

**THE WORLD BANK AND HUMAN RIGHTS: THE POTENTIAL OF  
THE SAFEGUARD POLICIES**

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AFRICA

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## **DEDICATION**

I dedicate all my work to God, family, friends and loved ones – in this life and the next.

I dedicate this year to the people of Africa. My people.

## ACKNOWLEDGEMENT

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## LIST OF ABBREVIATIONS

CSA	-	Country Systems Approach
ECOSOC	-	Economic and Social Council
EIA	-	Environmental Impact Assessment
ESSD	-	Environmentally and Socially Sustainable Development
HRIA	-	Human Rights Impact Assessment
IBR	-	International Bill of Rights
IBRD	-	International Bank for Reconstruction and Development
ICJ	-	International Court of Justice
ICSID	-	International Centre for Settlement of Investment Disputes
IDA	-	International Development Association
IFC	-	International Financial Corporation
IMF	-	International Monetary Fund
MDGs	-	Millennium Development Goals
MIGA	-	Multilateral Investment Guarantee Agency
OHCHR	-	Office of the High Commissioner for Human Rights
OP	-	Operational Policy
OPCS	-	Operations Policy and Country Services
Pipeline Project	-	Chad Petroleum Development and Pipeline Project
PRSP	-	Poverty Reduction Strategy Paper
Sardar Project	-	Sardar Sarovar Dam Project
SIA	-	© University of Pretoria Social Impact Assessment

- UDHR - Universal Declaration of Human Rights
- UN - United Nations
- WBG - World Bank Group

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# THE WORLD BANK AND HUMAN RIGHTS: THE POTENTIAL OF THE SAFEGUARD POLICIES

## CHAPTER ONE: INTRODUCTION

### 1.1 Background of the Study

The World Bank Group (WBG) has always been at the forefront of financial assistance to developing countries in their development endeavours. Due to this, much of its attention and operations have been in Africa since the decolonisation period started in the 1950s and 1960s. Unfortunately it has been recorded that the projects and programs funded by the Bank often negatively impact innocent bystanders. The Bank attempted to address these issues by adopting numerous policies aimed at social and environmental protection. The Bank, in its nature as an intergovernmental organisation, has to rely heavily on state assistance and compliance with the Bank's policies. In developing countries, as are the majority of African countries, governments more often than not lack the capacity to monitor or implement the policies or technical advice provided to them by the Bank.

Upon investigating what is considered to be a very routine development project in the highlands of Lesotho, it was evident that the current environmental and social protection framework of the World Bank does not always provide for adequate protection of humans or the environment.<sup>1</sup> Human rights violations of a massive scale are a frequent result of the projects funded by the Bank, even after completing the required screening processes and impact assessments. The situation is a result of the Bank not accepting any obligation or mandate to protect or fulfil human rights, not actively preventing their projects from violating human rights, and the fact that the current safeguard system is not adequately equipped to provide for any human rights protection. The Bank has always been very reluctant to embrace its human rights relation, even though it is very clear from its operations that its work is inextricably linked to human rights.

### 1.2 Problem statement

The World Bank has committed itself to operations that would not harm the environment or communities that may be affected by the projects. This commitment may be found in the policies and operational directives of the Bank. In its collaboration with other organisations, such as helping

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<sup>1</sup> Primary research was conducted in a study of the Lesotho Highlands Water Project in Lesotho, March 2012. It is important to emphasize that the World Bank did not initially fund the Lesotho Highlands Water Project, but it did provide technical assistance in the impact analysis and project preparation.

the United Nations (UN) in achieving the Millennium Development Goals (MDGs), the Bank has also committed itself to fulfilling specific human rights. Internal discussions about the Bank's work and its relation with human rights became very active in 2002, when the president of the WBG at the time, James Wolfensohn appointed a task force to draft a strategy paper on human rights and the Bank.<sup>2</sup> This paper was presented to the WBG board's development committee, but rejected by the board - furthering the impression of the WBG's reluctance to accept its human rights responsibilities.<sup>3</sup>

The Bank has avoided scrutiny for its human rights transgressions by not adopting any specific human rights mandate, or including any specific references to human rights in its policies. The monitoring and complaint mechanisms provided by the World Bank are also powerless on the issue of human rights, since they are only allowed to interpret compliance with existing Bank policies. The independent body appointed by the Bank to hear private complaints, the Inspection Panel, have alluded to human rights in a small selection of its cases, but continuously point out that the policies of the World Bank do not provide unequivocal human rights protection, disabling the Panel from effective human rights redress.<sup>4</sup>

The current position is that the World Bank, regardless of its clear connection with human rights institutions and work relating to the fulfilment and protection of human rights, continue to operate within a framework that lacks accountability for human rights violations, as well as a lack in specific human rights provisions. By adopting an explicit human rights policy, the Bank would not only provide more effective screening of possible human rights violations, but also create an effective mechanism for redress should the official mechanisms of the Bank be utilised by affected communities.

## 1.3 Working definitions

### 1.3.1 Human Rights

The term 'human rights' hold numerous different definitions and interpretations. The UN Office of the High Commissioner for Human Rights (OHCHR) defines human rights as being 'rights that every human being has by virtue of his or her human dignity'.<sup>5</sup> Unless indicated otherwise, for purposes of this study the term 'human rights' refers to all internationally recognised human rights including

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<sup>2</sup> World Resources Institute 'A Roadmap for integrating Human Rights into the World Bank group' (WRI 2010) 5.

<sup>3</sup> *Ibid.*

<sup>4</sup> S Herz & A Perrault 'Bringing Human Rights Claims to the World Bank Inspection Panel' (2009) *International Accountability Project* 3 - 10.

<sup>5</sup> UN OHCHR 'Human Rights: Handbook for Parliamentarians' (UN OHCHR, 2005) 1.

social, economic, cultural, civil and political rights. The OHCHR further declares that ‘duty bearers are under an obligation to respect, protect and fulfil human rights’.<sup>6</sup> Throughout this study, specific reference will be made to the particular human rights obligation in question.

### **1.3.2 The World Bank**

The World Bank Group is composed of five institutions – the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).<sup>7</sup> The difference between the WBG - which consists of all these institutions - and the World Bank, is of the utmost importance to this study. The World Bank, as used in the context of this paper, is composed of only the IBRD and the IDA. The IBRD lends money to governments of middle-income and creditworthy low-income countries, and the IDA provides interest-free loans, known as credits, to governments from the poorest countries.<sup>8</sup> Throughout the discussion the term ‘World Bank’ would be used as a first reference in every paragraph, after which it would invariably be termed as the ‘Bank’. Unless indicated otherwise, there is no distinction between the meanings of these two terms.

### **1.3.3 Articles of Agreement**

The World Bank was created at the Bretton Woods conference in 1944, through the adoption of the Articles of Agreements. Both the IBRD and the IDA have their own respective Articles of Agreement, but these two instruments are very similar in content. Unless expressly stated otherwise, the paper’s reference to the Articles of Agreement would therefore include the constitutive instruments of both the IBRD and the IDA. General issues addressed by the Articles of Agreement include the purposes of the Bank, membership and capital of the Bank, provisions relating to loans and guarantees, operations of the Bank, the organisation and management of the Bank, withdrawal and suspension of membership, and issues regarding the status, immunities and privileges of the Bank.<sup>9</sup>

### **1.3.4 Safeguard policies**

The safeguard policies of the World Bank is a specific set of policies adopted by the Bank to ‘prevent and mitigate undue harm to people and their environment in the development process. These policies provide guidelines for bank and borrower staffs in the identification, preparation, and

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<sup>6</sup> ‘Human Rights: Handbook for Parliamentarians’ (n 5 above) 1.

<sup>7</sup> The World Bank *A guide to the World Bank* (2008) 4.

<sup>8</sup> *Ibid.*

<sup>9</sup> See generally the IBRD Articles of Agreement.

implementation of programs and projects'.<sup>10</sup> In the context of this paper, the term 'safeguard policy framework' would refer to the safeguard policy framework in its entirety, including the systems and structures that activate the policies, monitor its compliance and serve as complaints mechanisms. The safeguard policies may therefore be understood to be an element of the safeguard policy framework.

### **1.3.5 Development projects**

Development projects in the context of the World Bank are defined to be projects for which the Bank provides capital. Since the mandate of the Bank would be discussed in more detail in chapter two, it is sufficient for the purposes of this definition to conclude that the projects supported by the Bank typically would include the development of infrastructure or resource management projects such as hydroelectric power plants, water reservoirs (dams), highway constructions, irrigation facilities etc.<sup>11</sup>

### **1.3.6 Development Programs**

Development programs are understood to cover a wider range of issues than development projects. It is also more difficult to define Development Programs, since no two programs necessarily involve the same elements. It may cover community programs, monetary support towards sustainable development and investing in issues that may not necessarily be connected to a project, but is imperative for its success. Development programs may also involve multiple different development projects, managed together to obtain results that would not be possible to achieve by managing them individually.

