WORLD BANK: STRIVING TO PROMOTE OR UNDERMINE HUMAN RIGHTS?

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This article examines whether the World Bank's dual identity, as a financial institution as well as a promoter and monitor of human rights and developmental issues, has recently become more pronounced, due to the growing scrutiny of the Bank's raison d'être in the global marketplace. The primary aim of the article is to discover the degree of truth existing behind the notion that the disproportionate impacts of Bank-supported structural adjustment policies on the poorest sectors of society have often been undermining, if not violating, economic and social rights as well as subverting the Bank's overall development mission. In course of such examination, the author has sought to focus on the Bank's mandate as laid down in its Articles of Agreement and developed through subsequent practice, analyze the current status of such mandate against the backdrop of evolving development paradigms. A brief examination has been undertaken of the historical evolution of political and human rights issues in Bank policies and operations as well as the existing arguments regarding the continuing relevance of human rights to the agenda pursued by the Bank. An effort has also been made to contrast the Bank's rhetoric with the reality of its practices regarding rule of law and accountability with respect to the projects it is involved in.

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I. Introduction

Having started with the initial objectives of promotion and financing of investment for productive purposes, the International Bank for Reconstruction and Development(the World Bank) has since then moved on to become the leading center for research, advisory services and finance for the advancement of developing countries. For such advancement to occur, promotion of certain factors have been deemed necessary, one of which is human rights; in fact, the contours of the interface between human rights and development have often been traced by many scholars –ranging from Amartya Sen's conceptual integration of development and human rights that paved the way for a rights-based approach[1] and the process of policy analysis aimed to identify the contents of such a right and its corresponding duties and responsibilities that has been sparked by the United Nations Declaration on the Right to Development[2], to the attempts of several international development organizations to explore the operational implications of the relationship between development and human rights.[3] Parallel to such rights-based approach, a strategic evolution has also occurred in the human rights community, with the focus having shifted against the milieu of globalization from a state-centered human rights regime to increasing impact of influential non-state actors.[4] In the light of the corresponding expansion of functions and responsibilities of international organizations, one cannot help but notice the existence of a significant disjuncture

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1 *See generally* Amartya Sen, Development as Freedom (1999).

2 The relevant declaration in this regard was adopted by G.A. Res. 41/128 (Dec. 4, 1986).

3 *See* Gernot Brodnig, *The World Bank and Human Rights: Mission Impossible?* (Carr Ctr. for Human Rights Policy Working Paper T-01-05), http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/BrodnigHR&WorldBank.pdf (last visited Jan. 11, 2012).

4 *Id.*

between the actual powers of such organizations, especially financial institutions such as IMF and the World Bank, and the available politico-legal options to hold them accountable.[5] The need for such options becomes more pronounced when considered together with the increasingly vocal public protests that the World Bank has been facing, in relation to projects promoting a paradigm of economic growth without paying adequate attention to the associated socio-environmental costs –in response to such protests, the Bank's response has been to adopt a set of binding policies governing a broad array of its activities, including mitigation of the social and environmental impacts of loans advanced.[6] Laying down a wide assortment of requirements for Bank staff and borrowers, ranging from consulting with and providing information to local communities to avoidance of displacement of people and respecting the rights and vulnerabilities of indigenous groups, these policies offer qualitative benchmarks against which project design and performance can be measured, thereby leading to a successful transition of Bank activities toward sustainable development.[7] Such transition is made even more easier, given the major role played by the Bank in extending its influence on the livelihoods of people in the developing world, by means of structural adjustment lending, country dialogue and its catalytic role as a guarantor, although recent times have seen a gradual decrease in capital transfers by the World Bank to developing countries. Perhaps inevitably, the Bank has attracted a fair share of controversy regarding its performance relating to human rights with several renowned projects such as the Narmada Dam or the Chad-Cameroon Pipeline having highlighted the Bank's significant, direct and often harmful

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5 *Id.*

6 *See* Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 Har. Hum. Rts. J. 205, 205 (2002).

7 *Id.*

involvement in areas of human rights concern. Indeed, it may appear to a critical observer that in contrast to most development institutions, the World Bank is yet to have a defined human rights policy –rather, it oscillates in its activities between hiding behind the 'prohibition' of political activities and obligation to consider factors strictly economic as contained in its charter on the one hand, and a steady expansion into the so-called 'human rights territory' and *de facto* adoption of certain human rights conditionalities in its operations at the other end of the spectrum.[8]

II. Evolution of Human Rights in the Context of World Bank Mandate

Throughout its existence, the World Bank has experienced a tension between being subjected to a narrow self-understanding as an economic development agency and a spate of efforts on several levels to broaden its mandate so as to include human rights concerns within the same. The Bank's first notable exposure to such efforts had taken place in the 1960s, when the United Nations General Assembly passed a series of resolutions[9] urging the Bank to put an end to its operations in South Africa and Portugal because of their respective apartheid and colonial policies. However, the Bank, in a rather holier-than-thou attitude, emphasized upon its nature as an apolitical organization and went on to approve several loans in defiance of the said resolutions.[10] The scenario took a turn, perhaps for the better, during the period between 1968 and 1981 when the presidential authority of

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8 Brodnig, *supra* note 3.

9 *See, e.g.,* G.A. Res. 1761 (Nov. 6, 1962) (wherein economic sanctions had been imposed on South African states for their apartheid and colonial practices and financial organizations related to the U.N. were asked to suspend their operation in those areas).

