

# The Asian Development Bank and the Role of Human Rights in the Pursuit of Just and Sustainable Development in the Asia-Pacific Region: An Advocacy Role for Australia?

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## Abstract

The Asian Development Bank ('ADB') is an important institutional financier of development in the Asia-Pacific region: its primary mission is reducing poverty in the region by promoting sustainable and inclusive economic growth. ADB-financed activities have the potential to advance the enjoyment of human rights, but may also be open to the accusation that they sometimes facilitate violations of those rights by national governments. This article examines the ADB's approach to the explicit incorporation of international human rights norms into its policies and procedures, noting its general reluctance to embrace such norms. It argues that ADB member states, including Australia, are under international human rights treaty obligations to ensure that their participation in the activities of and their dealings with the ADB do not involve the violation of their human rights treaty obligations. The article discusses the reasons why, nonetheless, there is relatively little interest among ADB members or staff in the explicit incorporation of human rights standards in their work. It puts forward suggestions for further research, including a detailed and systematic review of ADB's record and the potential that explicit use of human rights framework might have for improving the effectiveness of the ADB's development work. Finally, the article argues that, as the ADB is an important development partner for Australia, and one in which Australian influence is significant and to which Australia's contributions are likely to increase in coming years, there is a strong case for Australia doing more now to encourage the explicit integration of human rights standards into the work of the ADB.

## Introduction

In December 2006, the United Nations ('UN') General Assembly adopted the *Convention on the Rights of Persons with Disabilities* ('CRPD'),<sup>1</sup> which represents a major breakthrough on the

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<sup>1</sup> *Resolution on the Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61<sup>st</sup> sess, 76<sup>th</sup> plen mtg, Agenda Item 67(b), UN Doc A/RES/61/106 (13 December 2006) annex I, opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008; ratified by Australia on 17 July 2008). At the same time the General Assembly also adopted the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, GA Res 61/106, annex II, [2009] ATS 9 (entered into force 3 May 2008; acceded to by Australia on 21 August 2009).

international level in the promotion and protection of the rights of persons with disabilities. The Convention reaffirms the standard canon of human rights, and formulates them in often innovative ways to reflect the experiences and violations of human rights that persons with disabilities often face.<sup>2</sup> Among the innovations in the CRPD is article 32, a provision that, for the first time in a UN human rights treaty, explicitly addresses the obligations of States Parties in relation to international development cooperation.<sup>3</sup> Article 32 requires States Parties, among other things, to ensure that ‘international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities’.<sup>4</sup>

For the first time, the CRPD explicitly highlights the obligations of States Parties in development cooperation. However, the question about the extent to which States’ obligations under other human rights treaties apply to development cooperation (or, more generally, apply extraterritorially) persists.<sup>5</sup> Similarly, there are questions about the consistency of human rights frameworks with different approaches to development and their utility in achieving other development goals.<sup>6</sup>

This article takes up these questions in the context of the Asian Development Bank (‘ADB’) and considers: the extent to which that institution explicitly takes into account international human rights norms in its policies and procedures; the relevance of the international human rights obligations of its members to ADB activities in general and to bilateral relations; and the potential contribution that using a human rights framework might make to achieving the development goals of the ADB, with a particular focus on the

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<sup>2</sup> See, eg, Rosemary Kayess and Phillip French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8(1) *Human Rights Law Review* 1.

<sup>3</sup> Though, of course, article 2 of the ICESCR refers to international cooperation in the process of realising economic, social and cultural rights: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) (‘ICESCR’).

<sup>4</sup> Article 32 provides:

*International cooperation*

1. States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:

- (a) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;
- (b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;
- (c) Facilitating cooperation in research and access to scientific and technical knowledge;
- (d) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.

<sup>5</sup> See, eg, Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004); Michal Gonddek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009) 333–9; *Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (adopted 28 September 2011).

<sup>6</sup> See the discussions in: Paul J Nelson, ‘Human Rights, the Millennium Development Goals, and the Future of Development Cooperation’ (2007) 35(12) *World Development* 2041; Paul Gready, ‘Reasons to be Cautious about Evidence and Evaluation: Rights-based Approaches to Development and the Emerging Culture of Evaluation’ (2009) 1(3) *Journal of Human Rights Practice* 380; Siobhán McNerney-Lankford, ‘Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective’ (2009) 1(1) *Journal of Human Rights Practice* 51.

areas of gender and disability. It then explores the question of Australia's participation in the ADB and the extent to which its obligations under human rights treaties oblige it to bring explicit human rights considerations into the work of the ADB.

This article first provides a brief description of the mandate and activities of the ADB, and then notes the relevance of gender and disability issues in the context of development. It then considers the reluctance of the ADB to refer explicitly to human rights norms in its policies and procedures, and its inconsistent practice in this regard. The article then argues that the ADB and its individual member countries (both lenders and borrowers) should explicitly take into account human rights obligations that are binding on all or nearly all member countries in the activities of the ADB or funded by it, in particular those standards in treaties to which most ADB members are party. It identifies a number of questions for further research relating to the need to test the proposition that adopting a human rights framework will improve the development outcomes of ADB activities in light of the criteria the ADB itself uses to evaluate progress. Finally, it argues that, notwithstanding recent official disfavour of a rights-based approach to development generally, Australia is under a legal obligation to pursue greater explicit adoption of human rights standards within the ADB, and Australia's influence with the ADB and the likelihood that Australian contributions will increase make this particularly important.

## The ADB: Origins and goals

The ADB is an international organisation established in 1966 by international agreement, the *ADB Charter*,<sup>7</sup> its headquarters are in Manila. The ADB started out its life as an institution to assist developing member countries ('DMCs') in the region to develop economically. It was established as an 'Asian' institution, and was intended to be a regionally based and regionally focused bank reflecting the priorities and perspectives of countries in the Asia-Pacific region.<sup>8</sup> As of 31 January 2012, the ADB had 67 members: 48 of these came from the Asia-Pacific region, while 19 came from other parts of the world. The ADB is a significant development funder in the region: in 2009 it disbursed US\$10.1 billion in loans (up from US\$8.5 billion in 2008), and in the same year approved more than US\$13.2 billion in loans, US\$1.1 billion in grants and US\$267.2 million in technical assistance.<sup>9</sup> By way of comparison, in 2010, the World Bank disbursed US\$11.3 billion in loans to South Asia, US\$7.5 billion to East Asia, and US\$10.8 billion to Europe and Central Asia.<sup>10</sup>

Australia was a founding member of the organisation,<sup>11</sup> and considers it — along with the World Bank — to be a key development partner.<sup>12</sup> Cornford notes that Australia is 'the

<sup>7</sup> *Agreement establishing the Asian Development Bank*, signed 4 December 1965, 571 UNTS 123 (entered into force 22 August 1966) <<http://www.adb.org/Documents/Reports/Charter/charter.pdf>> ('*ADB Charter*').

<sup>8</sup> Nihal Kappagoda, *The Asian Development Bank* (Intermediate Technology, 1995); Nitish Dutt, 'The US and the Asian Development Bank: Origins, Structure and Lending Operations' (2001) 31(2) *Journal of Contemporary Asia* 241–61.

<sup>9</sup> ADB, *Annual Report 09* (2010), vol I, 6.

<sup>10</sup> World Bank, *The World Bank Annual Report 2010: Year in Review*, 30, 22, 24 <<http://siteresources.worldbank.org/EXTANNREP2010/Resources/WorldBank-AnnualReport2010.pdf>>.

<sup>11</sup> As of 31 December 2009, Australia had contributed 5.78 per cent of the capital of the ADB and has 4.917 per cent of the votes: ADB, *About ADB: Members* <<http://www.adb.org/about/membership.asp>>.