## **1.4 Study objectives**

The main objective of the study is to prove that the World Bank has human rights obligations, and that the only way to meet these obligations is to adopt an explicit human rights policy. It goes further to investigate the current policies of the Bank, the purposes/ aims of these policies, and whether the current framework is sufficiently suitable for human rights integration. In doing this, the study shall focus on the following specific objectives:

- Investigate the structures of the Bank and its reasons for omitting a specific human rights mandate.

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<sup>10</sup> 'Safeguard policies'

<<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html>> (accessed 19 October 2012).

<sup>11</sup> S Skogly *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001) 17.

- Define human rights within the scope of the Bank.
- Explore the possibility of integrating human rights principles into the existing safeguard policies, as well as evaluating the capacity of the Inspection Panel as a human rights redress mechanism.
- Describe the characteristics of a successful human rights policy in the context of the Bank.

## 1.5 Research questions

The study attempts to answer the following research questions:

- How has the mandate of the World Bank evolved since its inception, and what are the consequences in relation to human rights?
- Is a mandate concerning human rights feasible within the limitations of the Bank's constitutive instrument?
- How would human rights be defined within the structures of the Bank, and what would the human rights obligations of the Bank be?
- What is the current purpose of the safeguard policy framework, and how would this be influenced by the incorporation of human rights?
- Does the Bank have the required policy platform in place to provide for effective human rights integration, and what would an effective human rights policy entail?

## 1.6 Literature review

For the last two decades numerous attempts have been made to define a clear relationship, or convergence, between development and human rights.<sup>12</sup> Authors such as McNerney-Lankford are of the opinion that the convergence between development and human rights is primarily based on the normative overlap between the two concepts, further informed by the shared principles and objectives underlying these concepts.<sup>13</sup> This position emerged when Amartya Sen famously proposed that development is only attainable once collective and individual freedom is achieved.<sup>14</sup> With his groundbreaking work, Sen encouraged a global academic movement aimed at the exploration of the nexus between development and human rights.<sup>15</sup> The emerging conceptualisation of development as a human right introduced various different perspectives to the field of human

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<sup>12</sup> HO Sano 'Development and Human Rights: The necessary, but Partial Integration of Human Rights and Development' (2000) 22 *Human Rights Quarterly* 735.

<sup>13</sup> S McNerney-Lankford 'Human Rights and Development: Some Institutional Perspectives' (2007) 25 *Netherlands Quarterly Human Rights* 459.

<sup>14</sup> See generally AK Sen *Development as Freedom* (1999).

<sup>15</sup> J Augusti-Panareda 'Transforming weakness into virtue: A dialogue and context based approach to Human Rights at the World Bank' (2009) 2 *Human Rights & Globalisation Law Review* 23.

rights. Due to the classic synonymy between development and poverty alleviation, human rights were also increasingly regarded as an essential element to successful poverty reduction strategies.<sup>16</sup>

During the same evolution period of development and poverty alleviation, and its link with human rights, international financial institutions started committing themselves to poverty alleviation as opposed to strict economic development.<sup>17</sup> The work of the World Bank consequently became more and more involved with human rights, more often than not overlapping with the work explicitly aimed at the protection and fulfilment of human rights.<sup>18</sup> Scholars such as Skogly and Ghazi wrote extensively on the human rights obligations of the World Bank, often highlighting its association with the UN and the duties arising from this relationship.<sup>19</sup> Yet the Bank failed to adopt an explicit human rights policy, focussing its energy on environmental and social protection. In an attempt to improve and promote accountability, the Bank created and institutionalised the safeguard policies and the Inspection Panel.<sup>20</sup>

Attempts have been made to shed some light on the lack of accountability in the structures of international organisations such as the World Bank, but have not led to any substantial outcomes.<sup>21</sup> Scholars such as Uriz and Bradlow critically analysed the efforts made by the Bank to ensure safer, environmental-friendlier operations and came to different conclusions.<sup>22</sup> The Bank has been heavily criticised for regularly engaging in projects with devastating effects, with inadequate protection to the environment and affected communities. Concerns have been raised about the expanding mandate of the Bank, and the pressing need to have accountability measures put in place.<sup>23</sup> However, Bradlow explains how the Inspection Panel and safeguard policies vastly improved the accountability structures, especially taking into account the internal limitations of the Bank, and the

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<sup>16</sup> See R Perry 'Preserving Discursive Spaces to Promote Human Rights: Poverty Reduction Strategy, Human Rights and Development Discourse' (2012) 7 *McGill International Journal of Sustainable Development Law & Policy* 61; F Doz Costa 'Poverty and Human Rights: From rhetorical to legal obligations – A critical account of conceptual frameworks' (2008) 9 *SUR International Journal on Human Rights* 81 and JC Mubangizi 'Know your rights: Exploring the Connections between Human Rights and Poverty reduction with specific reference to South Africa' (2005) 21 *South African Journal on Human Rights* 32.

<sup>17</sup> Perry (n 16 above) 70 & 71 and United Nations 'Monterrey Consensus on Financing for Development' (United Nations, 2002).

<sup>18</sup> GA Sarfaty 'Why culture matters in International Institutions: The Marginality of Human Rights at the World Bank' (2009) 103 *The American Journal of International Law* 647.

<sup>19</sup> Skogly (n 11 above) 116 and B Ghazi *The IMF, the World Bank Group and the Question of Human Rights* (2005) 20.

<sup>20</sup> E Carrasco & A Guernsey 'The World Bank's Inspection Panel: Promoting True Accountability Through Arbitration' (2008) 41 *Cornell International Law Journal* 578.

<sup>21</sup> K Hudes & S Schlemmer-Schulte 'Accountability in Bretton Woods' (2009) 15 *ILSA Journal of International & Comparative Law* 501.

<sup>22</sup> GH Uriz 'To Lend or Not To Lend: Oil, Human Rights, and the World Bank's Internal Contradictions' (2001) 14 *Harvard Human Rights Journal* 197; A McBeth 'A right by any other name: The evasive engagement of International Financial Institutions with Human Rights' (2009) 40 *The George Washington International Law Review* 1101 and D Bradlow 'A Test Case for the World Bank' (1996) 11 *American University Journal of International Law and Policy* 247.

<sup>23</sup> C Tan 'Mandating Rights and Limiting Mission Creep: Holding the World Bank and the International Monetary Fund Accountable for Human Rights Violations' (2008) 2 *Human Rights and International Legal Discourse* 79.

strict mandate of the Panel.<sup>24</sup> Nonetheless, there appears to be global consensus among academia that the Bank would urgently have to clarify the relation between the Bank and human rights.

The position of the World Bank has always been that it lacks the necessary elasticity to accommodate a larger role and responsibility in the field of human rights.<sup>25</sup> The Bank has been eager to acknowledge that it has a role to play in the human rights paradigm, but classified this role as being exclusively facilitative.<sup>26</sup> The Bank often used the political prohibitions in its Articles of Agreement and its commitment to economic factors as excuses to avoid direct engagement with human rights.<sup>27</sup> Two appointed General Counsels of the Bank, Ibrahim Shihata (1983 – 1998) and Roberto Dañino (2003 – 2006) wrote legal opinions on the human rights role of the Bank.<sup>28</sup> Shihata took a very careful approach, not explicitly implicating the Bank in the fulfilment or protection of human rights. Dañino, however, very progressively stated that the link between the work of the Bank and human rights can no longer be ignored, and completely discarded the argument that any political prohibitions could be used to exempt the Bank from having any human rights obligations.

The World Bank announced an upcoming policy review process in order to bring its safeguard policies in line with international developments and best practices.<sup>29</sup> There has been much speculation whether the Bank would take the leap to include an explicit human policy, with accompanying suggestions as to how this should be done.<sup>30</sup> The Tilburg Guiding Principles proposed that a clause be inserted into the operational policies to the effect that '[t]he World Bank shall not finance projects that contravene applicable international human rights law'.<sup>31</sup> The Tilburg Guiding Principles does not, however, elaborate much on the implications of such a clause, except that it would strengthen the structures of the Bank and give it the necessary scope to provide for the total integration of human rights into its operations.

## 1.7 Significance of the study

The study attempts to provide innovative ideas for the integration of human rights into the structures of the World Bank, by analysing its prospects of successful integration into the existing

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<sup>24</sup> 'A Test Case for the World Bank' (n 22 above) 247.

<sup>25</sup> J Gathii 'Globalization and Human Rights: Does One Hurt the Other?' (2000) 94 *American Society of International Law Proceedings* 144.

<sup>26</sup> World Bank 'Development and Human Rights: The Role of the World Bank' (Washington, IBRD 1998).