10 *See* Samuel A. Bleicher, *UN v. IBRD,* 24 Int'l Org. 3 (1970) (for a detailed review of this dispute).

the Bank rested with Robert McNamara, with the focus shifting from large-scale infrastructure projects and economic growth to the broader paradigm of poverty alleviation and policy-based lending. The practice of providing structural adjustment loans came into being in the 1980s, gradually leading to macro- economic policy reform and substantial re-engineering of public sector policies and institutions. The divide between the Bank's activities in the political and economic arenas started to blur, culminating into the 1989 study on the long-term development prospects of Sub-Saharan Africa, in which the Bank clearly emphasized upon "*good governance*" and "*scrupulous respect for the law and human rights*" being absolute necessities for development.[11] Such a move met with mixed results, with the developing borrower countries being averse to such intrusion into their political autonomy but being in no position to challenge the same, and donor countries, mostly Western ones such as the U.S.A., propelled by their human rights activists and Non-governmental Organizations (NGO), welcoming the move towards accountability, transparency and the rule of law.[12]

During the early 1990s, the Bank sought to expand its operational policy framework, which dictated in turn a systematic redefinition of several operational parameters, including an increased emphasis on participation of stakeholders as well as certain safeguard policies pertaining to environmental, social and legal implications of Bank

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[11] *See generally* WORLD BANK, *Sub-Saharan Africa – From Crisis to Growth: A Long-Term Perspective Study,* (1989) (on file with the author), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/12/02/000178830_98101901364149/Rendered/INDEX/multi0page.txt (uncorrection version).

[12] Brodnig, *supra* note 3.

[13] Of these policies, the ones concerning involuntary resettlement and indigenous peoples are of direct relevance for human rights issues and have attracted the largest share of operational controversies; *see* World

operations.[13] There is little doubt that these policy reforms were indeed a significant step towards greater accountability; however, serious flaws in their implementation struck discordant notes in many operations. Mention can be made in this context of the highly critical report on the Bank's involvement with the controversial Narmada Dam in India[14] or the internal review of the organization's operations[15], which highlighted the rift between policy guidance and implementation on the ground. Subsequently, the Inspection Panel was established in 1994 under President Wolfensohn in an attempt to bridge this rift. This quasi-judicial organ represented an interesting addition to the landscape of human rights institutions as, for the first time, individuals harmed by the activities of a multilateral development bank were provided with a grievance redressal mechanism.[16] Wolfensohn guided the Bank into further new ventures such as cultural development, post-conflict reconstruction and anti-corruption. The importance of governance issues was solidified, and the most recent capital replenishment for the concessionary lending arm of the Bank, the International Development Association (IDA), explicitly introduced

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Bank's Operational Manual, http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf/textonly (last visited Oct. 20, 2011) (for the text of these policies).

[14] *See generally* BRADFORD MORSE et al., SARDAR SAROVAR: THE REPORT OF THE INDEPENDENT REVIEW (1992).

[15] *See generally* WILLI WAPENHANS et al., EFFECTIVE IMPLEMENTATION: KEY TO DEVELOPMENT IMPACT: REPORT OF THE WORLD BANK'S PORTFOLIO MANAGEMENT TASK FORCE (1992).

[16] *See generally* LORI UDALL, THE WORLD BANK INSPECTION PANEL: A THREE YEAR REVIEW (1997).

[17] The IDA Agreement notes that *"good governance is critical to the economic development process and to the effectiveness of development assistance",* whereby governance is understood to contain four dimensions: accountable and competent public institutions, transparent economic and social policies and practices, a predictable and stable legal framework and participation by affected groups and civil society. The

governance conditionality.[17] In spite of such developments, the Bank continued to play shy to openly acknowledge the nexus between civil and political rights and good governance and development. The IDA's embrace of governance as a performance criterion was followed by an initiative to redefine the Bank's development paradigm –thus was introduced the Comprehensive Development Framework (CDF), that "*takes a holistic approach to development. It seeks a better balance in policymaking by highlighting the interdependence of all elements of development - social, structural, human, governance, environmental, economic, and financial.*"[18] Moreover, the CDF recognized that "*[w]ithout the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible.*"[19] The time was thus ripe for the Bank to review and revisit its Articles of Agreement and interpretation thereof in the light of the developing human rights language, given any proper understanding of the World Bank's commitment to protect and promote human rights must stem from the said Articles.[20]

Article I establishes the purposes of the Bank as a

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agreement further stipulates that *"governance is a broad-based concept intended to encompass all factors that impact on a country's ability to assure sustained economic and social development and reduce poverty"* and noted that addressing those factors is compatible with IDA's mandate, including its political affairs provision. Good governance thus became an allocation criterion for IDA resources, which represent the majority of loans to least-developed countries; for further details, see generally John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement,* 33 CORNELL INT. L. J. 335 (2000).

18 Ciorciari, *Id.* at 342.

19 *Id.*

20 Articles of Agreement of International Bank for Reconstruction and Development, Dec. 27, 1945, 2 U.N.T.S. 134 (amended Feb. 19, 1989), *available at* siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf.

number of essentially economic and financial activities to assist the reconstruction (especially of Europe post World War II) and development of its members. To implement these objectives, the Bank is, according to its Article IV/10, prohibited from any political activity.[21] The Articles of Agreement lack a proper definition of key concepts such as 'development', 'political' and 'economic', the said ambiguity having fuelled a rather long-drawn conflict both inside and outside the Bank about human rights issues in Bank operations. Opinions range from a narrow functionalist interpretation of the Bank's mandate precluding an involvement in human rights matters to the postulation of an affirmative duty of the organization to protect and promote human rights in line with evolving international law and the changing nature of development challenges.[22]