<sup>12</sup> Jonathan Cornford, *Banking on Aid: An examination of the delivery of Australian aid through the World Bank and the Asian Development Bank (Discussion Paper)* (Manna Gum and Oxfam Australia, 2011) 3, 10–11; Review Panel, Australian

third largest donor and the fifth largest shareholder with the ADB' and 'has a weight of presence on the ADB Board of Governors that it cannot have with the World Bank or UN agencies'.<sup>13</sup>

Over the years the manner in which the ADB has pursued its underlying mission of promoting development has evolved to reflect broader understandings of what development involves beyond a primary focus on economic growth as the main indicator of progress.<sup>14</sup> There has been an increasing emphasis on poverty reduction,<sup>15</sup> to be achieved through sustainable and inclusive economic growth, and greater attention has been given to the need to avoid adverse social impacts and to take greater account of environmental impacts and sustainability in the design, implementation and assessment of the activities the ADB supports.<sup>16</sup>

The ADB is a development *bank* — and, thus, its primary business is lending to governments of DMCs to support programs and projects agreed between the ADB and governments as part of individual countries' development strategies. The ADB provides financial resources to governments in a number of ways: provision of loans at commercial rates of interest; loans at concessionary rates of interest; grants; and technical assistance funding. As many countries of the region have developed, ADB has begun to reorient its practices to reflect the changing nature of the States that make up its membership.

The ADB has also sought to realign its activities to reflect its 'comparative advantage' over other development funders, by focusing its efforts in areas such as 'hard' infrastructure projects (roads, bridges, and power projects), and by decreasing its level of involvement in 'soft' sectors (such as health).<sup>17</sup> It has also begun to place greater emphasis on budget support loans (large sums provided to governments to support specific sectors of the economy) rather than specific project loans.<sup>18</sup> Koeberle and Stavreski define 'budget

Government, *Independent Review of Aid Effectiveness* (2011) 198–9; ADB, *Asian Development Bank and Australia: Fact Sheet* (31 December 2010) <[http://www.adb.org/Documents/Fact\\_Sheets/AUS.pdf](http://www.adb.org/Documents/Fact_Sheets/AUS.pdf)>.

<sup>13</sup> Cornford, above n 12, 10.

<sup>14</sup> There are varying and contested concepts of 'development'. See generally Richard Peet and Elaine Rachel Hartwick, *Theories of Development: Contentions, Arguments, Alternatives* (Guildford Press, 2<sup>nd</sup> ed, 2009); Katie Willis, *Theories and Practices of Development* (Routledge, 2005); Amartya Sen, *Development as Freedom* (Oxford University Press, 1999).

<sup>15</sup> In 1999, the ADB announced 'poverty reduction' as its overarching goal, as outlined in ADB, *Fighting Poverty in Asia and The Pacific: The Poverty Reduction Strategy* <[http://www.adb.org/Documents/Policies/Poverty\\_Reduction/Poverty\\_Policy.pdf](http://www.adb.org/Documents/Policies/Poverty_Reduction/Poverty_Policy.pdf)>. The ADB's new strategy reiterates the vision of an 'Asia and Pacific region free of poverty by 2020': ADB, *Strategy 2020: The Long-Term Strategic Framework of the Asian Development Bank 2008–2020* <<http://www.adb.org/documents/Policies/Strategy2020/Strategy2020-print.pdf>>. Increasingly, its Annual Reports map the relationship between resource allocation with achieving strategic development goals.

<sup>16</sup> In particular, on 23 July 2009, the ADB approved its new *Safeguard Policy Statement*, which was the first policy to outline social and environment standards to govern its behaviour: ADB, *Safeguard Policy Statement (Policy Paper)* (2009) <<http://www.adb.org/Documents/Policies/Safeguards/Safeguard-Policy-Statement-June2009.pdf>>.

<sup>17</sup> For instance, in September 2011 the following projects were approved: the Greater Mekong Subregion Northern Power Transmission Project in Lao PDR; the O Mon Thermal Power Complex Project in Viet Nam; the Hydropower Project in Viet Nam; the Power Transmission Crossing Project in Indonesia; the Remote Island and Mountain Communes Project in Vietnam; the Transport Corridor in Kazakhstan; and the Solar Energy Development Project in Uzbekistan: see ADB, *Project Summaries* <<http://www.adb.org/projects/summaries.asp?query=&browse=1&mode=0&ctry=ALL&stat=2&year=ALL>>.

<sup>18</sup> See eg, ADB, Operations Evaluation Department, *Policy-Based Lending: Emerging Practices in Supporting Reforms in Developing Member Countries*, August 2007 <<http://www.oecd.org/dataoecd/49/55/39517329.pdf>>; R Keith Leonard and Scott Bayley, 'Improving project, program, and policy performance in developing countries through managing for development results' (2008) 8(2) *Evaluation Journal of Australasia* 14, 19 <[http://www.aes.asn.au/publications/Vol8No2/Improving\\_project\\_program\\_and\\_policy\\_performance.pdf](http://www.aes.asn.au/publications/Vol8No2/Improving_project_program_and_policy_performance.pdf)>.

support as financial assistance that supports a medium-term program and is provided directly to a recipient country's budget on a regular basis, using the country's own financial management systems and budget procedures'.<sup>19</sup> In other words, it is not tied to a particular project with specific conditions attached to the carrying out of that project, but rather left to the national government to disburse in accordance with its own national priorities and procedures within normal budgetary processes. This shift has begun to alter the way the ADB and the borrowing government can be held accountable for the manner in which funds are used, and if commitment to advancement of human rights is a low priority within the ministries with primary budgetary control or those with human rights responsibilities are politically weak, then directing resources in this way may be less effective than specific sectoral or project support.

The realignment of the ADB's priorities is embodied in its current 'Long Term Strategic Framework', *Strategy 2020*, adopted in 2008.<sup>20</sup> In this document, the ADB set three strategic agendas: inclusive growth, environmentally sustainable growth, and regional integration. These are to be pursued by focusing on five 'drivers of change': (i) private sector development and private sector operations; (ii) good governance and capacity development; (iii) gender equity; (iv) knowledge solutions; and (v) partnerships. Progress is to be assessed by a corporate results framework.<sup>21</sup>

## Gender, disability and development

### Gender

All the major international development institutions, bilateral development donors, and national governments accept that an effective development strategy requires the equal participation of women in development planning and implementation: they must be active agents in, as well as beneficiaries of, the development process. As the UN Millennium Development Project's Taskforce on Education and Gender Equality stated: '[d]evelopment policies that fail to take gender equality into account or that fail to enable women to be actors in those policies and actions will have limited effectiveness and serious costs to societies'.<sup>22</sup> This view is shared by the World Bank,<sup>23</sup> and other development actors, including the Australian Government, whose policy on gender and development underlines 'the importance of gender equality to growth, governance and stability' and

<sup>19</sup> Stefan Koeberle and Zoran Stavreski, 'Budget Support: Concept and Issues' in Stefan Koeberle, Zoran Stavreski, and Jan Walliser (eds), *Budget Support as More Effective Aid? Recent Experiences and Emerging Lessons* (World Bank, 2006) 3, 5. They also cite a number of other definitions, including those used by the OECD (2005) ('a method of financing a partner country's budget through a transfer of resources from an external financing agency to the partner government's national treasury. The funds thus transferred are managed in accordance with the recipient's budgetary procedures') and the Canadian Agency for International Development (2004) ('program support that is provided directly to host-country institutions to be spent as part of their budgets using their own financial management systems'). Koeberle and Stavreski, 6–7.

<sup>20</sup> ADB, *Strategy 2020*, above n 15.

<sup>21</sup> *ADB Results Framework* (August 2008) <<http://www.adb.org/Documents/Policies/ADB-Results-Framework/r166-08.pdf>>.

<sup>22</sup> UN Millennium Project Taskforce on Education and Gender Equality, *Taking action: achieving gender equality and empowering women* (Earthscan, 2005) 2–3.

<sup>23</sup> World Bank, *Engendering Development: Through Gender Equality in Rights, Resources, and Voice* (Oxford University Press, 2001); World Bank, *World Development Report 2012: Gender Equality and Development* (2011).

states that ‘gender equality is an overarching principle of Australia’s aid program’ and ‘integral to all Australian Government aid policies, programs and initiatives’.<sup>24</sup> The challenge is no longer to persuade donors or international development bodies that gender is critical, but rather how to ensure that this insight is given effect to in practice.