<sup>27</sup> Bradlow, D 'The World Bank, the IMF, and Human Rights' (1996) 6 *Transnational Law and Contemporary Problems* 47 and R Dañino 'The Legal aspects of the World Bank's work on Human Rights' (2007) 8 *Studies in International Financial, Economic and Technology Law* 3.

<sup>28</sup> IFI Shihata 'The World Bank and Human Rights: An analysis of the Legal Issues and the Record of Achievements' (1989) 17 *Denver Journal of International Law and Policy* 47 and Dañino (n 27 above) 3.

<sup>29</sup> Reviewing and updating the Environmental and Social Safeguard policies' <<http://go.worldbank.org/00E973V3B0>> (accessed 14 September 2012).

<sup>30</sup> Tilburg Guiding Principles on World Bank, IMF and Human Rights.

<sup>31</sup> Para 30 of the Tilburg Guiding Principles (n 30 above).

safeguard policies. With the upcoming policy review in mind, the study proposes an alternative approach to the authoritative Tilburg Principles, by suggesting an independent and categorical human rights policy as opposed to an overarching provision that would refer all policy interpretations to existing international human rights instruments.<sup>32</sup> The Bank aims to update its policies after the consultation process is complete. The study would be significant in its potential to feed into this transformation process.

## **1.8 Hypothesis**

This study is based on the premise that in order to effectively address large-scale human rights violations, caused by the operations of the World Bank, the Bank would have to adopt a distinct human rights policy into its safeguard framework. Furthermore, it is based on the supposition that the adoption of a human rights policy would strengthen environmental and social protection, would strengthen the functionality of the safeguard policies, and give the operational policies a better sense of coherence.

## **1.9 Methodology**

The bulk of the research would consist of desktop research, mainly focussing on legal and descriptive analyses of secondary research materials such as books, journals, articles, policies, legislation and other scholarly materials from the Internet. The author would also rely on limited primary research done in Lesotho, during March 2012. A human rights based approach would be used in the process, as it best fits the purposes of the study and is proposed as an effective solution to the research problem statement.

## **1.10 Limitations of the study**

The research would benefit greatly by more field research, but the author is constrained by both time and immobility. Discussing human rights in relation to international organisations may be a very challenging and intricate exercise. Combining the issue of human rights with the World Bank, which is a very complex organisation, may prove to be very challenging. It would therefore be imperative to maintain a balance between providing the reader with enough detail about the systems of the Bank, without losing focus of the core matter. Some of the issues relating to public international law, such as the specific human rights obligations of the Bank, would require further

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<sup>32</sup> 'Reviewing and Updating the Environmental and Social Safeguard Policies' <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,contentMDK:22849125~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html>> (accessed 5 September 2012) and Tilburg Guiding Principles (n 30 above).



elaboration and research, as the scope and length of the paper is constraining in this regard. The study is also exclusively theoretical, and no survey has been done on any of the topics.

## **1.11 Layout of chapters**

The study is divided into five chapters, each with different subheadings to ease the progress of the discussion for the reader:

**Chapter One ‘INTRODUCTION’** serves as the proposal to the study, giving the background and objectives of the study. It provides a very brief overview of the research topic, as well as a preliminary literature review.

**Chapter Two ‘THE WORLD BANK’** provides the reader with a general description of the setup and operations of the World Bank. It starts by recounting the history of the Bank, the reason for its creation and will conclude by providing a brief description of the safeguard policies and the Inspection Panel of the Bank.

**Chapter Three ‘THE WORLD BANK AND HUMAN RIGHTS’** is dedicated to the discussion of human rights in the context of the World Bank and its operations. It provides the reader with a brief history of the development of human rights within the structures of the Bank. It analyses the links between sustainable development and poverty alleviation - which is at the core of the Bank’s mandate - with human rights principles. The chapter would also examine the purposes for which the safeguard policies were created, and how these would be affected by the integration of human rights into the existing policy framework.

**Chapter Four ‘INTEGRATING HUMAN RIGHTS’** attempts to define human rights in the context of the World Bank. The chapter would explore the possibility of adopting a human rights policy, and give a brief description of what such a policy ideally would look like. The chapter would end by analysing the capacity of the Inspection Panel as a possible redress mechanism for human rights violations.

**Chapter Five ‘CONCLUSION AND RECOMMENDATIONS’** concludes the study by providing a detailed summary of the issues discussed throughout the paper, as well as specific recommendations.

## CHAPTER TWO: THE WORLD BANK

The World Bank is widely known to be an international development funding institution. Yet there seem to be common misperceptions about the functions of the Bank, the reasons for its creation, and even its distinct existence from the International Monetary Fund (IMF). Understanding the various complex issues faced by the Bank requires some basic knowledge of the Bank's structures, its setup and its operations. This chapter will give an overview of the background of the Bank, its place within the public international law paradigm, and the focus of its mandate. The discussion introduces the safeguard policies and the Inspection Panel, as both of these concepts lie at the core of the rest of the paper. The purpose of this chapter is to familiarise the reader with the necessary details about the Bank, without delving too deeply into its structures. In an attempt to provide a basic understanding, this component will not engage in too much analysis, and is therefore strictly informative.

### 2.1 Background of the World Bank

After the end of World War I, the global economy went through a very difficult phase, which eventually resulted in the international depression of the 1930s.<sup>33</sup> During World War II the allied states worried that similar circumstances would present after the end of the war, and consequently put in motion initiatives in an attempt to prevent a return crisis. It was the United States of America together with Great Britain that suggested the creation of the World Bank and the IMF. Both of these institutions were created at the 1944 Bretton Woods Conference through the adoption of their respective Articles of Agreement, which entered into force on 27 December 1945.<sup>34</sup> Although the IMF and the World Bank work closely together and have similar governance structures, the IMF and the World Bank are in fact two very different entities with very different individual roles.<sup>35</sup> The IMF provides financial services to any country, regardless of the state's income, whereas the World Bank only provides assistance to developing or transition economies. The IMF also focuses on short-term financial assistance, while the World Bank's work is aimed towards achieving environmental friendly sustainable development.<sup>36</sup> This study would focus only on the World Bank.

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<sup>33</sup> Skogly (n 11 above).

<sup>34</sup> Ghazi (n 19 above) 20. See also 'World Bank Group Historical Chronology' <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20035653~menuPK:56305~pagePK:36726~piPK:36092~theSitePK:295600.html>> (accessed 5 September 2012).

<sup>35</sup> *A guide to the World Bank* (n 7 above) 29.

<sup>36</sup> *Ibid.*

## 2.2 The World Bank and International Law

Before the link between the mandate of the Bank and its human rights implications can be analysed, the status of the World Bank under public international law needs to be determined. In order for the Bank to have determined rights and obligations, it is imperative to prove its existence as an independent international organisation with international legal personality. International organisations generally do not refer to their own position under public international law in their constitutive instruments, although it may be the case in some instances.<sup>37</sup> Indeed, the Articles of Agreement of the Bank did not provide for any such clarification. This does not, however, mean that the Bank does not have international legal personality. The Articles of Agreement consistently refer to the World Bank as a separate entity on the one hand, and its members states as being distinct from that entity on the other, proving that the institution was created with independence in mind. The Bank was created by states for a lawful purpose, with organs that may make decisions independently from any member state or group of states.<sup>38</sup> Furthermore, the International Court of Justice (ICJ) identified in an advisory opinion in 1949 certain elements or features that serve as criteria for an international organisation to have legal personality, and the Bank complies with all these necessary requirements.<sup>39</sup>

Global consensus seems to have been reached on the nature of the World Bank as an independent international organisation, with the capacity to bear rights and duties under public international law.<sup>40</sup> Whether the Bank has obligations under international human rights law is an altogether different question that will be addressed in subsequent chapters, but it is nonetheless important to acknowledge the possibility of such obligations under public international law. It is accepted that the Bank functions as an international body with legal personality due to the nature of its specific powers granted to it under its Articles of Agreement. It may be bound by obligations under general principles of international law, with the capability of possessing international rights and duties.<sup>41</sup> The Bank's formal relationship with the UN is defined by an agreement that recognises the Bank as an 'independent specialised agency of the UN – as well as an observer in many UN bodies, including the General Assembly'.<sup>42</sup> The Bank, as an independent specialised agency, officially falls under the

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<sup>37</sup> Ghazi (n 19 above) 64.

<sup>38</sup> Ghazi (n 19 above) 106.

<sup>39</sup> Advisory opinion on the reparation for injuries suffered in the service of the United Nations, *ICJ Reports* (1949) 178 – 179.

<sup>40</sup> See Sarfaty (n 18 above) 657, 'The World Bank, the IMF, and Human Rights' (n 27 above) 63 and Shihata (n 28 above) 47.

