and how secondary rules of international law may be engaged in cases of failure to comply with human rights requirements. A key trigger for the present monograph lies in the basic assumption that if member States, acting as international legal subjects, and the organisations they create *affect* individuals, then the former must make sure that this impact does not occur to the detriment of the international

[33] Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others* v. *European Commission and European Central Bank*, 20 September 2016.

[34] The ESM is an international financial institution created in 2012 to mobilise funding and provide stability support under strict conditionality to ESM members. See: Treaty Establishing the ESM, signed on 2 February 2012, Articles 1 and 3.

[35] *Ledra* v. *European Commission and European Central Bank*, *supra* note 33, para. 67. It is of note that the question had been left unresolved in Case C-370/12, *Thomas Pringle* v. *Ireland*, 27 November 2012.

[36] Lawsuits have been filed against international financial institutions for alleged human rights violations stemming from policy mistakes. Mention could be made of a claim filed by a group of South Korean labour unions against the IMF, blaming the organisation for giving wrong advice when austerity measures were imposed on the country, thereby causing businesses to fail and unemployment to rise (see: Brettonwoods Project, 'Korean Workers Lawsuit Against IMF Thrown Out', 15 April 2000, available at: www.brettonwoodsproject.org/2000/04/art-15638/, last consulted 15 October 2018). The lack of success of these lawsuits is mostly owed to immunity questions, of course (see Section 3.4.2.2, C).

human rights obligations they are bound to observe. As will be seen, such a guaranteeing role is substantiated by procedural requirements of due diligence.

It is sometimes observed that the main reason why member State responsibility is pondered relates to the difficulties around the establishment of international organisation responsibility.[37] Not only are the latter's internal accountability mechanisms underdeveloped, but also, the fact remains that their conduct is hardly liable to judicial adjudication: at the international level, since no standing international court or tribunal enjoys jurisdiction to do so; and at the domestic level, as courts will inevitably grapple with issues of immunity. While all such hurdles might indeed steer third parties towards claiming reparation from member States in cases where international organisation responsibility is quite likely at issue, it is submitted here that the parallel sphere of responsibility of the member States cannot be overlooked. Indeed, as this book will demonstrate, notably in Chapter II, there may very well be valid reasons to claim member State responsibility for/in connection with international organisation conduct and, principally, for their own acts performed in institutional settings. To be sure, to discuss member States' responsibility does not in any way negate the separate legal personality of international organisations and their own responsibility under international law; rather, discussing member States' responsibility for their own behaviour *solely* brings to view a parallel sphere of conduct (to that of the organisation), which is liable to judgement against international legal prescriptions.

In the grand scheme of things, then, this book – focusing as it does on member State responsibility – responds only partially to the question of how to establish international responsibility when it comes to international financial institution operations and attendant injurious human rights impacts. In other words, it solely explores one piece of the responsibility puzzle. Indeed, responsibility in the contexts addressed in this book mainly lies in the hands of the organisation, as decision-maker and executor of programmes and projects. International financial institutions comprise thousands of staff members that make decisions on a daily basis, determine benchmarks and priorities in project implementation, mobilise resources on the ground, evaluate risks and create data. For all this, said organisations will be held responsible if things go wrong. This fact, notwithstanding, does not invalidate the possibility of inquiring into whether the member States were in some way involved in said wrongs.

A few instances of international responsibility therefore arise: as already mentioned, it is highly likely that in most cases only the responsibility of the international

[37] See, e.g.: N. Blokker, 'Member State Responsibility for Wrongdoings of International Organizations: Beacon of Hope or Delusion?', in A. S. Barros, C. Ryngaert and J. Wouters (eds.), *International Organizations and Member State Responsibility: Critical Perspectives* (2016) 34; C. Ryngaert and H. Buchanan, 'Member State Responsibility for the Acts of International Organizations', 7 ULR (2011) 131, 146; R. Wilde, 'Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake', 12 ILSA J Int'l & Comp L (2006) 395, 408, 409.

financial institution for its own wrongful conduct will be at stake; exceptionally, the responsibility of member States may be invoked for/in connection with the wrongs committed by the organisation; exceptionally, again, the responsibility of member States may be invoked for their own wrongful conduct performed in an institutional setting. It is not this book's purpose to address the first hypothesis, that is, the responsibility of international organisations. It will take it as given that international organisations are responsible for their own conduct and that this responsibility can be invoked separately. When it comes to the member States, the book will test, to the extent possible, their responsibility for/in connection with the conduct of international organisations; still, the major part of the analysis will concentrate on member States' responsibility for their own wrongful behaviour.