The ADB’s approach to gender issues reflects this position at the level of policy,<sup>25</sup> but the extent to which gender perspectives have been fully incorporated into the design and implementation of projects and other activities and internalised in ADB operations has been uneven. The ADB’s independent advisory body on gender issues, the External Forum on Gender and Development,<sup>26</sup> has consistently urged the ADB to give greater prominence to gender equality perspectives and to the position of women in all its activities, and to use rights-based frameworks in addressing gender equality issues.<sup>27</sup> While this ‘call to rights’ has been taken up only on a sporadic and ad hoc basis, significant progress has been made in the incorporation of gender perspectives in the work of the ADB.<sup>28</sup> However, the shift in focus of the ADB’s activities — towards a greater emphasis on ‘hard’ infrastructure projects, budget support lending, and supporting capital markets development — poses challenges for the full integration of gender equality concern.<sup>29</sup>

## Disability

Although a more recent development, there is also increasing recognition of the importance of ensuring that persons with disability are fully included in the process of development, both as participants and beneficiaries;<sup>30</sup> this is advocated not just as a matter of social justice, but also for sound economic reasons. The adoption of policy frameworks such as the 2002 *Bivako Millennium Framework for Action towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific*<sup>31</sup> (renewed in 2007) reflects the growing international awareness of disability both as a development and as a rights issue in the Asia-Pacific region. Similarly, the inclusion in the CRPD of a specific provision

<sup>24</sup> AusAID, *Gender equality in Australia’s aid program – why and how* (March 2007) 4 <[http://www.ausaid.gov.au/publications/pdf/gender\\_policy.pdf](http://www.ausaid.gov.au/publications/pdf/gender_policy.pdf)>.

<sup>25</sup> ADB, *Gender and Development* (1998) <<http://www.adb.org/Documents/Policies/Gender/gender-policy.pdf>>.

<sup>26</sup> ADB, *External Forum on Gender and Development* <<http://beta.adb.org/themes/gender/external-forum>>.

<sup>27</sup> See, eg, ADB, *External Forum on Gender and Development: Seventh Session, 29–31 May 2006, Outcome of Meetings* (2006) <[http://www.adb.org/Documents/Conference/Gender\\_Development/Gender-Development-Jul2006.pdf](http://www.adb.org/Documents/Conference/Gender_Development/Gender-Development-Jul2006.pdf)>.

<sup>28</sup> According to the 2010 *Gender and Development Progress Report*, 42 per cent of ADB’s overall portfolio and 53 per cent of ADF financed projects directly addressed gender equality and women’s empowerment objectives and 83 per cent of projects addressed gender issues in 2010: ADB, Poverty Reduction, Gender, and Social Development Division, Regional and Sustainable Development Department, *Gender and Development Plan of Action (2008–2010): 2010 Annual Implementation Progress Report* (2011) <<http://www.adb.org/Documents/Reports/Gender/GAD-Plan-of-Action-2010-AR.pdf>>. In 2003, the ADB established the Gender and Development Cooperation Fund as a facility to promote gender equality and women’s empowerment in the Asia-Pacific region.

<sup>29</sup> ADB, *External Forum on Gender and Development: Ninth Session, 15–17 October 2008 - Outcome of Meetings* (November 2008) <[http://www.adb.org/Documents/Conference/Gender\\_Development/Gender-Development-Oct2008.pdf](http://www.adb.org/Documents/Conference/Gender_Development/Gender-Development-Oct2008.pdf)>.

<sup>30</sup> See, eg, Maria Kett, Raymond Lang and Jean-Francois Trani, ‘Disability, development and the dawning of a new convention: A cause for optimism?’ (2009) 21(5) *Journal of International Development* 649; Teresa Njoroge Mwendwa, Ambrose Murangira and Raymond Lang, ‘Mainstreaming the rights of persons with disabilities in national development frameworks’ (2009) 21(5) *Journal of International Development* 662.

<sup>31</sup> The Framework was adopted at the ‘High-level Intergovernmental Meeting to Conclude the Asian and Pacific Decade of Disabled Persons of the United Nations Economic and Social Commission for Asia and the Pacific’ held in Otsu, Shiga, Japan in October 2002. The Framework sets out a policy framework, priority areas for action and goals for the advancement of the position of persons with disabilities. It was renewed in 2007. See Eilíonóir Flynn, *From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities* (Cambridge University Press, 2011) 83–5.

obliging States Parties to ensure the inclusion of disability issues in development activities reflects the increasing awareness of the importance of disability as a development issues.

The ADB undertook a number of activities relating to disability about a decade ago,<sup>32</sup> but there has been little done since that time to incorporate disability perspectives systematically in its work.<sup>33</sup> This is so, even though the ADB recognises that persons with disability in the region are estimated to number 400 million and are consistently among the poorest of the poor.<sup>34</sup> The World Bank has devoted much more attention to disability issues, and has done so within a rights-based framework.<sup>35</sup>

## Human rights, development and the ADB

Although the ADB is not a ‘human rights’ body, as a regional development institution many of its goals overlap with human rights goals: the existence of poverty in the region means that millions of people fail to enjoy basic human rights — in particular, fundamental economic and social rights, such as the right to an adequate standard of living, the right to health and the right to education. The achievement of the institution’s development goals potentially means the achievement of important human rights goals as well.<sup>36</sup> There is also a significant body of literature that argues that ensuring the enjoyment of human rights can be an effective *means* of achieving more effective and fair development.<sup>37</sup> Rights analysis can be important to the setting of goals (for example, defining what type of development projects are needed, to produce what results), as well as a critical part of the process of achieving them (for example, participation of communities in decision-making is likely to lead to more effective projects, as is observance of rights to freedom of expression and organisation, and equality and non-discrimination on the basis of sex, race, ethnic or other status). The World Bank has explicitly recognised the importance of human rights in development, as have the UN<sup>38</sup> and many other development bodies.<sup>39</sup>

<sup>32</sup> For instance, the ADB initiated regional and country-based activities on disability, such as the ‘Expanding Employment Opportunities for Poor Disabled Persons’ project in Mongolia. In 1999, the ADB launched its first ‘Workshop on Disability’ in Manila. In 2002, the ADB hosted a Regional Workshop on Disability and Development: ADB, *Annual Report 2002* (2002) 40. In 2005 it published *Disability Brief: Identifying and Addressing the Needs of Disabled People* <<http://www.adb.org/Documents/Reports/Disabled-People-Development/disability-brief.pdf>>. There are also some references to the position of disabled people in a number of country analyses and other documents.

<sup>33</sup> Andrew Byrnes, ‘A New United Nations Treaty on Disability — An Opportunity for the Asian Development Bank?’ in ADB, *Gender Network News* (September 2006) <<http://www.adb.org/Documents/Periodicals/GNN/newsletter-16.pdf>>.

<sup>34</sup> ADB, ‘Foreword’, *Disability Brief*, above n 32, 3.

<sup>35</sup> World Health Organization and World Bank, *The World Report on Disability* (WHO Press, June 2011); Jeanine Braithwaite and Daniel Mont, ‘Disability and poverty: A Survey of World Bank Poverty Assessments and implications’ (2009) 3 *European Journal of Disability Research* 219; Jeanine Braithwaite, Richard Carroll, Daniel Mont and Karen Pefley, *Disability & Development in the World Bank: FY 2000–2007*, Social Protection Discussion Paper No 0808 (2008); Katherine Guernsey, Marco Nicoli and Alberto Ninio, *Convention on the Rights of Persons with Disabilities: Its Implementation and Relevance for the World Bank*, Social Protection Paper No 0712 (2007); R Holzmann, World Bank, *Social Protection & Labor at the World Bank, 2000–2008* (2009).

<sup>36</sup> Peter Uvin, *Human Rights and Development* (Kumarian Press, 2004).

<sup>37</sup> See, eg, Gready, above n 6.

<sup>38</sup> UN, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies* (2003) <<http://www.undg.org/?P=221>>.