Regarding the question whether the latter opinion is to be preferred over the former, one must remember that the Articles of Agreement itself is a dynamic instrument capable of expanding its ambit to cover issues that were yet to appear on the radar screen of the Bretton Woods negotiators. At present, the Bank's operational policies can boast of several binding provisions on environmental impacts, the need for social assessments and the protection of cultural property in Bank operations and the emphasis on good governance theme has all but erased the boundaries of economic and financial assistance. The author would herein like to advance the argument that

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[21] According to said Article, *"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."*

[22] *See generally* Daniel D. Bradlow, *Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?,* 50 KAN. L. REV. 697 (2002).

since development represents a bundle of interlocking concepts of very broad environmental, socio-economic, legal and institutional implications, including the protection and promotion of human rights, therefore the latter automatically undergo integration with the objectives of the Bank. In this context, one may point out, in line with proclamations of scholars such as Dr. Amartya Sen, that the rights-based approach to development has currently become the logical sequel to the concept of sustainable development with its "triple bottom line" of economic, social and environmental sustainability.[23] The integration of human rights into the development process can occur at two levels –the different types of basic freedoms being causally interdependent and there existing more fundamental "conceptual integrity" between all human freedoms, and, beyond that, with other elements of the development process.[24]

The Bank has usually till date limited itself to an assessment of the causal interdependence between human rights and economic development but stayed clear of a more pro-active acknowledgment of the 'conceptual integrity' of the development process to the political stability of a nation. Similarly, the Bank has usually preferred involvement in socio-economic sectors over politico-civil ones –as has been noted by Ibrahim Shihata, "*while there are limits on the possible extent to which the World Bank can become involved with human rights, especially those of civil and political nature, the bank certainly can play, and has played, within the limits of its*

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[23] *See generally* SEN, *supra* note 1.

[24] *Id. see also* the Preamble to the Declaration on the Right to Development: *"all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights…".*

mandate, a very significant role in promoting various economic and social rights."[25] In light of the emergence of rights-based approaches to development, and given the World Bank's increasing involvement in human rights issues, the organization is under increasing pressure to address this challenge and develop its own set of policies, like other development organizations. Some of the operational policies on involuntary resettlement and indigenous peoples, as well as the establishment of the Inspection Panel, are positive steps in this direction but cannot replace a more comprehensive set of principles and operational guidelines to deal with the broad range of civil, political, economic and social rights Bank interventions invariably affect.

Shifting through the entire gamut of scholarly opinions and literature on this matter, the authors have arrived at the following conclusions –viz. one must consider human rights issues as part of a more holistic approach to development in the World Bank operations and such considerations must not be limited to passive inaction but ought to extend to the adoption of a policy framework that mainstreams human rights concerns. While the Articles of Agreement permit the consideration of human rights issues, as long as such policies and practices do not violate the (considerably narrowed) political activity prohibition of Article IV/10, the evolving notion of what constitutes development, together with the Bank's past practice of integrating non-economic issues into its work, suggest that there are no major legal obstacles to adopting a rights-based approach to development. Whether such a step is politically feasible or the organization has the necessary capacity to fulfill this extended mandate, is, however,

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25 *See generally* Ibrahim F.I. Shihata, *Prohibition of Political Activities in the Bank's Work: Legal Opinion by the Senior Vice President & General Counsel,* July 12, 1995 (World Bank).

another issue altogether.

III. Difference Between Rhetoric And Reality –Could World Bank Have Done More And Should It Have Done The Same?

There is no doubt that the primary concern of the World Bank is to reduce global poverty in all its aspects –but at the same time, questions have arisen time and again whether the same can be achieved without influencing the political regime that may have allowed its subjects to wallow in such poverty by way of oppression and inefficient governance. The introduction of the concept of sustainable development, which dares to look beyond the socio-economic sphere, in the Rio Earth Summit in 1992 was perhaps the juncture at which the Bank ventured beyond its single-minded preoccupation with economic growth rates.[26] At the same time, scholars had also begun to concentrate on the interdependence of the twin concepts of human rights protection and sustainable development[27], which the Bank was quick to seize upon. A drive to extend such protection could scarcely have been made without venturing into the political arena, given that the state often plays a central role in either protection or violation of the human rights vis-à-vis its citizens and non-citizens too. However, given that the Bank's interference in political matters have often attracted strong reactions among its opponents for eroding state sovereignty and exceeding its mandate[28], one of the ways out for the Bank was to distance itself from the spheres of political and civil rights and instead concentrate on the social and economic ones. In fact, that is the very course of action that the Bank

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26 Korinna Horta, *Rhetoric and Reality: Human Rights and the World Bank*, 15 Harv. Hum. Rts. J. 227, 227 (2002).

27 Sigrun Skogly, The Human Rights Obligations of the World Bank and the International Monetary Fund 96 (2001).

28 *See Id.* at 71-102.

has at times sought to advocate –it has made a differentiation between the two spheres of socio-economic rights and politico-civil rights and insists that its mission is concerned with the former and not the latter. This distinction has been made despite the fact that the international human rights community has long decided that the dichotomy created between these sets of rights is at best, a false one. As Amita Dhanda had mentioned[29], while the Universal Declaration of Human Rights was a composite document incorporating all the aforesaid rights, the conventions following the Declaration had implanted a barrier between them, by requiring civil and political rights (also termed negative) to be immediately available on the one hand, and social and economic rights (also termed positive) to be progressively realizable. What precipitated this division was the presumption that while States need to expand resources to uphold the former set of rights, such was not the necessity as far as respecting the latter set of rights was concerned. Learned scholars like Henry Shue has, however, said that the classification may not be entire proper, since both civil and political rights and social and economic rights can give rise to positive and negative duties.[30] He cites the example of the right to security that requires the State not only to ensure that the citizen is not arbitrarily deprived of his right to life and liberty, but also to perform active duties of protection by maintaining an adequate infrastructure there for. However, despite these logical arguments, the artificial dichotomy between civil and

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[29] Amita Dhanda, *Constructing a New Human Rights Lexicon: Conventions on the Rights of Persons with Disabilities,* 8 SUR INT'L J. HUM. RTS. 58, 61 (2008).