<sup>41</sup> Sarfaty (n 18 above) and ICJ Advisory Opinion (n 39 above).

<sup>42</sup> *A guide to the World Bank* (n 7 above) 29. See also World Bank and the United Nations' <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:23066272~menuPK:8337019~pagePK:50004410~piPK:36602~theSitePK:29708,00.html>> (accessed 5 September 2012).

purview of the Economic and Social Council (ECOSOC) of the UN, and as such is required to act in conformity with the UN Charter.<sup>43</sup>

The existence of international legal personality in an international organisation is not in itself very significant. It is important to determine the consequences of the legal personality of the international organisation in order to establish the rights and obligations of the organisation in relation to other subjects of international law. The ICJ has stated that

[w]hereas a state possesses the totality of international rights and duties recognised by international law, the rights and duties of an entity such as the [World Bank] must depend upon the purposes and the functions as specified or implied in its constituent document and developed in practice.<sup>44</sup>

The rights and obligations of the World Bank should therefore be determined through the interpretation of its purposes and functions, which may be found in its Articles of Agreement, as well as its practices. Summarily, the purposes and functions would constitute the mandate of the Bank. According to the ICJ, the international rights and duties of an international organisation would be based on its constitutive instrument - the international organisation would therefore possess the rights and duties necessary to fulfil its mandate. The mandate of the Bank has been a topic of much discussion in recent years. Civil society and NGOs have been advocating for the Bank to expand on its social and environmental responsibilities by adopting a human rights approach. The Bank on the other hand, has been very hesitant to admit any such explicit human rights obligations, and equally hesitant to adopt human rights principles into its policies.

### 2.3 The Mandate of the World Bank

The mandate of the World Bank has developed continuously since the creation of the institution. The initial mandate was set on rebuilding Europe post-World War II, but this function was eventually taken over by the Marshall plan in 1947.<sup>45</sup> The mandate quickly became defined through the Bank's operations as it focussed more on the 'development' part of its purposes in subsequent years. After the process of decolonisation ensued in the 1950s and 1960s, the Bank became very involved in Africa, since it was at the time far less developed than the prominent Western powers. The nature of its work also changed significantly internally - where the Bank started its work by mainly lending for development *projects*, the Bank seemed to move toward lending to development

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<sup>43</sup> 'The World Bank, the IMF, and Human Rights' (n 27 above) 63.

<sup>44</sup> ICJ Advisory Opinion (n 39 above).

<sup>45</sup> The Marshall plan, officially known as the European Recovery Program, was an aid program in the form of monetary assistance led by the United States after World War II. The aid program was in operation for four years, and was aimed at rebuilding European economies.

*programs* on a more frequent basis.<sup>46</sup> Thus, the mandate of the Bank significantly evolved from rebuilding to development, and from projects to programs – turning its attention in the direction of human development.

The constitutive instrument, or mission statement, of any given organisation primarily informs its functions. The purpose of the World Bank, as defined by the IBRD Articles of Agreement, is

[t]o assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.<sup>47</sup>

The Articles of Agreement provide certain limitations that are helpful in determining the mandate of the Bank, even though they are not very decisive. There are two general political prohibitions in the Articles of Agreement. Firstly, the Bank is prohibited from interfering in a country's political affairs, both domestically and internationally. Secondly, the Bank is prohibited from being influenced in its decision making by the political character of a member country.<sup>48</sup> In the past, the Bank has raised the prohibition on political involvements or political considerations as a reason why it should not take any human rights factors into consideration, for it was argued at the time that human rights were exclusively of a political nature.<sup>49</sup>

The World Bank's purpose as stated above should not be read in isolation, as the Articles of Agreement further dictate that 'only economic considerations shall be relevant to [the Bank's] decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I'.<sup>50</sup> It is clear that the Articles of Agreement place emphasis on the Bank's consideration of economic factors, since it is after all first and foremost a financial institution. Interestingly enough, the Bank does not define 'economic considerations', just as it does not define 'political affairs' or 'political character'.<sup>51</sup> The implication of the omission of strict definitions is that the Bank is left to define and interpret the terms as it sees fit.<sup>52</sup> This allows the Bank to govern its own mandate to some extent, provided that it operates within the designated limitations of the Articles of Agreement.

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<sup>46</sup> Skogly (n 11 above) 17.

<sup>47</sup> Article 1(i) of the IBRD Articles of Agreement.

<sup>48</sup> Articles of Agreement art IV sec 10.

<sup>49</sup> 'The World Bank, the IMF, and Human Rights' (n 27 above) 61.

<sup>50</sup> Articles of Agreement art IV sec 10.

<sup>51</sup> 'The World Bank, the IMF, and Human Rights' (n 27 above) 54.

<sup>52</sup> JD Giorciari 'The Lawful Scope of Human Rights Criteria in the World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement' (2000) 33 *Cornell International Law Journal* 338.

The World Bank has recently been under much criticism for its ‘mission creep’ – a term used to describe the expansion of its mandate far beyond its initial intentions.<sup>53</sup> Critics are of the opinion that the organisation has developed and expanded its mandate to such an extent that is no longer manageable.<sup>54</sup> In 1988 the then-general counsel of the Bank reiterated the political prohibitions on the Bank, but acknowledged the fact that there existed a great deal of scope for the Bank to have an impact on issues such as human rights without violating its political prohibitions.<sup>55</sup> This could be regarded as the pivotal point in the expansion of its mandate, and the Bank itself for the first time referred to poverty reduction as being one of its primary objectives in 1990.<sup>56</sup> The Bank’s focus on poverty alleviation gradually evolved and today the primary mission of the Bank is defined to be ‘the alleviation of poverty through economic growth and social equity’.<sup>57</sup> The so-called ‘mission creep’ of the World Bank highlights two important aspects for purposes of this study.<sup>58</sup> Firstly, it is evident that the provisions in the Articles of Agreement relating to economic considerations, and even the political prohibitions, do not prevent the Bank from engaging in human rights related issues. Secondly, the work of the Bank, in its adoption of poverty alleviation as its main purpose, is now undeniably and inextricably focussed on human rights.

## 2.4 The safeguard policies of the World Bank

In the early 1980’s a couple of projects funded by the bank were reported to have caused significant environmental damage and devastating consequences to thousands of people.<sup>59</sup> One of these projects was the Sardar Sarovar Dam Project (Sardar Project). The Bank advanced a loan to India to build a dam, which would supply water to 30 million people and irrigate crops to feed another 20 million.<sup>60</sup> The Sardar Project, however, caused thousands of people to be relocated without any prior knowledge, and resulted in widespread soil erosion.<sup>61</sup> The president of the World Bank at the time commissioned an independent review of the Sardar Project, known as the Morse Commission, to investigate the operations of the Bank’s role in the situation.<sup>62</sup> The Morse Commission produced a report that revealed that the Bank had pervasively failed to comply with its own social and environmental policies. The Morse Commission’s report was followed by another internal review of the Bank, known as the Wapenhans Report, which concluded that the Bank had developed a ‘culture

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<sup>53</sup> ‘New World Bank chief must tackle “mission creep”’ *Public Service Europe* 26 March 2012. See <<http://www.publicserviceeurope.com/article/1711/new-world-bank-chief-must-tackle-mission-creep>> (accessed 18 September 2012).

<sup>54</sup> *Ibid.*

<sup>55</sup> McBeth (n 22 above) 1113.

<sup>56</sup> World Bank ‘World Development Report’ (World Bank Group, 1990) 24.

<sup>57</sup> Dañino (n 27 above) 4.

<sup>58</sup> McBeth (n 22 above) 1114.

<sup>59</sup> S Park *Ownning Development: Creating Policy Norms in the IMF and the World Bank* (2010) 191.

<sup>60</sup> Carrasco & Guernsey (n 20 above) 578. © University of Pretoria

<sup>61</sup> B Morse & TR Berger ‘Sardar Sarovar: Report of the Independent Review’ (1992).

<sup>62</sup> Carrasco & Guernsey (n 20 above) 578.

of approval' without adequately taking into consideration the environmental and social consequences of its projects.<sup>63</sup> Investigations concluded that Bank projects ran the risk of exacerbating poverty and destroying the environment as opposed to fostering sustainable development.<sup>64</sup> Environmental and human rights NGOs began applying unrelenting pressure on the Bank to increase its accountability and transparency of its lending processes.<sup>65</sup> It was during this period that international financial institutions started realising the importance of mitigating the negative impacts of development projects in order to achieve sustainability.<sup>66</sup> The Bank responded by adopting the 'safeguard policies' and establishing the World Bank Inspection Panel.