<sup>39</sup> Philip Alston and Mary Robinson (eds), *Human rights and development: towards mutual reinforcement* (Oxford University Press, 2005); Uvin, above n 36. Not all development agencies have done so. For example, AusAID has not

The ADB has been reluctant to embrace human rights standards explicitly in its policy documents, to use a human rights framework systematically in its policies and operations, or even to follow the World Bank in its approach to development and human rights. This reflects concerns among many member states about protecting their sovereignty and questioning universal human rights standards, sometimes justified by reference to the prohibition in the *ADB Charter* on ‘political activity’ and on taking into account considerations other than ‘economic considerations’:

The Bank, its President, Vice-President(s), officers and staff 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 concerned. Only economic considerations shall be relevant to their decisions. Such considerations shall be weighed impartially in order to achieve and carry out the purpose and functions of the Bank.<sup>40</sup>

This reluctance to embrace rights explicitly at the policy level extends even to those instruments which have been accepted by all, or nearly all, of ADB member states<sup>41</sup> (such as the *Universal Declaration of Human Rights*)<sup>42</sup>, or treaties ratified by most ADB members such as the *UN Convention on the Rights of the Child* (‘CRC’)<sup>43</sup> or the *UN Convention on the Elimination of All Forms of Discrimination against Women* (‘CEDAW’).<sup>44</sup> At the same time, the ADB has been prepared to embrace other international standards of lesser normative standing, such as the Millennium Development Goals (‘MDGs’),<sup>45</sup> as part of its policy framework. While some of these embody or are closely aligned with rights frameworks,<sup>46</sup> they do not have the binding force of international treaty or customary law obligations.<sup>47</sup>

By contrast, there has been vigorous and public debate — to which World Bank officials have contributed — about the extent to which the World Bank can and should take human rights considerations into account as a matter of law and policy.<sup>48</sup> This is so, notwithstanding similar limitations in its Charter on political activity and taking into

adopted a general human rights strategy in relation to development activities, though its disability strategy has a rights focus and gender equality has been adopted as a ‘cross-cutting theme’.

<sup>40</sup> *ADB Charter*, above n 7, art 36(2).

<sup>41</sup> See section below, ‘The relevance of international human rights obligations to the work of the ADB’ and nn 66 ff.

<sup>42</sup> GA Res 217A(III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948).

<sup>43</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>44</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>45</sup> *Resolution on the United Nations Millennium Declaration*, GA Res 55/2, UN GAOR, 55<sup>th</sup> sess, 8<sup>th</sup> plen mtg, Agenda Item 60(b), UN Doc A/RES/55/2 (8 September 2000) [19].

<sup>46</sup> Guido Schmidt-Traub, ‘The Millennium Development Goals and human rights-based approaches: moving towards a shared approach’ (2009) 13(1) *International Journal of Human Rights* 72; Philip Alston, ‘Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals’ (2005) 27(3) *Human Rights Quarterly* 755; Cathal Doyle, ‘Indigenous peoples and the Millennium Development Goals – “sacrificial lambs” or equal beneficiaries?’ (2009) 13(1) *International Journal of Human Rights* 44.

<sup>47</sup> See generally Nelson, above n 6; Greedy, above n 6; and McInerney-Lankford, above n 6.

<sup>48</sup> See section below, ‘The relevance of international human rights obligations to the work of the ADB’; Antony Anghie, ‘International Financial Institutions’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Hart Publishing, 2006); David Kinley, ‘Human Rights and the World Bank: Practice, Politics and Law’ in C Raj Kumar and DK Srivastava (eds), *Human Rights and Development: Law Policy and Governance* (LexisNexis, 2006) 155–75; Roberto Dañino, *Legal Opinion on Human Rights and the Work of the World Bank*, 27 January 2006.



account considerations other than economic ones.<sup>49</sup> As a consequence, the approach of the World Bank has become much more flexible, and it has employed explicit human rights frameworks in some activities<sup>50</sup> — although the extent to which human rights has become part of the accepted culture and way of doing things in the World Bank has been questioned.<sup>51</sup> There has apparently been no such public debate initiated around the ADB's position.<sup>52</sup> There has been some limited internal discussion of this issue within ADB, presumably spurred by the developments at the World Bank, but things have progressed no further than this. It appears that human rights are not generally seen by ADB management or by many of its officials as relevant to their central task of promoting development. At best, some officials consider that the ADB is in fact doing human rights work and promoting the enjoyment of human rights substantively, whether or not it explicitly employs human rights analysis in so doing.

### Core labour standards and the ADB

Despite the ADB's reluctance explicitly and systematically to recognise rights in its rhetoric and policies, in practice it has recognised the utility of using a rights framework to design and monitor the effectiveness of development projects in some areas. The most prominent instance has been in relation to Core Labour Standards ('CLS'), which are based on international labour conventions. In 2002, the ADB entered into a cooperation agreement with the International Labour Organization ('ILO'),<sup>53</sup> under which both organisations recognised their overlapping areas of responsibility and the importance of international standards on decent work in the development process. Most, though not all, ADB members are also members of the ILO and are, therefore, bound by basic human rights principles in the field of work, in addition to any specific ILO treaties they may have ratified. In 1998, the 86<sup>th</sup> session of the General Conference of the ILO declared that these fundamental human rights standards were binding on all ILO members.<sup>54</sup> These core standards are: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective

<sup>49</sup> Article IV (10) provides:

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.

(*Articles of Agreement of the International Bank for Reconstruction and Development*, as amended 25 August 1965 (article III) and 30 June 1987 (article VIII(a)), 21 UNTS 439 ('*World Bank Charter*'))

<sup>50</sup> As early as 1998, the World Bank issued a major report about how 'creating the conditions for the attainment of human rights is a central and irreducible goal of development': World Bank, *Human Rights and Development: The Role of the World Bank* (1998). See also, Ana Palacio, 'Special Report: The Way Forward: Human Rights and the World Bank' in World Bank Institute, *Development Outreach* (October 2006) 35.

<sup>51</sup> See Galit A Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank' (2009) 103 *American Journal of International Law* 647.

<sup>52</sup> Though Suzuki and Nanwani discuss some of these issues: Eisuke Suzuki and Suresh Nanwani, 'Responsibility of International Organisations: The Accountability Mechanisms of Multilateral Development Banks' (2005) 27(1) *Michigan Journal of International Law* 181. See also Eugenia McGill, 'The Inspection Policy of the Asian Development Bank' in Gudmundur Alfredsson and Rolf Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Martinus Nijhoff, 2001) 191.

<sup>53</sup> ILO, *Memorandum of Understanding between the Asian Development Bank and the International Labour Organization* (2002) <<http://www.ilo.org/public/english/bureau/leg/agreements/asdb.htm>>.

<sup>54</sup> ILO, *Declaration on the Fundamental Principles and Rights at Work* (1998).

abolition of child labour; and the elimination of discrimination in respect of employment and occupation.<sup>55</sup>

International labour standards are, of course, human rights standards. The prohibition in article 36(2) of the *ADB Charter* of ‘political activities’ and the limitation of factors relevant to decisions to economic considerations only, do not appear to have stood in the way of ADB acceptance of these human rights standards as a useful analytical, monitoring and evaluative tool in areas relevant to the ADB’s operations. Indeed, the ADB has gone further, underlining the importance of the CLS in its work<sup>56</sup> and incorporating them into its *Social Protection Strategy*.<sup>57</sup> Covenants are frequently included in loan agreements, under which the borrowing member country undertakes to ensure observance of these standards in the implementation of the project. The ADB’s *Social Protection Handbook* states that the ADB will comply with the CLS in the design and formulation of its loans, take necessary and appropriate steps to ensure that contractors, subcontractors and consultants will also do so, and regularly monitor that this has been done.<sup>58</sup> Notwithstanding this formal provision, the extent to which effective monitoring of the observance of CLS is actually carried out is not clear.<sup>59</sup>

On the other hand, in its safeguard policies and guidelines in many other areas, the ADB makes use of its own standards that are substantively very similar to human rights standards, but generally makes no reference to the relevant applicable standards, despite their obvious relevance. For example, human rights standards on the right to adequate housing and forced eviction are particularly pertinent to the issue of involuntary resettlement,<sup>60</sup> but the ADB’s *Policy on Involuntary Resettlement*<sup>61</sup> makes no mention of the extensive human rights jurisprudence on this topic, such as the *General comments* of the UN Committee on Economic, Social and Cultural Rights (‘UNCESCR’) on the right to housing,<sup>62</sup> and on forced evictions.<sup>63</sup> Other areas where human right standards are relevant, but have generally not been drawn upon, include the right to education<sup>64</sup> and the right to health<sup>65</sup> in relation to education and health sector loans.