[30] *See generally* HENRY SHUE, BASIC RIGHTS SUBSISTENCE AFFLUENCE AND US FOREIGN POLICY (2nd ed., 1996).

[31] The indivisibility of these sets of rights is further emphasized by the necessity for hybrid rights required for classes of people such as those with disability. In this context, one can also mention the Grootboom Case relating to women's housing rights, wherein the South African Court

political rights and social and economic rights continues to be reiterated time and again, as is seen here.[31] Given such a position, the Bank cannot really argue that its concerns lie only in the socio-economic sphere, because the latter invariably impinges on civil and political matters and by extension, on subjects pertaining to human rights.

One of the major allegations that have been heaped against the World Bank is the financial help that it has extended even to dictatorships engaged in blatant human rights violation without exercising any oversight on whether such aid is being utilized for so-called poverty alleviation or development of natural resources for which they were meant in the first place. On the one hand, the Bank has been known to openly condemn corruption, lack of governance and depriving the citizen of his rights and on yet on the other hand, it has continued to extend its support in a technocratic and depoliticized manner that is ill-conducive to overall development.[32] The Bank is after all an U.N. authorized institution by virtue of the Agreement between the United Nations and the International Bank for Reconstruction and Development (the Relationship Agreement). Thus it ought to

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had sought to interpret Section 26 of the South African Constitution, which provides the right to access to adequate housing and includes both the positive duty of the State to take reasonable legislative and other measures within its available resources to achieve progressive realization of the said right and at the same time, the negative duty of the State not to evict one from his house or demolish one's house without a judicial order made after careful consideration of the surrounding circumstances.

[32] *See* Skogly, *supra* note 27, at 78.

[33] Article 55 of the Charter requires "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"; however, Article 2 of the Charter also prohibits interference in internal political affairs. The matter is thus open to interpretation as to which Article ought to be considered while delineating the scope of the Articles of Agreement.

be under an obligation to be a champion of the human rights enshrined in the U.N. Charter.[33] Can the Bank ever shirk the obligations imposed by an international agreement relating to human rights, simply by defining its operational parameters in the light of Article 2? Or should the Articles of Agreement be interpreted considering that the provision for non-interference under Article 2 does not apply to human rights, which are considered to be a matter of international concern and not the prerogative of a sovereign state?[34]

Keeping aside for a while the technicalities as to whether the Bank ought to do something in the arena of human rights, an effort may be made to look into what the Bank has been able to achieve till date. The right to development is one that the Bank has been promoting from its very inception. The Bank projects are usually drawn up so that the mass populace whose welfare ought to be the goal of development get the benefits at the end, be it the agricultural or the industrial sectors.[35] There is no dissenting opinion as to the adverse effect that poverty, if left unchecked, can have on certain human rights such as nutrition, health, adequate living conditions, education etc. Recognizing this, the Bank has maintained a ceaseless vigil to eradicate poverty by expanding employment, raising the productivity of the poor, making special commitments to low-income-group countries, modifying its lending program to benefit sectors more directly committed towards poverty alleviation etc.[36] Having said that, not all these efforts have achieved poverty alleviation –some may even be perceived as having had the opposite effect in

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[34] SHUE, *supra* note 30.

[35] *See generally* International Bank of Reconstruction and Development, Statement of Loans (Jan. 31, 1988).

[36] *See* Ibrahim F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements,* 17 DENVER J. INT'L L. & POL. 39, 51(1998).

[37] *See generally* IBRD: FOCUS ON POVERTY 2 (World Bank Publ. Rev. ed., 1983).

making the landless worse-off, ignoring the gender inequality in income distribution and so on and so forth.[37] With regard to education, more than 200 large-scale and pervasive educational projects have been funded by the Bank all over the world, to combat illiteracy as well as to provide skill-enhancing training programs.[38] In the health sector, despite having a well-defined health policy, the Bank's efforts have so far remained mostly as an adjunct to its programs aimed at other sectors, although substantial financial and technical assistance have been provided on the Bank's part to the health components of other projects as well as coming up with theoretical and research work in the nutrition and health sectors.[39] Similar achievements have also been made in promotion of gender equality[40] and improving the condition of refugee and asylum seekers.[41]

Thus, one can see that the in its role as a debatable champion of human rights, the World Bank has not remained entirely idle. Nonetheless, there appears to be a contradiction between the Bank's stated goals of promoting local participation and governance reforms as essential to alleviating poverty and its lack of consideration of political situations, as has been evident from its support of the oppressive tyrannical regimes of Suharto in Indonesia and Mobutu in the former Zaire, its distorted praise of the Ugandan and Rwandan ruling governments despite the numerous atrocities and infringements that still occur in those regions on a regular basis, as well as its direct involvement in the Chad-Cameroon Oil and Pipeline project that exemplifies the

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38 Shihata, *supra* note 36.

39 *See* International Bank of Reconstruction and Development Health Sector Policy Paper (1980); *see also* Shihata, supra note 36.

40 Shihata, *supra* note 36, at 57 (citing Berger and Horenstein, Integrating Concerns for Women into the World Bank's Indonesia Program, I.C.R.W. (Mar. 1987) (unpublished)).