The safeguard policies of the World Bank were formulated with the intention to ensure that the operations of the Bank assist people and the environment, as opposed to harming them.<sup>67</sup> There are ten safeguards, of which the policy on Environmental Impact Assessment (EIA) serves as the overarching policy. Other policies formulated to fall within the scope of the EIA policy are: international waterways, involuntary resettlement, disputed areas, indigenous peoples, cultural property, forestry, natural habitats, safety of dams and pest management.<sup>68</sup> To determine whether these policies are activated, the Bank conducts environmental screening of each project to specify the type and appropriate extent of EIA to be undertaken by the Bank. Depending on the screening outcome, the project may also trigger other policies immediately. The projects would be categorised according to the location, scale, type and sensitivity of the project.<sup>69</sup> It is important to note that the borrower remains responsible for the any assessment required by the Bank, with general and technical assistance provided by Bank staff members. The safeguard policies are monitored by the Environmentally and Socially Sustainable Development (ESSD) Network,<sup>70</sup> and compliance with all the policies of the World Bank are monitored by the Operations Policy and Country Services (OPCS).

The World Bank, at the time, was the spearhead with matters relating to social and environmental protection measures in development funding. In the wake of the adoption of the safeguard policies, numerous private and public financial institutions followed suit by adopting similar policies relating to disclosure, environmental and social issues.<sup>71</sup> One of the most significant achievements of the

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<sup>63</sup> Carrasco & Guernsey (n 20 above) 579.

<sup>64</sup> S Lawrence 'Retreat from the Safeguard Policies: Recent Trends Undermining Social and Environmental Accountability at the World Bank' (2005, Environmental Defense) 3.

<sup>65</sup> DB Hunter 'Civil Society Networks and the Development of Environmental Standards at International Financial Institutions' (2008) 8 *Chicago Journal of International Law* 437.

<sup>66</sup> Lawrence (n 64 above) 1.

<sup>67</sup> *A guide to the World Bank* (n 7 above) 40.

<sup>68</sup> *A guide to the World Bank* (n 7 above) 40.

<sup>69</sup> 'Safeguard Policies'

<[http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/0,,contentMDK:20124315~menuPK:559747~pagePK:148956~piPK:216618~theSitePK:24488490,html](http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/0,,contentMDK:20124315~menuPK:559747~pagePK:148956~piPK:216618~theSitePK:24488490,html accessed 5 September 2012) accessed 5 September 2012).

<sup>70</sup> The policies addressing international waterways and disputed areas are monitored by the Bank's legal vice presidency.

<sup>71</sup> Lawrence (n 64 above) 6.

formulation of the safeguard policies was the creation of the Equator Principles.<sup>72</sup> As the Bank highlighted the risks and concerns about social and environmental impacts of development projects, ten leading private banks took it upon themselves to act. They collaborated to form the Equator Principles – an initiative that would have private financial institutions follow the safeguard policies adopted by the IFC in the projects they finance in developing countries.<sup>73</sup> Many other commercial banks subsequently committed themselves to the Equator Principles. The Equator Principles represented a critical advancement in corporate social responsibility for major international private banks – all as a result of the safeguards formulated by the Bank.

The safeguard policies ensured levels of transparency, consultation, social and environmental protection and risk mitigation that would allow the World Bank to achieve its overall mission – to eradicate poverty and promote sustainable development.<sup>74</sup> The safeguard policies attempted to guarantee certain standards of social and environmental protection, especially in circumstances where these were not provided for under national law.<sup>75</sup> Recently the Bank has been criticised for failing to consistently update and implement its safeguard policies based on latest best practice standards and to make matters even worse, the Bank also experimented with alternative approaches to its safeguard provisions. The Bank's indecisiveness about its policy standards has caused doubt about the sincerity of its commitment to social and environmental protection.

#### **2.4.1 Safeguard Policies under threat**

In 2001 the World Bank completed a study on the costs of its projects, including the cost of complying with its operational (safeguard) policies.<sup>76</sup> The report portrayed the perception that the safeguard policies were an expensive standard to maintain, even though they were calculated to cost only about one-third of what the Bank's procurement and financial policies costed.<sup>77</sup> Nonetheless, this report opened the floor to many critics of the safeguard policies, and the findings of the report were used to call for the weakening of social and environmental due diligence in the structures of the Bank. The safeguard policies were criticised for slowing down the lending process, which in turn slowed down the Bank's ability to get money and projects realised on the ground. Arguments were raised that the safeguard policies promoting stringent transparency, broad consultation, and environmental and social due diligence required time consuming and expensive

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<sup>72</sup> 'History of the Equator Principles' <<http://www.equator-principles.com/index.php/about-ep/about-ep/history-of-the-eps>> (accessed 18 September 2012).

<sup>73</sup> Lawrence (n 64 above) 6.

<sup>74</sup> Lawrence (n 64 above) 5.

<sup>75</sup> Lawrence (n 64 above) 1.

<sup>76</sup> World Bank Group 'Cost of Doing Business' (Washington, IBRD 2001).

<sup>77</sup> See generally Cost of Doing Business (n 76 above).



project preparation and appraisal.<sup>78</sup> Bank staff members were concerned that members would borrow elsewhere if the safeguard requirements were too burdensome.

During the late 1990s the World Bank started exploring alternative methods of enforcing its environmental and social protection policies. It started with a safeguard policy conversion strategy that would effectively cause the mandatory nature and the universal comprehensive standards of the safeguard policies to be replaced by flexible principles or national standards.<sup>79</sup> The Bank claimed that it would 'simplify' its policies and focus on promoting ownership of the development process in its member states. The Bank has since 2002 been advocating for this national safeguard approach under the banner of the Country Systems Approach (CSA), and in March 2005 the first pilot program was approved by the executive directors of the Bank. The pilot program was approved to run for a period of two years in order to allow the Bank to critically analyse and assess the success of the new approach.<sup>80</sup> Whereas the traditional approach required countries to meet the policies of the Bank in addition to their own national laws and regulations, the CSA would require national systems to be evaluated against a simplified set of safeguard policies, and if considered to be equivalent, used for project preparation and implementation.<sup>81</sup>

The current official status of the safeguard policies, however, seems to be unchanged.<sup>82</sup> The Bank has not made any official permanent change to the implementation of its operational policies, causing the safeguards to prevail for the time being. In its announcement of the upcoming policy review process, the Bank reaffirmed that the safeguard policies are at the core values of the institution.<sup>83</sup> The Bank further promised to review and update the policies to 'better meet new development demands and challenges'.<sup>84</sup> The review and updating process would be part of a larger modernisation effort within the institution, and includes separate but parallel reviews of Investment Lending and Procurement.

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<sup>78</sup> Lawrence (n 64 above) 9.

<sup>79</sup> Tan (n 23 above) 96.

<sup>80</sup> 'Exploring further use of Country systems'

<<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20266649~menuPK:538163~pagePK:41367~piPK:51533~theSitePK:40941,00.html>> (accessed 14 September 2012).

<sup>81</sup> Lawrence (n 64 above) 10.

<sup>82</sup> McBeth (n 22 above) 1146.

<sup>83</sup> 'Reviewing and updating the Environmental and Social Safeguard policies' <<http://go.worldbank.org/00E973V3B0>> (accessed 14 September 2012). © University of Pretoria

<sup>84</sup> 'Reviewing and updating the Environmental and Social Safeguard policies' (n 83 above); Review of the Resolution Establishing the Inspection Panel (1996) and Clarification of the Board's Second Review of the Inspection Panel (1999).

## 2.5 Complaints mechanism: The World Bank Inspection Panel

The Inspection Panel was officially created by two resolutions from the IBRD and the IDA in 1993, with clarifications added later in 1996 and 1999.<sup>85</sup> The resolutions have identical contents, and specify the jurisdiction and mandate of the Panel. According to the resolutions, the Panel has the power to carry out independent investigations of projects funded by the World Bank in order to evaluate the Bank's compliance with its own policies.<sup>86</sup> After such an investigation the Panel will conclude with findings on the harm done by the project, which it reports to the Bank's Board of Executive Directors. The Bank Management is also expected to prepare a response to the findings of the Panel, with recommendations and actions to address the issues raised by the Panel. The Board of Executive Directors would take the reports from both the Panel and Bank Management into consideration in deciding future actions.

The Inspection Panel consists of three members, and is supported by a small secretariat, which is also functionally independent from the World Bank Management.<sup>87</sup> The Panel is authorised to hear complaints from any two or more persons 'with common interests or concerns' that believe their rights or interests have, or could be directly harmed by a Bank project.<sup>88</sup> The procedure of the Inspection Panel consists mainly of two stages. The first stage may be called the establishment of jurisdiction and admissibility stage, after which the Inspection Panel submits its recommendation to the Executive Directors.<sup>89</sup> If the Executive Directors deem it necessary, the second stage would commence. The second stage consists primarily of an investigation into the alleged breach of policy, after which the Inspection Panel submits a report to the Executive Directors. The report would reflect the Inspection Panel's opinion on compliance or non-compliance with the Bank's policies. It is important to note, however, that the final decision about any action that would follow an investigation would still rest with the Executive Directors of the Bank.<sup>90</sup>

The Inspection Panel was the first forum ever to be created through which private parties may hold international organisations accountable for policy breaches.<sup>91</sup> The main motivation behind the creation of the Inspection Panel was to improve the accountability of the Bank to people affected by

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<sup>85</sup> IBRD Resolution 93-10 and IDA Resolution 93-6.