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<sup>55</sup> ADB, *Core Labor Standards Handbook* (2006).

<sup>56</sup> ADB, ‘Core Labor Standards and ADB’, April 2007 <<http://www.adb.org/Documents/Handbooks/Core-Labor-Standards>>.

<sup>57</sup> ADB, *Social Protection: Our Framework, Policies and Strategies* (2003) <[http://www.adb.org/documents/policies/social\\_protection/social-protection.pdf](http://www.adb.org/documents/policies/social_protection/social-protection.pdf)>.

<sup>58</sup> *Ibid* [84], [56]–[57] (footnote omitted).

<sup>59</sup> See generally Peter Bakvis and Molly McCoy, ‘Core Labour Standards And International Organizations: What Inroads Has Labour Made?’ (Friedrich Ebert Stiftung, International Trade Union Cooperation, Briefing Paper No 6/2008) 5.a. <[http://www.nuso.org/upload/fes\\_pub/McCoy.pdf](http://www.nuso.org/upload/fes_pub/McCoy.pdf)>.

<sup>60</sup> Oxfam Australia, *Safeguarding or disregarding? Community experiences with the Asian Development Bank’s Safeguard Policies* (2007), 14.

<sup>61</sup> ADB, *Policy on Involuntary Resettlement* (1995) <<http://www.adb.org/Resettlement/default.asp>>.

<sup>62</sup> UNCESCR, *General Comment No. 4: The Right to Adequate Housing (art 11)*, 6<sup>th</sup> sess, UN Doc E/1992/23 (1991).

<sup>63</sup> UNCESCR, *General Comment No. 7: The Right to Adequate Housing (art 11.1): Forced Evictions*, 16<sup>th</sup> sess, UN Doc E/1988/22 (1997).

<sup>64</sup> UNCESCR, *General Comment No. 13: The Right to Education (art 13)*, 21<sup>st</sup> sess, UN Doc E/C.12/1999/10 (1999) (‘*General Comment No. 13*’).

<sup>65</sup> See, eg, UNCESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (art 12)*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (2000) (‘*General Comment No. 14*’).

## The relevance of international human rights obligations to the work of the ADB

There is a significant body of literature addressing the question of the extent to which international legal obligations formally bind the multilateral development banks,<sup>66</sup> though only some of this specifically addresses the position of ADB.<sup>67</sup> The focus of this article is not whether some of these obligations bind ADB as an international legal person by virtue of their status as customary international law rules or are a relevant source for interpreting the *ADB Charter*. Rather, this article addresses the relevance of the international human rights treaty obligations of the *individual* member countries of ADB to their participation in the ADB's work. Of particular importance are the CRC, the CEDAW and the CRPD — to which most of the members of the ADB are already, or are likely to become, parties.

Whatever the position is in relation to the obligations that bind international organisations,<sup>68</sup> there is a strong argument that States do not absolve themselves of their human rights obligations in a particular area by establishing an international organisation with responsibility in that area.<sup>69</sup> Indeed, it can be argued that States must conduct themselves consistently with those obligations when they participate in the activities of the organisation and must endeavour to ensure that the actions and consequences of the actions taken by those organisations do not involve violations of rights guaranteed by human rights treaties and customary international law. Given the collective nature of these organisations and their status as independent legal entities, the content of a State's obligation is a complex issue, particularly if an individual State is not in a position to control or even influence significantly decisions that may have the effect of violating the human rights of persons in other States.

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<sup>66</sup> Clapham, above n 48; Anghie, above n 48; Darrow, above n 48; Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Routledge, 2001).

<sup>67</sup> See Suzuki and Nanwani, above n 52.

<sup>68</sup> The Draft Articles on the Responsibility of International Organizations and Commentaries, adopted by the International Law Commission in 2011, also provide some insights into the question of the responsibility of a State that may arise from its engagement with an international organisation: International Law Commission, 'Draft Articles on the Responsibility of International Organizations', *Report of the International Law Commission*, 63<sup>rd</sup> sess (2011), ch V, para 87, UN GAOR, 66<sup>th</sup> sess, Supp No 10, UN Doc A/66/10 ('*ILC Draft Articles*'). The *ILC Draft Articles* deal with the secondary rules of state responsibility, rather than the primary rules set out in particular treaties or embodied in specific norms of customary international law. A State is not, in general, responsible where international organisation of which they are a member commits an internationally wrongful act: see Article 62, Commentary, *ILC Draft Articles*, 162–5. However, the *ILC Draft Articles* make it clear that States may incur liability for aiding, assisting, or directing and controlling an international organisation in the commission of an internationally wrongful act, or for coercing an international organisation to commit an act that but for the coercion would be an internationally wrongful act. However, in order for States to incur this secondary form of liability, it must be shown, among other things, that the act of the international organisation is a violation of an international obligation binding on the international organisation and that the State had knowledge of the circumstances of the internationally wrongful act: see *ILC Draft articles*, arts 58–60. There is a further category of potential liability that may be relevant to State participation in development banks where the international wrongfulness of the act of the international organisation is not a prerequisite to the responsibility of the State. Article 61 provides that a member State 'incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing to commit an act that, if committed by the State, would have constituted a breach of the obligation.'

<sup>69</sup> See Andrew Byrnes, 'Article 2' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012).

There is considerable support for the application of human rights treaties in this way. For example, the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*,<sup>70</sup> which deal specifically with obligations under the ICESCR, state:<sup>71</sup>

The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organizations, individually or through the governing bodies, as well as the secretariat and nongovernmental organizations should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights.

The position in relation to the obligations of States in relation to their participation in international organisations was put even more clearly in a recent document emanating from a similar source, the 2011 *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, adopted by a group of international human rights law experts and purporting to summarise the current state of international law express the obligation on this issue:

#### 15. Obligations of States as members of international organisations

As a member of an international organisation, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competences to, or participates in, an international organisation must take all reasonable steps to ensure that the relevant organisation acts consistently with the international human rights obligations of that State.<sup>72</sup>

<sup>70</sup> 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691. The Guidelines were adopted by a meeting of more than 30 distinguished experts at Maastricht on 22–26 January 1997 that sought to elaborate on the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*. The participants described the Guidelines as reflecting the evolution of international law since 1986 vis-à-vis the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies).

<sup>71</sup> *Maastricht Guidelines*, *ibid* 698. See also Clapham, above n 48, 109, citing *Waite and Kennedy v Germany* (European Court of Human Rights, Grand Chamber, Application No 26083/94, 18 February 1999):

67. The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.

See also Article 61, Commentary, *ILC Draft Articles*, above n 68, at 159–61.

<sup>72</sup> *Maastricht Principles*, above n 5, [69].

There is also support in the practice of the UN human rights treaty bodies for the position that a State should ensure that its actions, and the consequences of any agreement it enters into or of any decision it has control over, do not violate the rights guaranteed in treaties to which it is party. Various human rights treaty committees have called on States Parties: to take into account the effect of development assistance on the realization of the rights in other treaties;<sup>73</sup> to take into account the rights guaranteed under human rights treaties when a State is negotiating with international financial institutions in relation to loans and other forms of financing for national projects;<sup>74</sup> to ensure that when entering into international agreements relating to trade liberalisation or other subjects, that these agreements do not have an adverse impact on protected rights;<sup>75</sup> and to take steps in their capacity as members of international organisations — including the various international financial institutions — to ensure that due account is taken of protected rights in the activities of those institutions.<sup>76</sup>

On this approach, individual member countries are obliged to take what measures they reasonably can to ensure that they comply with their obligations under all treaties to which they are party. However, not all member countries are parties to the same treaties and, in the case of the ICCPR for example, a significant number of ADB members are still not parties.<sup>77</sup> Accordingly, it might be argued that it would be unreasonable to expect the organisation as a whole to explicitly embrace the standards of treaties to which a significant proportion of member countries are not party.