41 Shihata, *supra* note 36.

42 Horta, *supra* note 26, at 234.

increasing marginalization of poor rural communities and indigenous peoples.[42] Mention can also be made in the same context of projects like the *Sardar Sarovar* Dam in India [displacement of large groups of people to sites with non-arable land, unclean water and no electricity], the Polonoroeste Frontier Development Scheme in Brazil [causing mass resettlement and deforestation of the Brazilian rain forest region], the Pak Mun Dam in Thailand [destroying critical fisheries on the Mun River, thereby leading local fishermen to suffer from abject poverty], the Singrauli in India [open-pit mining causing resettlement and environmental pollution] etc.[43] Nor does the tide of criticisms heaped against the World Bank shown any sign of quietening with – on the contrary, continuing violations committed by the Bank with regard to human rights seem to have acquired even worse hues during recent times. Examples can be cited of the Ezgulik's (a prominent civil society organization based in Uzbekistan) allegation in 2010 of the Bank's failure to concede state control of agriculture and the extent of child labor in Uzbekistan's cotton industry in relation to the agrarian and agricultural reforms supposed to be undertaken with the $67.9 million loan extended by the Bank.[44] As recently as December, 2011, a panel of the Independent People's Tribunal on the World Bank Group has found the Bank to be liable for causing

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43 *See* Enrique R. Carrasco, Maria Weidner & Nicole Wendt, *50th Anniversary of the World Bank and IMF Prompts Criticisms, in* UICIFD E-Book, *available at* http://blogs.law.uiowa.edu/ebook/sites/default/files/Part_2_2.pdf (last visited Dec. 22, 2011).

44 *See* Catherine A. Fitzpatrick, *World Bank Responds to Criticisms on Uzbek Report*, Child Labour Coalition (Jan. 9, 2011), http://stopchildlabor.org/?p=2307.

45 *See World Bank Indicted on Human Rights Abuse in India: Study*, Mint (Sept. 25, 2008), http://www.livemint.com/2008/09/25131400/World-Bank-indicted-on-human-r.html (last visited Dec. 22, 2011) (Charges in the final report include, *inter alia*, failure of the World Bank in its mission to reduce poverty, advocacy of policies which contribute to increased hunger, contributing to the agricultural crisis, and deliberate posting of

environmental degradation and lowering the standard of living for most Indians.[45]

These lapses on the part of the Bank have led the author to opine that the Bank is yet to realize that the lure of financial assistance may at times act as incentives to perpetrate human rights violation for furtherance of selfish interests rather than to promote good governance and protection of rights. Instead of strengthening foreign authoritarian regimes by providing financial aid and thus tightening their iron hold on the populace, perhaps the Bank ought to concentrate on the opinion of the activists in those countries regarding the potential impact of the projects as well as on fostering democratic participation instead of economy-based marginalization.

IV. The Accountability Scenario

Having spared a glance at the degree to which the World Bank has striven to further the human rights cause, one may now take a look at the other end of the spectrum, viz. the extent to which the Bank has allowed liability or accountability to be attributed to itself for the manifold alleged human rights violations that its activities may have resulted in. Despite the apparent suitability of the World Bank as a global enforcer of human rights, many nations have vehemently protested against such a development on the grounds of it being a violation of certain principle of international law, including sovereignty, equality, the developing countries right to

former staff in the Indian bureaucracy in order to influence policy and diluting Indian environmental legislation).

46 The recipient states will suffer from aid being withheld owing to the positive correlation between poverty and human rights violation, while the donor states will be denied market access in such countries. The bank will turn gradually into a political weapon in the hands of the powerful, instead of remaining a respected international financial organization.

development as well as being impractical and positively detrimental to the donor and recipient nations and the Bank itself.[46] As has been mentioned before, the Bank's use of economic aid over developing nations may be perceived as economic coercion aimed at forcing developing countries to comply with certain ideologies. Furthermore, in a move that seems rather strange to the authors, the Bank's withholding of economic aid, due to human rights abuses, has been condemned as illegal, being in violation of the recipient nation's right to economic development.[47] Regarding problems of impracticality, there lies the irony of having an institution like the World Bank, which itself is being accused of violating human rights, suddenly become a human rights enforcer, the lack of experience of the Bank staff to perform such a complex role and the dearth of an effective monitoring and enforcement mechanism in the Bank.

In what has been described as the 'violence of development', an estimated two million people have been forced from their homes and land as a result of Bank-assisted projects,[48] despite Bank policy requiring of people to be resettled should not be left worse off than they were before.[49]

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47 *See* Halim Morris, *World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?,* 4 ILSA J. Int'l & Comp. L. 174, 187 (1997) (The recipient states argue that the Bank and the donor nations not only have an obligation to extend economic aid for the economic exploitation that took place during the colonization period and any withholding of the same is nothing but a conspiracy by the World Bank and the developed countries, being a violation of the recipient countries' right to develop).

48 *See* Balakrishnan Rajagopal, *The Violence of Development,* Wash. Post, Aug. 9, 2001, at A19 (comparing involuntary resettlement to ethnic cleansing).

49 *See* World Bank Operational Manual, Operational Directive 4.30: Involuntary Resettlement (June 1, 1990), *available at* http://www.bp.com/liveassets/bp_internet/bp_caspian/bp_caspian_en/STAGING/local_assets/downloads_pdfs/xyz/BTC_English_Operation_Plan_ESAP_Content_Annexes_Annex_G_Part_1.pdf.