<sup>86</sup> See Resolutions (n 85 above).

<sup>87</sup> *A guide to the World Bank* (n 7 above) 28; 'Panel Secretariat'

<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173250~menuPK:64129466~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>> (accessed 9 September 2012).

<sup>88</sup> See Herz & Perrault (n 4 above) 1 and *A guide to the World Bank* (n 7 above) 41.

<sup>89</sup> E Hey 'The World Bank Inspection Panel: Towards the Recognition of a new Legally Relevant relationship in International Law' (1997) 2 *Hofstra Law and Policy Symposium* 67.

<sup>90</sup> Hey (n 89 above) 67.

<sup>91</sup> 'A Test Case for the World Bank' (n 22 above) 248.

its projects and programs.<sup>92</sup> A member state of an international organisation, especially if the state is the beneficiary of the organisation's decisions, may not be the appropriate forum for holding the organisation accountable, which is why the Bank opted to turn to an internal, yet independent, accountability mechanism.<sup>93</sup> The creation of the Panel was an important step in recognising a new interactive relationship between international organisations and individuals.<sup>94</sup>

Since the Panel is only mandated to inspect the Bank's compliance with its own operational policies, it has been very careful not to draw any conclusions about matters outside this purview.<sup>95</sup> The Panel is yet to express an opinion about the normative standards and sources of law that would be taken into account if human rights related matters were brought before them.<sup>96</sup> However, this does not mean that the Inspection Panel has not been considered as an appropriate redress mechanism for the human rights violations, or even that the Panel has not already been faced with issues relating to human rights.<sup>97</sup> The Panel for the first time heard a case specifically based on international human rights violations in 2007, when it investigated the *Honduras Land Administration Project*.<sup>98</sup> In its report the Panel alluded to its limited mandate in addressing human rights issues, and was careful not to comment on Honduras' implementation of its International Labour Organisation (ILO) obligations.<sup>99</sup>

Various factors, however, places doubt on the ability of the Inspection Panel to function as an international law, including international human rights law, redress mechanism.<sup>100</sup> The Inspection Panel currently bases its conclusions on the internal regulations and policies of the Bank, as opposed to strict international law. The decisions are also legally non-binding, with the final decision lying in the hands of the Executive Directors. This makes it difficult for the Panel to have an input into any redress actions, other than the recommendations mentioned in its report. The independence of the panellists may also be questioned, since the Bank employs them, creating a certain awareness of loyalty to the Bank. The Inspection Panel is advised by the Legal Department of the Bank on issues related to the rights and duties of the Bank, and cannot rely on their own independent legal advice. This is not surprising, as the Panel currently consists of a social

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<sup>92</sup> See 'The Inspection Panel'

<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64129249~pagePK:64132081~piPK:64132052~theSitePK:380794,00.html>> (accessed 9 September 2012) and Herz & Perrault (n 4 above) 1.

<sup>93</sup> Hey (n 89 above) 65.

<sup>94</sup> Hey (n 89 above) 70.

<sup>95</sup> Herz & Perrault (n 4 above) 2.

<sup>96</sup> Herz & Perrault (n 4 above) 2.

<sup>97</sup> The Panel has been confronted by issues relating to human rights as far back as 2002, in the highly publicized case of the Chad-Cameroon Petroleum and Pipeline Project. See McBeth (n 22 above) 1148.

<sup>98</sup> World Bank Inspection Panel 'Investigation Report - Honduras: Land Administration Project (IDA Credit 3858-HO, 2007).

<sup>99</sup> Herz & Perrault (n 4 above) 4.

<sup>100</sup> Hey (n 89 above) 71.

anthropologist from Norway, a civil engineer from Argentina and a sociologist from Japan.<sup>101</sup> It therefore does not currently have any member with a background in international law, not to mention human rights law. In fact, since the inception of the Panel in 1993, only one of the twelve members that have served on the Panel had any formal educational background in international law.<sup>102</sup>

Regardless of the above-mentioned factors, the effectiveness of the Inspection Panel as an accountability mechanism is nonetheless clear. Even if the final decision on any actions taken by the Bank on the basis of an Inspection Panel investigation rests with the Executive Directors, the Inspection Panel may very well cause an entire project to be cancelled based on its findings. The Arun III project in Nepal serves as a very good example of such a case. Summarily, the Arun III was a hydroelectric project in Nepal, initially supported by the World Bank. After protests from NGOs and civil society, the Panel conducted an investigation into the safeguard compliance by the Bank. The president of the Bank at the time, James Wolfensohn, eventually withdrew the support of the World Bank, effectively ending the project for good.<sup>103</sup> The Arun III case demonstrates that the Inspection Panel may play a very useful and effective role in protecting the interests of people who have, or may be, harmed by the operations of the Bank. It illustrates that the Inspection Panel may highlight weaknesses in the framework of the Bank, and consequently improve its efficacy.<sup>104</sup> In conclusion, it is clear that the Inspection Panel may, with very little structural modifications, certainly prove to be a good forum to hear complaints under international human rights law.

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<sup>101</sup> 'The Inspection Panel' (n 22 above).

<sup>102</sup> Ms Edith Brown Weiss was a professor of international law, and served on the Panel from 2002 to 2007. See 'Previous panel members'

<[http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20205101~menuPK:434360~pagePK:64129751~piPK:64128378~theSitePK:33009400,html\\_q=0](http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20205101~menuPK:434360~pagePK:64129751~piPK:64128378~theSitePK:33009400,html_q=0) (accessed 8 September 2012).

<sup>103</sup> 'A Test Case for the World Bank' (n 22 above) 280.

<sup>104</sup> 'A Test Case for the World Bank' (n 22 above) 282.

## CHAPTER THREE: THE WORLD BANK AND HUMAN RIGHTS

The lack of having an explicit human rights policy causes uncertainty in stakeholders about what could or should be expected from the World Bank with regards to human rights.<sup>105</sup> In an attempt not to repeat any of the general discussions regarding the overall mandate of the Bank, this chapter would give a summarised history of the development of human rights within the World Bank with the purpose of shedding some light on the reluctance of the Bank to explicitly adopt these rights into its policy framework. The history of human rights within the Bank might also be a good indicator of the future of human rights in Bank structures – an attestation of the Bank’s disposition towards human rights leading up to the coming policy reforms. This component will further also discuss the concepts of poverty, sustainable development, environmental protection, and how all of these are inextricably linked to each other and human rights. It will conclude by arguing that all of the missions of the Bank would benefit greatly from adopting a human rights approach into the Bank policy framework.

### 3.1 Development of human rights in the World Bank

The World Bank has been quite reluctant to accept any explicit human rights responsibilities or obligations, often passing human rights off as exclusively being of a political nature.<sup>106</sup> This may be regarded as ironic, since the Bank is already emerged in human rights work throughout the majority of its operations. The common association of the Bank with the UN also causes some discrepancies between what the UN is advocating, and the actions of its own agencies. Nonetheless, many Bank officials have openly expressed their acceptance of the link between the mandate of the Bank and human rights work.<sup>107</sup> The accepted mission of the Bank is to ‘reduce poverty and support development’.<sup>108</sup> The question, however, is whether either one of these two goals - poverty alleviation or sustainable development support - may realistically be achieved without proper cognisance of human rights? The Bank, in its early years, regarded development to be almost exclusively based on the economic growth of a country, which suited states well at the time, since it respected borrowing states’ sovereignty completely.<sup>109</sup> However, the concept of development has since evolved significantly and is today accepted to include a much wider spectrum of elements than

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<sup>105</sup> ‘The World Bank, the IMF, and Human Rights’ (n 27 above) 80.

<sup>106</sup> Ghazi (n 19 above) 111.

<sup>107</sup> Former World Bank general counsel, Roberto Dañino, stated that ‘human rights are at the very core of the World Bank’s mandate’. See Dañino (n 27 above) 3.

<sup>108</sup> ‘Two institutions, one mission’

<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTNAR/EXTNARIBO/0,contMDK:20103838~menuPK:1696997~pagePK:51123644~piPK:329829~theSitePK:29708,00.html>> (accessed 4 October 2012).