However, when it comes to those treaties to which most or all ADB member countries are or are likely to become parties, the situation may arguably be claimed to be different — as the ADB community as a whole has accepted these standards as applicable to themselves; they are not imposed from outside. Into this category fall the CRC and CEDAW, and it is likely that the CPRD will also attain a similar level of ratification.

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<sup>73</sup> This would include: ensuring that gender impact is taken into account when designing and delivering development assistance. The CEDAW Committee has commended a number of States for ensuring that gender was specifically taken into account the provision of development assistance. For example, the Committee has commended Canada's policy 'at the international level, in setting women's human rights standards, providing financial and other assistance to women's rights projects in developing countries as well as mainstreaming gender in its development assistance programmes and projects': 'Concluding comments on Canada', UN Doc A/58/38 [340] (2003). See also the Committee's 'Concluding comments on Japan', UN Doc A/58/38 [355] (2003) and 'Concluding comments on Ireland', UN Doc A/60/38 [377] (2005).

<sup>74</sup> See, eg, UNCESCR, *General Comment No 18 (The right to work)*, 35<sup>th</sup> sess, UN Doc E/C.12/GC/18 (2005) [30]; UNCESCR, *General Comment No. 12 (The right to adequate food)*, 20<sup>th</sup> sess, UN Doc E/C.12/1999/5 (1999) [36] ('*General Comment No. 12*'); Committee on the Elimination of Racial Discrimination, *General Recommendation XXIX (Article 1, paragraph 1 of the Convention (descent)*, 61<sup>st</sup> sess (2002) [7(ii)]. See also Principle 19 of the *Montreal Principles on Women's Economic, Social and Cultural Rights* in (2004) 26 *Human Rights Quarterly* 772 ('*Montreal Principles*').

<sup>75</sup> See UNCESCR, *General comment No 15 (The right to water)* (2002), 29<sup>th</sup> sess, UN Doc E/C.12/2002/11 (2002) para 35; *General Comment No. 14*, UN Doc E/C.12/2000/4, [39]; *General Comment No. 13*, UN Doc E/C.12/1999/10, [56]; *General Comment No. 12*, UN Doc E/C.12/1999/5, [36]. See also *Montreal Principles*, above n 74, Principle 19.

<sup>76</sup> See, for example, *General Comment No. 14*, UN Doc E/C.12/2000/4, [39]. See also *Montreal Principles*, above n 74, Principle 19.

<sup>77</sup> As of 31 January 2012, of the eligible 65 members of the ADB (Hong Kong and Taipei are ineligible to ratify the ICCPR in their own names, though it applies to Hong Kong as a matter of international law), 49 are parties to the ICCPR. Bhutan, Brunei, Cook Islands, Fiji, Kiribati, Malaysia, Marshall Islands, Micronesia, Myanmar, Singapore, Solomon Islands, Tonga and Tuvalu have neither signed nor ratified the ICCPR. China, Nauru, and Palau have signed, but not ratified, the ICCPR. See *Multilateral Treaties Deposited with the Secretary-General*, chapter IV, <<http://treaties.un.org/Pages/ParticipationStatus.aspx>>.

As of 31 January 2012 there were:<sup>78</sup>

- 193 States Parties to the CRC, and all but two of the members of the ADB were bound by the treaty;<sup>79</sup>
- 187 States Parties to the CEDAW, which applied to all but two members of the ADB;<sup>80</sup>
- 110 States Parties to the CRPD. Of the 65 ADB members eligible<sup>81</sup> to become a party to the CRPD, 36 had become parties to the Convention, and another 20 members had signed, but not yet ratified, the treaty.<sup>82</sup> One can reasonably expect the CRPD to attain levels of ratification of the same order as CEDAW in the coming years.

What this demonstrates is that among the ADB community there is a broad consensus (almost unanimity) on the content of particular human rights treaties. Given that the provisions of these treaties are binding on individual members in relation to their participation in international organisations, there is much to be said for arguing that the ADB should be explicitly taking into account these norms in designing and implementing its policies and activities. Certainly, individual member countries such as Australia are obliged to make efforts in their governance and other roles within the ADB to ensure that these standards are followed.

There is no reason to be found in the language of the *ADB Charter* why this should not be done. While the few studies of the ADB as an institution<sup>83</sup> do not address the human rights or ‘political activities’/‘economic considerations’, there has been extensive discussion of the almost identical provisions in the *World Bank Charter*. The debates in that context, and subsequent practice of the World Bank, make it clear that taking human rights into considerations in the design and implementation of activities does not, of itself, offend against those prohibitions. In fact, the legal position seems very clear — nearly all the member states of the ADB are obliged to ensure that they observe the relevant human rights standards in the CRC and CEDAW (and arguably others) in their participation in ADB governance, and also in the agreements they enter into with the ADB as borrowers or recipients of grants or technical assistance. Indeed, there appears to be no reason why

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<sup>78</sup> Ibid.

<sup>79</sup> The only members of the ADB that are not parties to the CRC are the United States of America (‘US’) (which has signed but not ratified the Convention), and Taipei (which is not in a position to become party to the Convention).

<sup>80</sup> The only members of the ADB to which the CEDAW Convention does not apply are Taipei (which is not eligible to ratify the Convention) and the US. The US has signed but not ratified the Convention. The Convention applies to Hong Kong by virtue of the application of the Convention to the Hong Kong SAR by the People’s Republic of China.

<sup>81</sup> Hong Kong and Taiwan (‘Taipei, China’) are separate members of the ADB. The CRPD applies to Hong Kong by virtue of China’s ratification of the Convention and its application to the Hong Kong Special Administrative Region. The Convention does not apply to Taipei/Taiwan as a matter of international law.

<sup>82</sup> Only the following members eligible to do so have neither signed nor ratified/acceded to the CRPD: Afghanistan, Kiribati, Marshall Islands, Nauru, Samoa, Singapore, Switzerland, Tajikistan, Timor-Leste, and Tuvalu. The following ADB members had signed the CRPD but not yet ratified it: Bhutan, Brunei Darussalam, Cambodia, Federated States of Micronesia, Fiji Islands, Georgia, Japan, Kazakhstan, Kyrgyzstan, Palau, Papua New Guinea, Solomon Islands, Sri Lanka, Tonga, Uzbekistan, Viet Nam, Finland, Ireland, Netherlands, Norway, and the US. Most of these States can be expected to ratify the CRPD in the next few years.

<sup>83</sup> John White, *Regional Development Banks: The Asian, African and Inter-American Development Banks* (Praeger, 1972), ch 2, 33–86; Po-Wen Huang, *The Asian Development Bank: Diplomacy and Development in Asia* (Vantage Press, 1975); Kappagoda, above n 8.

the ADB should not draw a borrowing member's attention to its human rights obligations in order to ensure that the relevant partners on the borrowing side are present in negotiations and appropriate safeguards included in any loan agreement in the form of explicit standards and tailored evaluation procedures. However, in practice, this appears to be done relatively infrequently.