The new policy proposed by the World Bank on this matter provides that people without recognized legal rights to lands and assets will not be fully consulted or compensated for loss of land when relocated by World Bank projects.[50] Such a policy can scarcely be a good option either, owing to it being inequitable in the context of most Bank projects, because a large part of the affected people are likely to belong to the indigenous group having never had formal land titles of any sort, as well as because of the absence of a well-developed land law regime in most of the lesser-developed nations that would have been prone to such official recognition for land held by individuals or for common property resources.[51]

This brings one to the question as to the truth behind the extent to which the World Bank subjects itself to accountability vis-a-vis the human rights violations that such policies fashioned by it can lead to in the form of sponsored projects. As far as the accountability scenario is concerned, the Bank's social and environmental policies had been developed in the 1980s and 1990s in an attempt to shift the Bank toward sustainable development through the avoidance and mitigation of the negative impact of Bank lending, and the increased involvement and participation of local people. Until the advent of the Inspection Panel, however, local people had no institutional means of defending their rights

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50 *See* World Bank, *Resettlement and Development: The Bankwide Review of Projects Involving Involuntary Resettlement* 1986–1993 (Mar. 1996), *available at* http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1996/03/01/000009265_3980728143956/Rendered/PDF/multi_page.pdf.

51 Horta, *supra* note 26, at 227, 238 (One must also point out that this new Bank policy runs afoul of the ILO Convention No. 169, which establishes that the rights of ownership and possession of indigenous and tribal peoples over the land they traditionally occupy shall be recognized.); *see also* Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Jun. 27, 1989, 169 I.L.O. 1989.

and interests when policies were violated. As a result, the Bank continued to provide financial and institutional support for many environmentally destructive projects that violated the rights and interests of affected communities. The controversy over the *Sardar Sarovar* dam on the Narmada River in India was an historical watershed for the World Bank, and an important landmark in the struggle for accountability. It was found that the Bank had largely disregarded its policies on involuntary resettlement and environmental assessment, and that it had also knowingly tolerated its borrower's violation of the policies. The World Bank was further scandalized that same year when an internal review of the Bank's portfolio was leaked to the public. The report, authored by Bank Vice President Willi Wapenhans, documented and criticized the Bank's pervasive "culture of approval," in which the incentive structure encouraged staff to move money out the door quickly, without adequate attention to project quality or mitigation of the social and environmental impact of projects.[52] Evidence of mismanagement and poor governance from both internal and external reviews galvanized criticism of the Bank's accountability failures. Finally, in 1993, the campaign for greater accountability led the Board of Executive Directors to authorize the creation of the Inspection Panel and to approve an improved policy on information disclosure.[53] While these were landmark reforms from the perspective of affected communities, they have not been welcomed warmly at the Bank. The Inspection Panel has been under attack almost continuously since its creation, and the information disclosure policy is at present undergoing revision.

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52 Brodnig, *supra* note 3.

53 Chris Jochnick, *Confronting the Impunity of Non-state Actors: New Fields for the Promotion of Human Rights,* 21 HUM. RTS. Q. 63, 65-68 (1999).

A crucial link in the accountability chain can be the manner in which the World Bank strives to maintain the standards of the rule of law in its governance and policy-making decisions. Recently it had recognized "that the rule of law was essential in the fight against corruption, the empowerment of the poor—especially women—and the proper functioning of the economy"[54], but at the same time, Bank staff were at a time forbidden from openly discussing corruption matters relevant to Bank projects, because corruption was labelled a "political" issue.[55] Thankfully, better sense has prevailed since then and such 'gag orders' are no longer in operation. It can scarcely be argued that corruption does not have an adverse impact on development –every instance money flows to the coffers of power-hungry and corrupt officials instead of reaching to the deserving public is yet another nail driven on the coffin that democratic governance and the principle of rule of law share with each other. What makes this assume further significance in the human rights context is that such officials are the ones who tend to perpetrate human rights atrocities simply to further their own selfish economic/financial goals. Adherence to rule of law is undoubtedly a laudable goal that can improve prevailing conditions –the question that needs to be answered is that whether the Bank is on the right path to achieve the same. A host of legal and judicial reforms have been undertaken by the Bank, in its drive to promote rule of law and hence accountability, such as the Venezuelan judicial reform projects, for example.[56] The problem with such

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54 Press Release, The World Bank, Rule of Law Central to Fighting Poverty (July 9, 2001), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20011894~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

55 Clark, *supra* note 6, at 208.

56 *See* Gordon Barron, *The World Bank & Rule of Law Reforms* (Development Studies Institute, LSE, Working Paper Series, No. 05-70, 2005), *available at* www2.lse.ac.uk/internationalDevelopment/pdf/WP70.pdf.

measures is the Bank's economic mandate that imposes certain restrictions in its legal reformist agenda –while specific institutions have been made to undergo reforms, the role that the Bank's activities have played in furtherance of the rule of law as a concept/idea (which would have furthered the scope of human rights protection) is still open to debate. Yet the Bank may simply argue that instead of a substantive abstract ideal of rule of law, what it has aimed for is a more concrete, achievable goal of reforming individual economic institutions and the governance thereof in terms of law, so as to further its own agenda of creating an overall strong foundation of law that can be conducive to overall development.[57] The author would like to say herein that in order to maintain credibility in promotion of accountability and the rule of law, the Bank must pay greater attention to its own internal accountability crisis and internal application of principles of governance and the rule of law. The non-involvement of the World Bank in projects that violate the human rights and environmental integrity of affected communities should be viewed as a natural outcome of moving toward sustainable development: projects that are inherently unsustainable will no longer be supported or subsidized by the public. Accountability and rule of law, as applied in the context of the World Bank, should mean that in certain cases, environmental and social impacts will trump economic and technical (and, indeed, political) justifications for a project.[58]

Vis-a-vis matters of being held accountable for its actions at this juncture, the author would like to point out that even if all the allegations levelled against the World Bank of being involved in human rights violations in projects funded by it turn out to be true, such abuse is not beyond the purview of legal redress, notably through the machinations of the International Court of Justice (ICJ), for example. When an