<sup>109</sup> ‘The World Bank, the IMF, and Human Rights’ (n 27 above) 55.

mere economic considerations. Inevitably, human rights are increasingly becoming relevant to the work of the Bank.<sup>110</sup>

The World Bank's main focus for the past twenty years has been on sustainable development and poverty alleviation, coinciding with the same period in which its environmental and social protection safeguard policies were adopted. It is safe to assume that the Bank realised that neither of these concepts were achievable without paying due regard to the vast environmental and social impacts of its projects. The policies were initially adopted with the protection of the environment in mind, but they unintentionally created a safeguard - weak as it may be - for human rights at the same time.<sup>111</sup> Nonetheless, environmental and social protections are very much part of the bigger human rights picture and adopting an explicit human rights policy would not only provide for the necessary human rights protection, but would also strengthen and improve environmental and social protection.

Many of the principles integrated in World Bank policy are similar, if not identical, to those underlying international human rights instruments. These principles include accountability, participation, good governance, equity and inclusion.<sup>112</sup> The World Bank does not necessarily use explicit human rights language in its policies, but many core human rights concepts such as the rule of law, independence of the judiciary, transparency, institutional pluralism and freedom of association and participation are mentioned.<sup>113</sup> The assumption may be that these underlying principles and concepts allude to an implied human rights mandate of the World Bank, but such an assumption would be unsubstantial at best and completely inadequate to be of any practical value to human rights defenders. An interpretation of the Bank's work aside, it still has an obligation to take into account its international human rights responsibilities. These responsibilities are based on three arguments: Firstly, the Bank's nature as an international organisation with international legal personality. Secondly, the fact that it is a specialised agency of the UN and therefore have to respect the provisions of the UN Charter, and finally, its duty to ensure that its operations do not undermine the ability of its members to live up to their international legal obligations.<sup>114</sup> The human rights related principles and concepts found in Bank policy might be an indication of the Bank's attempt to engage with these issues in a piecemeal, non-committal fashion.

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<sup>110</sup> Dañino (n 27 above) 3.

<sup>111</sup> Some of the safeguard policies have even been interpreted by the Inspection Panel to serve as the basis for bringing claims of human rights violations before the Panel. See Herz & Perrault (n 4 above) 3 for a summary of the Inspection Panel's findings with regard to human rights violations.

<sup>112</sup> McNerney-Lankford (n 13 above) 472.

<sup>113</sup> K Tomaševski 'The Influence of the World Bank and IMF on Economic and Social Rights' (1995) 64 *Nordic Journal of International Law* 386.

<sup>114</sup> 'The World Bank, the IMF, and Human Rights' (n 27 above) 63.

### 3.2 The World Bank, poverty alleviation and sustainable development

Development was traditionally seen to be an instrument of solidarity, with an exclusive focus on economic factors, but this changed during the 1990's when it was increasingly perceived as a combination of different elements.<sup>115</sup> In order to understand why the World Bank - which is essentially a development financing institution - should be concerned about human rights, one first needs to understand the evolution of the conceptualisation of development. The Bank has always been at the forefront of development and it plays a very influential role in how development is perceived. It is thus unsurprising that the evolution of development and the evolution of the Bank's mandate kept pace with each other. The Bank, along with the IMF, also played an important role in creating a platform for poverty alleviation to be adopted into development, as well as orchestrating the shift in development focus from the state to the individual. The Bank plays a significant role in setting the global development agenda, which in turn requires it to stay conversant with changes in the international understanding of development. Owing to the fact that the international perception of development has included human rights as an intricate part of development and poverty alleviation since the end of the 20<sup>th</sup> century, the Bank is running the risk of becoming out-dated in its institutional configuration, also causing serious risk to all the progress made in the field of development and human rights during the last twenty years.

A lack of income was traditionally identified as being the main conducive factor to underdevelopment. This led to the logical deduction that economic growth is not only imperative to development, but at the core of the concept.<sup>116</sup> The economy focussed concept of development evolved significantly during the 1970s, mainly due to the then-president of the World Bank, Robert McNamara, recognising the close links between security, poverty reduction and development.<sup>117</sup> He furthered this notion by pushing direct policy intervention in the promotion of development.<sup>118</sup> The Bank began advancing policy-based lending, adding environmental concerns, governance, economic transformation and also private sector development to its list of permissible operations.<sup>119</sup> The paradigm shift in the development arena was reflected throughout international organisations and civil society, finally coalescing under the umbrella of the MDGs adopted by the UN General Assembly in 2000.<sup>120</sup> The Bank has declared that the MDGs reflect the mission of the Bank, committing itself to assisting in achieving these goals.<sup>121</sup>

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<sup>115</sup> Sano (n 12 above) 736.

<sup>116</sup> Perry (n 16 above).

<sup>117</sup> R Peet *The Unholy Trinity: The IMF, World Bank and WTO* (2003) 135.

<sup>118</sup> *Ibid.*

<sup>119</sup> 'The World Bank, the IMF, and Human Rights' (n 2 above) 36.

<sup>120</sup> Perry (n 16 above) 67.

<sup>121</sup> 'World Bank's role' <<http://www.worldbank.org/mdgs/>> (accessed 6 October 2012).

With the new development paradigm emerging, an increased focus on poverty alleviation as a defining mission of international development institutions surfaced.<sup>122</sup> Poverty alleviation and reduction soon were regarded as the main rationale behind international financial institutions.<sup>123</sup> The World Bank articulated its new focus through assisting in the implementation of Poverty Reduction Strategy Papers (PRSPs), in which recipient countries would have to provide a detailed plan of how funding would be applied with the goal to alleviate poverty.<sup>124</sup> The PRSPs are entrenched with human rights components, requiring extensive participation in the development process from the general public, civil society organisations and the private sector.<sup>125</sup> The PRSPs are now accepted as the conventional framework for regulating the provision of development assistance, serving as the basis for lending in all low-income countries.<sup>126</sup>

As the World Bank's mandate shifted from strict economic development to sustainable development and poverty alleviation, it declared that the fulfilment of social, economic and cultural rights is of cardinal importance to its poverty reduction strategy.<sup>127</sup> This adjustment came with the Bank committing itself more to the fulfilment of certain human rights, but still failing to adopt it into the constitutive and policy framework of the Bank.<sup>128</sup> The argument forwarded by numerous development institutions when confronted with the issue, including the Bank, was that development assistance preconditions human rights, but does not overlap with it.<sup>129</sup> This position taken by the Bank does not correspond with Bank practice. It is clear that the paradigm change towards sustainable development and the international understanding of poverty is very much entrenched in human rights. The following analysis of the link between sustainable development, poverty alleviation and human rights, proves that the Bank has committed itself to human rights protection and fulfilment through its operations.

### 3.2.1 The link between human rights, poverty and development

The World Bank's fear that it will be used as an enforcement mechanism for human rights, through conditional lending, may be ascribed to its lack of a clear human rights mandate.<sup>130</sup> The mission and

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<sup>122</sup> Perry (n 16 above) 69.

<sup>123</sup> B Rajagopal 'International Law and Social Movements: Challenges of Theorizing Resistance' (2003) 41 *Columbia Journal of Transnational Law* 422.

<sup>124</sup> Perry (n 16 above) 70.

<sup>125</sup> The World Bank and International Monetary Fund 'Review of the PRS Approach: Balancing Accountabilities and Scaling Up Results' (2005).

<sup>126</sup> Perry (n 16 above) 70 & 71.

<sup>127</sup> Sano (n 12 above) 746.

<sup>128</sup> 'Development and Human Rights: The Role of the World Bank' (n 26 above).

<sup>129</sup> Sano (n 12 above) 745.

<sup>130</sup> These issues were highlighted by Kenneth Roth, Human Rights Watch Executive Director, in 2006 when he addressed the staff of the World Bank. See 'Remarks before the 2006 World Bank Global Communications Forum'

<<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20922626~pagePK:220503~piPK:22047>



purpose of an international organisation may be deduced from its constitutive instrument, *but also from its practices*.<sup>131</sup> By committing itself to sustainable development and poverty alleviation, the Bank took a step in the direction of setting its own human rights mandate. The normative framework of the Bank's involvement in human rights may be found in those rights commonly associated or overlapping with sustainable development and poverty. Development has been linked with human rights as early as 1986.<sup>132</sup> Human development and human rights share a common motivation or commitment to promoting the freedom, well-being and dignity of individuals from all societies.<sup>133</sup> Poverty alleviation is also considered to be a fundamental principle of development, and the prevailing international view is that poverty should be addressed by considering a wide variety of issues, including human rights.<sup>134</sup> Regardless of its reluctance to include human rights into its mandate, the Bank gave its first step towards committing itself to human rights the moment it turned to sustainable development and poverty alleviation.