The book will examine member States' responsibility from the viewpoint of their governance role. It will draw on a novel sphere in which State power has been institutionalised and reconstruct the political reality of the State as a global actor within multilateral cooperative undertakings.[38] Said 'novel sphere' can, for instance, be discerned in the WB's official description of its governance bodies: 'The organizations that make up the World Bank Group are owned by the governments of member nations, which have the ultimate decision-making power within the organizations on all matters, including policy, financial or membership issues. Member countries govern the World Bank Group through the Boards of Governors and the Boards of Executive Directors.'[39] Member States' role as governors thus relates to the notion that they *own* the organisation and have decision-making power on all institutional matters.

The concept of governance has been said to stem from the Greek *kybernan*, which means to pilot, steer or direct.[40] It relates to how actors are capable of providing direction and control for society,[41] thereby yielding collective goods for a particular community.[42] In this book, the notion will be picked up to depict the

[38] Political scientists have explored at length the shifting role of States in the global order by noting the transition from a world of 'government' to one of 'governance'. Various 'theories of the State' have been advanced to describe this phenomenon, notably those of 'governance as the hollowing out of the State', 'degovernancing', 'state-centred governance' and 'big governance', which is marked by the notion of regulatory States. According to the last two perspectives, States still play a leading role in global governance without, however, monopolising authority. This is the understanding that is embraced in this book. See: D. Levi-Faur, 'From "Big Government" to "Big Governance"', in D. Levi-Faur (ed.), *Oxford Handbook on Governance* (2012) 3, 10–14.

Yet, an important distinction must be made between the role that States assume at the global level in a unilateral fashion (think of the exercise of universal jurisdiction under Articles 5 and 7 of the UN Convention Against Torture) and their role in multilateral settings – which includes their participation in international organisations. The latter form of international cooperation can be said to bring about a 'new' role for States, as their subjectivity is defined (for international law purposes) in light of their relationship with the international organisation wherein they operate.

[39] The website is available at:www.worldbank.org/en/about/leadership/members, last consulted 15 October 2018.

[40] D. Levi-Faur, *supra* note 38, 5.

[41] B. Guy Peters, 'Governance As Political Theory', in D. Levi-Faur (ed.), op. cit. *supra* note 38, 19.

[42] T. Risse, 'Governance in Areas of Limited Statehood', in D. Levi-Faur (ed.), op. cit. *supra* note 38, 700.

steering role assumed by States in international financial institutions and the terms in which their actions serve common developmental needs.[43]

But is this not, after all, a matter of politics? As has been observed, there is an 'inherent conflict between law and politics at the heart of the practice of States conferring governmental powers on international organizations'.[44] Drawing on member State governance could thus be seen as 'unduly cloaking the exercise of power within concepts of legality'.[45] Yet, it is submitted here that leaving the matter unexplored in legal terms, which is currently (almost) the case in the literature, is tantamount to unduly cloaking member State exercise of power within concepts of politics. As will be demonstrated in this book, State adherence to international financial institutions does have human rights implications which merit careful attention. Said implications may in some cases lead to the invocation of member State responsibility. If politics are also a question of legitimacy and credibility, the truth is that, in creating and participating in international financial institutions to strengthen cooperation in global development, member States can only be fully credible in what they do if they are prepared to assume responsibility for it.

1.3 *Member State (Human Rights) Responsibility As an Ongoing Discussion*

The main concern underlying this book relates to the fact that the operations of international financial institutions and their member States may produce negative impacts upon human rights, without there being clear criteria, in international law, to establish member State responsibility in said contexts. The absence of a consistent analytical framework to notably assess the creation, by member States, of international financial institutions, and their participation in the latter, runs counter to

[43] Some level of generalisation when referring to the 'member States of international financial institutions' is unavoidable, as it would be impractical to cover even half of the existing international financial institutions. Governance dynamics within these organisations (e.g. powers, functioning and bureaucratic institutionalisation) will necessarily differ if a more in-depth account is undertaken. For example, the BSTDB does not have a resident Executive Board, in contrast with the Bretton Woods institutions. However, for the purposes of this book, which works upon *legal categories* and is meant to provide a general conceptual framework to determine the responsibility of the member States of international financial institutions, such differences do not seem to matter much. Indeed, the governance structure of all these organisations can to some extent be analogised to the corporate model, with shareholders and a weighted voting system that is based on the number of shares or quotas that each member State has subscribed, which, in turn, is linked to the relative size of each member's economy (see M. Ragazzi, *supra* note 1, para. 13). Importantly, the regional financial institutions that were created in the post–World War II era generally followed the institutional set-up of the Bretton Woods organisations, with the Boards of Governors (plenary organ) and Executive Directors (executive organ) assuming the governance and representative functions of these organisations (see Chapter II).

[44] D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005) 31.

[45] I. Venzke, 'International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law', 09(11) GLJ (2008) 1401, 1423.