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[57] *Id.*

[58] *See generally supra note 45.*

individual suffers from an infringement of his human rights owing to a developmental project (loss of shelter, livelihood etc., to name a few), one of the options available to him is of course bring the matter before the domestic courts, which, as per the mandate of the International Covenant on Civil and Political Rights, ought to provide relief in matters of human rights abuse, being an organ of the state.[59] A major drawback of this approach is the rampant corruption that the judiciary of certain regimes may be festered with, along with the fact that in certain developing countries like Indonesia, where instances of such violation have been known to occur, and the judiciary does not enjoy supremacy over the executive.[60] Given such a problem, perhaps an international forum like the ICJ is the best possible alternative to address such issues involving state and non-state actors and cross-border activities. Given the combined force of the founding statute of the ICJ, the U.N. Charter as well as scholarly opinion on the issue, it appears that individuals, or even states for that matter, cannot directly approach the ICJ to seek advisory opinion on such matters.[61]

The options that are left before the victims are thus threefold:

(1) A suit against members of the World Bank who have signed the compulsory jurisdiction clause (A. 36) of the Court's Statute, claiming that the World Bank violates international law when human rights abuses take place in its projects, and that member states share responsibility for those abuses;

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[59] *See* Art. II, The International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (India, as a matter of fact, is bound by such mandate, being an ICCPR signatory).

[60] *See* Department of State, Country Reports on Human Rights Practices for 1988 (1989), at 811.

[61] *See* Thomas Hutchins, *Using the International Court of Justice to. Check Human Rights Abuses* in the World Bank Projects, 23 Colum. Hum. Rts. L. Rev. 486, 501 (1991).

(2) A suit against members of the World Bank which have become parties to international human rights covenants with compromiser clauses granting jurisdiction to the Court, making the same claim as in (1); and

(3) A direct plea to member-states of the World Bank to pressure the Bank into requesting an advisory opinion of the Court on whether the Bank and its members violate international law when human rights abuses occur in its projects.[62]

While it is true that all these avenues signify a step towards the right direction, showing promises to foster greater accountability within the World Bank, yet they depend (at least the first two courses do) on the victims' finding a state to champion their cause, something that is likely to be very difficult in the light of the states' habitual reluctance in bringing charges of human rights violations against other states and also in risking the wrath of the economically powerful member-states, while in case of the latter course, jurisdictional problems can arise, given that the Bank, like most other international organizations, has the authority to deal with challenges against its actions exceeding its mandate.[63] Having said that, scholars who hold such opinions about an international organization's self-sufficiency often do so owing to the absence of a suitable appellate forum to deal with such matters, something which may not hold true in case of World Bank, since the latter can always approach ICJ for advisory opinion even on its own.[64] Such a course of action, may,

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[62] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTEGRATING HUMAN RIGHTS INTO DEVELOPMENT: DONOR APPROACHES, EXPERIENCES AND CHALLENGES 48 (2006).

[63] *See* Ebere Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations,* 77 AM. J. INT'L L. 239, 241 (1983); *see also Id.* at 241-42 (ICJ's acceptance of this position).

[64] *See* Hutchins, *supra* note 67, at 507.

according to the author, yield better fruits, especially given the ICJ's progressive, developmental and pro-human rights approach till date.[65] When faced with such a challenge to its authority, the Bank officials can fall back to a few traditional legal defenses such as arguing that the Bank's mandate being limited only within economic considerations, matters political or relating to human rights need not be considered by the Bank at all.[66] Furthermore, even if it is accepted for the sake of argument that as an international organization, the Bank cannot really act in isolation within a single sphere without getting involved into other related areas, that is no reason for the Bank officials to accept liability for human rights abuses taking place in Bank-funded projects. Even ICJ's erstwhile decisions regarding culpability, such as *Nicaragua* v. *United States*[67], would seem to *prima facie* reflect this stance. However, since all the World Bank member-states are parties to the U.N. Charter too[68], perhaps ICJ can persuade them not to be a party to an act of violation of those broad and fundamental human rights that are enshrined in U.N. approved norms like the UDHR, the ICCPR etc. Moreover, if ICJ does find against the Bank in any particular matter, then even more than the actual damages awarded by the Court (which it anyway cannot do in cases where mere advisory opinion has been sought), greater benefit will accrue from the resulting

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[65] *See* Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L.Q. 321, 328 (1989).

[66] In this context, one can revert to the provisions of A. 3(5xb), A. 4(10) & A. 5(5xc) of the Articles of Association of the World Bank. *See* Hutchins, *supra* note 67, at 492 (for further details).

[67] Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (U.S.A. had escaped liability for lack of evidence of control exercised by them over the perpetrators, i.e. Contra rebels) Nor is there much likelihood of establishing a better chain of control between World Bank and the project coordinators. *See Id.*

[68] *See* International Bank for Reconstruction and Development, *International Bank for Reconstruction and Development Financial Statements (Report) (June 30, 1988), at 168-71.*

negative publicity that the Bank will face and the resulting policy changes that the member-states may have to undertake. At the same time, the Bank may even be compelled to pressurize the state wherein the project is taking place to adopt a legal regime more conducive to human rights protection, which according to the author, ought to be a huge stride forward. Viewed from that perspective, the so-called ICJ approach may have more significance in the political, diplomatic and social fronts that it can ever hope to have in the legal front.