### **The (lack of) power of legal norms and the implications for research and advocacy**

Perhaps the more interesting question — to international lawyers at any rate — is why these strong legal arguments, if made at all in the ADB environment, have so little persuasive power. The answer here lies in the political sensitivity for some States, such as China, Myanmar, Singapore and Thailand, of even mentioning the term 'human rights', let alone the implications for them of its substantive content. It arises equally importantly from the different perspectives applied by those who place a premium on international legal obligations (above all, international lawyers, and human rights advocates), and those who make up the bulk of the development community, who have different disciplinary backgrounds and different perspectives on what drives and is important in development.<sup>84</sup>

The cognitive and professional frameworks and development assumptions that make up the dominant culture of an institution such as the ADB are critical to how claims of law and its priority are received. Of itself, the normative status of international law has little persuasive value in this context — interest is likely only to be aroused when it can be demonstrated that legal or human rights frameworks have an instrumental value, by helping to achieve the goals that the institution considers critical to development.<sup>85</sup>

The challenge is, thus, to demonstrate not only that human rights may be important process goals in themselves (many of the values of human rights as process are recognised in the development universe — participation, consultation, transparency, due process), but also how human rights can bring about better development in the terms in which development institutions themselves measures that progress.<sup>86</sup>

It is here that those interested in securing a more prominent place for international legal norms in the ADB world face a major task. There has been much discussion of rights-based approaches<sup>87</sup> to development and there is considerable support for the importance of rights-based approaches within bodies such as the World Bank, Oxfam, CARE, UNICEF

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<sup>84</sup> See generally Sarfaty, above n 51.

<sup>85</sup> See Varun Gauri, 'Social Rights and Economics: Claims to Health Care and Education in Developing Countries' (2004) 32(3) *World Development* 465.

<sup>86</sup> See, eg, McInerney-Lankford, above n 6, 57.

<sup>87</sup> See, eg, Uvin, above n 36; André Frankovits, Patrick Earle, and Eric Sidoti, *The Rights Way to Development: Policy and Practice* (Human Rights Council of Australia, North Sydney, 2001); McInerney-Lankford, above n 6, 62–8. While there are different understandings of what a rights-based approach might involve, the formulation by the Australian Human Rights Commission in its submission to the Independent Review of Australia's Aid Effectiveness is a useful formulation:

A human rights-based approach to development is based on agreed international human rights standards. It views poverty as a direct result of disempowerment and exclusion. A rights-based approach focuses on redressing the discriminatory practices and inequalities that impede development progress by supporting empowerment, participation and capacity building. A rights-based approach focuses as much on how things are done as what is being done.

(Review Panel, above n 12, 112)

and the UN Development Programme ('UNDP').<sup>88</sup> Although there is evidence that a rights-based approach may produce better results,<sup>89</sup> there has been little detailed work on this in the context of the ADB, or by the ADB. Human rights-based approaches may contribute to measurable development advances, but they also potentially pose challenges to systemic structures or deprivation and exclusion — that is why they can be so challenging to some States and why they are often fiercely resisted in this type of debate.

As a practical matter, to advance the case for the more explicit and systematic inclusion of relevant human rights norms in ADB policies and practices, a case will have to be made that responds to the perspectives and priorities of those who test the relevance of such external standards by reference to their efficacy. To do this, scholars, advocates and the ADB itself need to undertake a critical examination of ADB practice in areas where there are broadly accepted human rights norms (including CLS, but also CEDAW and CRPD), and to assess their actual or potential contribution to ADB operations and goals. This would involve:

- an examination of the development goals set by the ADB and the indicators that the ADB uses to evaluate its success in achieving those goals in relation to gender equality and the position of marginalised groups such as persons with disabilities, and its systems for assessing the implementation of Core Labour Standards in its operations;
- identification of the specific human rights and corresponding indicators that are relevant to these specific areas; and
- identification of projects in which it is demonstrable that a failure to adopt a 'human rights approach' or to advert to specific human rights, has led to a less effective outcome in terms of the ADB's development goals than would have occurred had a human rights-focused approach been taken.

### **Australian development assistance policy, human rights and the ADB**

This section takes up the issue of whether Australia is under an obligation to promote the implementation of international human rights treaties through its participation in the work of the ADB and, if so, what forms that might take. This question is linked to the broader questions of the extent to which Australia adopts rights-based frameworks in its development assistance policies generally (including through the multilateral development banks). As shown below, while there has been some discussion of this issue from broad policy and instrumental perspectives in official inquiries, there has been almost no attention given to the normative dimensions of the question.

The scope and operation of Australia's development assistance policies have been subject to review by a number of bodies in last few years. In 2010, the Commonwealth Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade, in the report of its inquiry into human rights in the Asia-Pacific region, considered the relevance

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<sup>88</sup> While AusAID does not adopt a rights-based approach generally, in relation to gender and disability its focus appears to rest on such an approach. AusAID (2007), *Gender equality in Australia's aid program – why and how* (March 2007) <[http://www.ausaid.gov.au/publications/pdf/gender\\_policy.pdf](http://www.ausaid.gov.au/publications/pdf/gender_policy.pdf)>; AusAID, *Development for All: Towards a disability-inclusive Australian aid program 2009-2014* (2008), <[http://www.ausaid.gov.au/keyaid/pdf/FINAL\\_AusAID\\_Development for All.pdf](http://www.ausaid.gov.au/keyaid/pdf/FINAL_AusAID_Development%20for%20All.pdf)>.

<sup>89</sup> See, eg, Greedy, above n 6, 390–8.



of human rights to Australia's aid program.<sup>90</sup> The Committee expressed the view that 'development assistance is a natural and logical arena of government operations in which consideration of human rights impacts should be integral to the planning and implementation',<sup>91</sup> and, accordingly, recommended that 'AusAID adopt a human rights-based approach to guide the planning and implementation of development aid projects'.<sup>92</sup>

The matter was further considered by a Review Panel that conducted an independent review of the effectiveness of Australia's aid programs in 2010–2011.<sup>93</sup> The Panel received a number of submissions advocating that Australia should formally adopt a rights-based approach to its aid program. While the meaning of a 'human rights-based approach' is not self-evident and there are various understandings of it, the Panel (as had the Joint Standing Committee) referred with approval to an approach encapsulated in the submission by the Australian Human Rights Commission.<sup>94</sup>

The Review Panel noted that there were already ways in which Australian development assistance policy and activities reflected a rights-based approach or explicitly supported activities that were intended to promote awareness of and fuller enjoyment of human rights. In this regard, it referred to AusAID's disability strategy, *Development for All: Towards a disability-inclusive Australian aid program 2009-2014*, as 'an example of a human rights-based approach to development as it is guided by the [CRPD]'.<sup>95</sup> The Panel also noted the role of the Human Rights Small Grants Scheme, the aim of which was to directly support human rights education, capacity building and advocacy.<sup>96</sup>

The Panel rehearsed a number of arguments for and against the adoption of a rights-based approach to development assistance generally.<sup>97</sup> The arguments put in support of such an approach were that: development programs should advance human rights; and development cooperation should be underpinned by human rights principles and should support the claiming of rights and the meeting of responsibilities. It was also argued that a rights-based approach involved a more holistic approach to development, led to improved aid effectiveness, improved sustainability, and improved cooperation with governments.

A number of counterarguments were also identified.<sup>98</sup> It was suggested that such a rights-based approach was vague and unpredictable, and that the Australian Government does not adopt such an approach in its own domestic health, education and other programs. In addition, there was the counterargument that a rights-based approach would have the result of making human rights the fundamental objective of Australian aid policy, rather than the reduction of poverty. Further, some parts of the aid program, 'such as technical assistance to central banks or road maintenance, do not easily lend themselves to a human rights perspective and it would be a waste of time trying to twist such efforts into

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<sup>90</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Human rights in the Asia-Pacific: Challenges and opportunities* (May 2010) 130–4.

<sup>91</sup> Ibid 134, [6.47].

<sup>92</sup> Ibid 134, Recommendation 2.

<sup>93</sup> Review Panel, above n 12, 110–14.

<sup>94</sup> Ibid 112. The definition appears above n 87.

<sup>95</sup> Ibid 110.

<sup>96</sup> Ibid 111.

<sup>97</sup> Ibid 112–13.