The author would at this juncture, seek to draw attention to a stellar piece of work penned by Kirk Herbertson,[69] wherein he has opined that with such lapses on the Bank's part and the resulting backlash of strong public opposition against its policies and the way they had given rise to controversial situations involving infringement of rights, the Bank is at present looking for ways out of the conundrum. After an internal audit that revealed certain flaws within the Bank's procedures for supervision and monitoring, a safeguard review process has been initiated within the Bank as late as 2011. This was indeed needed, since studies have revealed, as per Herbertson, that the bank's traditional safeguards could cover as little as 16% of its total portfolio by volume of lending.[70] Among the modernization processes undertaken by the Bank, activities such as greater voting power for emerging economies, addition of new lending instruments like the Programming for Results, review of independent review mechanisms such

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[69] *See* Kirk Herbertson, *World Bank vs. World Bank: Protecting Safeguards in a "Modern" International Institution*, WORLD RESOURCES INSTITUTE, http://www.wri.org/stories/2011/05/world-bank-vs-world-bank-protecting-safeguards-modern-international-institution#safeguards (last visited Dec. 22, 2011).

[70] *Id.*

as World Bank Inspection Panel, replenishment of capital funds from government donors, streamlining of staff's operational manual and updating of safeguards and procurement policies. Herbertson then goes to mention some prominent happenings that are likely to influence the review process, viz. allowing developing countries to assume more prominent roles in the policy-making process, greater competition faced by the Bank from other financial institutions from developing countries such as the Chinese EXIM Bank that can provide greater low-cost alternatives to loan-seekers, budgetary restrictions imposed on the World Bank following a series of financial crises, and shift in the Bank's portfolio lending from the traditional to a more project-specific form [which allows the Bank greater flexibility in facilitating development, but at the same time leads to opacity in terms of performance].[71] The review procedure itself has, however, already been subjected to challenges in terms of its limited scope, the differing timelines applied to different reformatory measures, minuscule staff incentives provided to conduct robust environmental and social due diligence processes, the ambivalence of civil society organizations and other stakeholders towards the review mechanism and a changing accountability scenario that can block access to the Bank's Inspection Panel. Having underlined such flaws, Herbertson has then proceeds to make a set of recommendations that are in the author's opinion both pertinent and promising in nature:

(a) Reforming safeguards across all lending instruments within a single review mechanism following a single timeline;

(b) Including safeguards for development policy loans as part of the review;

[71] *Id.*

(c) Updating the "country systems" approach that allow municipal standards of environmental and human rights; and

(d) Fostering greater public participation and consultations about the grievance mechanisms and the role of the inspection panel.[72]

V. Conclusion

Throughout this article, what has been highlighted over and above is the undercurrent of tension as to whether the World Bank has an obligation, not only to consider the human rights implications of extending its political and economic support to a regime or a project, but also to actively promote legal, economic, social and political avenues for safeguarding and fostering conditions conducive to such rights. The author would like to opine that not only does the Bank have such an obligation in its capacity as a U.N. authorized international institution, but it also has posited itself in course of time on a unique vantage position by virtue of its monetary supremacy to be able to do the same by exerting pressure on the regimes unwilling to pledge themselves to the human rights cause. Perhaps the entire rights debate can be put to rest if one is willing not to perceive human rights as something that belongs to the exclusive bailiwick of internal political affairs of a nation. With respect of economic stability and foreign exchange receipts, human rights can also be argued to have a direct impact on the economic sphere[73], thus bringing the matter within the Bank's purview. However, even if the jurisdictional problem is dealt with, there still remains the question of whether any institutional changes ought to be introduced in the bureaucratic maze that a major international organization like the Bank represents so as to

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72 *Id.*

73 *See Victoria E. Marmorstein, World Bank Power to Consider Human Rights Factors in Loan Decisions, 13 J. Int'l L. & Econ. 113, 135 (1978).*

facilitate such a drive towards championing the human rights cause that the Bank may choose to undertake, especially given that a handful of ostensibly powerful nations are always likely to remain at the Bank's helm of affairs, thereby colouring the Bank's policy-making decisions in the hue of their own national interests. Such influence can be readily observed in the Bank's lending being guided by Cold War considerations, its management of the international debt crisis, and, more recently, a possible role for the Bank in rewarding nations for their participation in combating international terrorism.[74]

To conclude, one of the possible ways forward would, according to the author, be to integrate within the Bank's decision to extend credit/loans for a project or a regime, an oversight mechanism that would evaluate not only the impact of such a project on the rights of the inhabitants of that country, but also whether the regime, that is likely to make a profit out of the Bank's assistance, is inclined towards promotion of at least those human rights that are enshrined in the U.N. Charter. It is not true that the Bank has entirely neglected such promotion and lawful governance-related matters as a whole, but so far its efforts have been largely concentrated on technical reforms in public sector management and efforts to restore investor confidence by creating enabling environments for the private sector[75], rather than tackling the issues pertaining to human rights. While such a change of stance, viz. inclusion of human rights consideration in its lending policy may lead to a temporary decrease in the Bank's overall project performance in terms of quantity, the author believes that such a move is much-needed nonetheless. If the World Bank is to play a constructive role in promoting human rights and the rule of law, it must first take

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74 *See* Oxford Analytica Ltd., Brief: The Impact on the World Bank and the IMF of the September 11 Terrorist Attacks on the United States (Sept. 25, 2001).

75 Horta, *supra* note 26, at 242.

responsibility for ensuring that its activities do not undermine the rights of affected communities. Failure to respect the rights of local people and the health of ecosystems leads to impoverishment, ineffective development, and social and environmental injustice. As noted by the former General Counsel of the World Bank, "*balanced development can only be achieved if the basic human rights are secured for persons adversely affected by development*."[76]

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[76] Morse et. al., *supra* note 14, at 38.