<sup>98</sup> Ibid 113.

a human rights framework',<sup>99</sup> and adopting such an approach would mean that the aid program would have to be significantly reshaped. The Panel also noted that the MDGs 'do not fully align with helping countries meet their human rights responsibilities' and that 'there were many more agreed human rights goals than those which overlapped with the MDGs' and advancing these other human rights were 'not core business for the Australian aid program.'<sup>100</sup>

The Panel noted that 'some of these arguments carry weight, others not so much'<sup>101</sup> — though it did not identify which were which — and suggested that '[t]o some degree, the debate is about how the aid program approaches and describes what is being done rather than what it is actually doing', and that, in essence, the benefits of a rights-based approach reflected 'good development practice'.<sup>102</sup>

In the end the Review Panel did not support the formal adoption of a rights-based approach.<sup>103</sup> Its main concern seems to have been that because the major goal of the Australian aid program was the reduction of poverty (and the pursuit of the MDGs as a principal means to this end), explicitly adopting human rights standards to determine when and how aid might be offered would, at best, be replicating good development practice, and, at worst, could be a distraction from the focus on poverty reduction activities. It did, however, consider that the Government needed to do more to communicate the human rights dimensions of the aid program.<sup>104</sup>

The Review Panel's conclusion is, thus, based on its assessment of the primary policy goals and the most effective means of achieving those goals, and does not address any of the normative issues about the extent of Australia's obligations under treaties that apply to how it conducts itself in its development activities. Even in terms of its policy and instrumental assessment, the Review Panel appears to have overstated the case against such an approach. The adoption of a rights-based approach would not necessitate human rights being placed above poverty reduction, but rather human rights norms and approaches would be built into the procedure for pursuing that goal. Specifically, those human rights relevant to the achievement of the development goals would be the ones that would be drawn on. For example, if a series of new primary schools were to be built, explicit attention to the right of accessibility of children with mobility or vision impairments, and the right to sexual equality (for example, the need to ensure that there were proper toilet facilities for girls to ensure equal access), would be enhanced by specific attention to CRPD and CEDAW norms and the practice under those treaties. The Panel itself accepted that a human rights-based approach in many cases reflects good development practice and could contribute to the achievement of development goals in some circumstances.<sup>105</sup>

Nor would a rights-based approach necessarily lead to the intrusion of rights that were not part of 'core business' (the Panel refers to freedom of expression), though in some cases the achievement of poverty reduction goals might well be most effectively achieved if the enjoyment of such rights were enhanced. For example, if a new power station and

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<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid 113–14.

<sup>105</sup> See *ibid* 112–13.

transmission lines were to be built in an area, then a range of rights would be relevant — not just the rights to health and respect for one's home, but also the rights of the local population to be informed, to organise themselves, and to exercise their freedom of expression. The adoption of a human rights-based approach in relation to a proposed loan for such a project would involve a consideration not of the level of the enjoyment of human rights (or freedom of expression) generally in the country, but of ensuring their enjoyment in the particular context.

The Independent Review of Australia's aid program has addressed only some of the issues relevant to whether Australia should be adopting a more explicit human rights-based approach in development assistance activities, in particular in the context of its participation in the ADB. The review largely focused on instrumental issues and whether a human rights-based approach (rather generally discussed) would enhance the achievement of the overriding goal of reducing poverty for the excluded and marginalised groups. The Review Panel saw that as questionable — human rights were simply a reinforcement of what was already accepted as good development practice (and, therefore, added nothing of significance), or they were a potential distraction. This perspective reflects the approach, referred to above, of many development practitioners in the ADB and elsewhere. It also raises the challenge of the need for further research along the lines outlined above to demonstrate the ways in which a rights-based approach can enhance the achievement of those goals (reinforcement might be enough). Furthermore, the Review did not address the normative issues, in particular Australia's explicit obligation under the CRPD and similar obligations that arguably exist under the CRC and CEDAW Conventions (and other treaties as well).

The Australian Government's July 2011 response<sup>106</sup> to the Independent Review Panel report did not address these issues — indeed, the term 'rights-based approach' did not appear in the response and there is no discussion of relevant treaty obligations. The Government response was focused on setting clear substantive and country/regional priorities, the efficient and transparent administration and oversight of the aid program, and the means of delivering aid. It made no explicit reference to the recommendations of the Independent Review so far as human rights went.<sup>107</sup>

The Government response identified five strategic goals for the aid program: saving lives; promoting opportunities for all; investing in food security, sustainable economic growth and private sector development; supporting security, improving the quality of governance, and strengthening civil society; and preparing for and responding to disasters and humanitarian crises.<sup>108</sup> While human rights goals are plainly relevant in many of these areas — gender equality, disability, governance, and food security stand out as the obvious, but by no means exclusive ones — there was no discussion of, or commitment to, an explicit rights-based framework across the board.

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<sup>106</sup> AusAID, Australian Government, *An Effective Aid Program for Australia: Making a real difference—Delivering real results* (July 2011).

<sup>107</sup> This appears to be in part due to the fact that these recommendations were not formally identified as numbered Recommendations. The Government responded to each of the numbered Recommendations made by the Review Panel: *ibid* annex I.

<sup>108</sup> *Ibid* ch 5.

## Conclusion

The activities of the ADB have the potential both to advance human rights, but also to facilitate violations of them (which may in turn undermine long-term goals of development). Advocates of human rights maintain that not only is the enjoyment of human rights important in itself (including the process aspects of human rights guarantees), but that adopting an explicit human rights framework of analysis has a range of benefits, including enhanced development effectiveness.

Australia is under international legal obligations to take whatever measures are reasonably open to it to ensure that the ADB acts consistently with the international obligations that Australia has assumed. This would include Australia taking whatever measures it reasonably can to ensure that ADB-supported activities do not lead to violations of human rights, including encouraging the explicit adoption of human rights standards in ADB policies, practices and loan conditions, and encouraging the inclusion of human rights standards in discussions between the ADB and member countries. While an obligation to take reasonable steps is not a requirement to achieve the result, it does require the adoption of focused and explicit measures towards that goal.

Australia's position of influence within the ADB suggests that concerted attention to this issue would not be futile. Given that the recent Independent Review and Government response respectively have rejected and ignored the issue of a rights-based approach, and failed to consider the extent of Australia's human rights treaty obligations in this context, the question needs to be reconsidered, taking into account these normative arguments. As a start some consideration could be given to how this might be included in Australia's next partnership agreement with the ADB. There is presently no explicit reference to human rights standards in the AusAID–ADB Partnership Framework, the document that provides the basis for cooperation between Australia and the ADB from 2009 to 2016.<sup>109</sup> The document reflects a commitment to the pursuit of poverty reduction and sustainable development as the primary goals, with the achievement of the MDGs as a focus of that effort.

While the argument about legal obligation applies to Australia, it applies equally to other member states which are party to human rights treaties. Certainly, so far as the three treaties to which nearly all ADB members are presently parties or likely to become parties (CEDAW, CRC and CRPD), there appears to be no substantive human rights policy reason why these treaties could not be drawn on explicitly in a systematic way to inform the work of the ADB. Arguments that referring to human rights norms are inconsistent with the *ADB Charter* are unpersuasive, and the collective effect of individual States' obligations — if pursued by States within the ADB — mean that the ADB could go down this path.

However, the issue is not just a normative one — there is also the issue of whether a human rights-based framework involving more explicit use of human right standards would help to achieve the primary development goals of the ADB. Only by making a convincing case to this effect will those in government, the ADB, and the development community who are not persuaded by normative arguments, come to accept that this is a desirable course of action. While there has been some helpful work done in this regard,

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<sup>109</sup> *Partnership Framework on Development between the Asian Development Bank and the Australian Agency for International Development 2009 – 2016*, ADB–AusAID, signed 9 September 2009.

more needs to be done both by and about the ADB. One of the concrete ways in which Australia could further the implementation of its substantive obligation to ensure that the ADB complies with human right standards would be to advocate that ADB undertake studies of this sort. It is timely to undertake a systemic and detailed analysis of how the ADB has integrated human rights norms and substantive human rights considerations in its activities. It would also an opportunity to bring together those who see legal norms as important components of an inclusive and sustainable development, and those who approach that goal from different disciplinary and conceptual frameworks that assign no particular privileged place to legal and human rights norms.

As an influential participant in the work of the ADB (which in turn is an important conduit for Australian development assistance), Australia is well-placed to take action to influence other ADB members and the ADB itself to enhance the implementation of the human rights treaties obligations by giving these standards explicit attention in their ADB work and ensuring that the ADB does so itself in its policies and operations.