It is widely acknowledged that poverty, as a social phenomenon, has a very significant impact on human rights.<sup>135</sup> The relation between poverty and human rights may be regarded in one of three ways.<sup>136</sup> Firstly, poverty may be considered as a violation of all or several human rights. Secondly, the freedom from poverty may be regarded as an independent human right. Finally, poverty may be regarded as a consequence or cause of human rights violations. These different approaches overlap in many ways and one should take care not to interpret any of these in isolation. Regardless of the position taken on poverty and human rights, the link between poverty, poverty alleviation, and human rights is apparent. The UN OHCHR recognised the link between poverty and human rights by formulating guidelines for the integration of human rights into poverty reduction strategies.<sup>137</sup> This is informed by the realisation that the only sustainable way of addressing poverty is by using a human rights approach.<sup>138</sup>

Certain development activities, often perceived as entitlements, overlap with economic, social and cultural rights such as food security, primary health care and education.<sup>139</sup> The work of the World

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6~theSitePK:228717,00.html> (accessed 20 September 2012). See also H Moris 'The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?' (1998) 4 *ILSA Journal of International & Comparative Law* 188.

<sup>131</sup> Skogly (n 11 above) 68.

<sup>132</sup> See Declaration of the Right to Development (1986) and Article 10 of the Vienna Declaration on Human Rights (1993).

<sup>133</sup> R Ball 'Doing it Quietly: The World Bank's engagement with Human Rights' (2008) 34 *Monash University Law Review* 332.

<sup>134</sup> Ball (n 133 above) 340.

<sup>135</sup> Mubangizi (n 16 above) 32.

<sup>136</sup> Doz Costa (n 16 above) 86.

<sup>137</sup> See generally Office of the High Commissioner for Human Rights 'Principles and Guidelines for a Human Rights approach to poverty reduction strategies' <<http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>> (accessed 1 October 2012).  
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<sup>138</sup> Mubangizi (n 16 above) 33.

<sup>139</sup> Sano (n 12 above) 744.

Bank directly advances numerous human rights articulated in the Universal Declaration of Human Rights (UDHR), most notably its work in the fields of education, healthcare, nutrition, sanitation, housing and environment.<sup>140</sup> The interdependence between human rights and sustainable development has been highlighted by scholars like Amartya Sen.<sup>141</sup> His work informed that:

[D]evelopment is redefined as the process of expanding people's substantive freedoms or capabilities to lead the lives they value. This includes 'functionings' as good health, literacy and education, the ability to participate in the life of the community, and the freedoms of expression and association. In other words, development covers the whole range of economic, cultural, social as well as civil and political rights.<sup>142</sup>

The Bank has always taken an 'instrumental' view of human rights, acknowledging its commitment to social, cultural and economic rights.<sup>143</sup> It does not, however, take the same eager approach when it comes to civil and political rights. Nevertheless, engagement in capacity building development projects driven by normative constructs such as the rule of law and good governance has led to the conclusion that civil and political rights are now also regarded as part of the development process.<sup>144</sup> Roberto Daniño, the Bank's general counsel from 2003 to 2006, also stated in a legal opinion that the Bank should take into account civil and political issues that may have economic consequences or implications to the Bank.<sup>145</sup> Daniño also indicated in his legal opinion that substantial violations of political and civil rights are related to slower economic growth.<sup>146</sup> It is clear that the Bank would have to engage in economic, social, and cultural as well as civil and political rights if it wants to achieve its goals of sustainable development and poverty eradication.

A mere suggestion that the World Bank would have to engage in all categories of human rights in order to fulfil its mandate does not in itself shed any light on the normative human rights framework of the Bank. The Bank's operations have always had a very important element of cooperation with its member states. The Bank depends on the cooperation of its member states for the implementation of the projects, mainly playing an overseeing or facilitative role. In many development projects the Bank would also only assist by providing the member state with technical assistance, and would not necessarily even provide funding for the project.<sup>147</sup> It has recently been suggested by scholars that the normative framework of the Bank should comprise of the

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<sup>140</sup> McInerney-Lankford (n 13 above) 469.

<sup>141</sup> G Brodnig 'The World Bank and Human Rights: Mission Impossible?' (2001) *Carr Center for Human Rights: Policy Working Paper T-01-05* 10.

<sup>142</sup> Brodnig (n 141 above) 10.

<sup>143</sup> Brodnig (n 141 above) 14.

<sup>144</sup> D Kinley 'Human Rights and the World Bank: Practice, Politics, and Law' (2007) *Sydney Law School* 357.

<sup>145</sup> Daniño (n 27 above) 6.

<sup>146</sup> Daniño (n 27 above) 4.

<sup>147</sup> Technical assistance may involve aiding the state in its environmental and social impact assessments.

International Bill of Rights (IBR).<sup>148</sup> Former World Bank President James Wolfensohn also mentioned in a speech at a conference on human rights and development:

I continue to read the Universal [D]eclaration [of Human Rights] and it refers to...social security, equal employment, the right to adequate standards of living, motherhood, children, education, international order. All of these are things which, if you had asked me to indicate what is the agenda of our institution, I would have told you...was the charter of our institution.<sup>149</sup>

The normative framework is highly influenced by the definition of the World Bank's duties in terms of human rights. Under international law, role-players usually assume the obligations to respect, protect and fulfil human rights.<sup>150</sup> The proposed definition of the Bank's human rights responsibilities will be addressed in the subsequent section, but there seems to be international consensus that all international organisations should at least pay heed to the IBR. This would necessitate the Bank to accept the influences of civil and political rights on development projects. As a result of the cooperative relationship between the Bank and its member the states, the normative human rights framework for any given project would therefore include the IBR as well as any international legal responsibilities agreed to by the borrowing state, and any domestic commitments to human rights protection.

### **3.2.2 Human Rights and development – an inextricable combination**

To understand the link between the development process and human rights, it might be helpful to move away from theory rhetoric, and examine the relationship from the other side – the development process itself. By analysing some of the World Bank's projects, it becomes clear as to why it is sometimes difficult, if not impossible, to separate the development process from human rights implications. This may be as a result of the social, economic and cultural impacts of development projects, but in some complex situations it may also be due to civil and political issues. It is already determined that the political prohibitions in the Articles of Agreement were created to ensure political impartiality by the Bank, and cannot be used as an excuse to ignore political considerations that may impact directly or indirectly on the Bank's projects. The development projects themselves often highlight the practical implications that are neglected in theory.

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<sup>148</sup> The International Bill of Rights consists of the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. 'University of Minnesota Human Rights Library' <<http://www1.umn.edu/humanrts/instree/auob.htm>> (accessed 7 October 2012).

<sup>149</sup> The speech was delivered at the Dialogue on Human Rights and Development in 2004. See 'Human Rights and Development: Towards Mutual Reinforcement' <[www.chrgj.org/docs/3-1jameswolfensohnremarks.doc](http://www.chrgj.org/docs/3-1jameswolfensohnremarks.doc)> (accessed 1 October 2012).  
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<sup>150</sup> 'International Human Rights Law' <<http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>> (accessed 7 October 2012).

One of the most famous cases illustrating this complex relationship was the pipeline project between Chad and Cameroon (Pipeline Project). The project, and its circumstances, has been considered to be a turning point in the Bank's relationship with human rights.<sup>151</sup> Prior to the Pipeline Project, the World Bank wistfully denied its involvement in human rights. However, the Pipeline Project proved that in some instances it is impossible to engage in the one without paying heed to the other. The Pipeline Project was the largest energy infrastructure development in Africa, estimated at \$3.7 billion.<sup>152</sup> It involved drilling 300 oil wells in three oil fields in the southern region of Chad named Doba, and the construction of an export pipeline more than 1100 km long through Cameroon to an offshore facility.<sup>153</sup> The Bank's total investment in the project amounted to about 6% of the project's total cost, and the Bank played the roles of lender, development promoter and risk mitigator.<sup>154</sup>

From the onset of the project, the international community protested against the involvement of the Bank due to Chad's poor human rights record. Despite human rights activists' protests, the World Bank initially ignored this factor, publically justifying its decision to support the project.<sup>155</sup> Nonetheless, after massive mobilisation of civil society and numerous other stakeholders, it became apparent to the Bank that the appreciation of these issues is crucial to the Bank's success, and moreover, its reputation. Various human rights issues came to the front throughout the project, some very complicated in its relation to the work of the Bank. Sponsors estimated that 150 families would have to be forcibly resettled, without any consent or cooperation.<sup>156</sup> Controversies involving government opposition leaders and allegations of torture also gained widespread international attention.<sup>157</sup> The main concern, however, was the misappropriation of funds, as it was estimated that the Chad government spent about \$12.5 million of the 'welcome bonus', including \$4.5 million of the revenues from the project on the acquisition of arms, contrary to the revenue management agreements.<sup>158</sup> Interesting from the Pipeline Project however, was that none of the protesting political groups campaigned for the abolition of the project – they simply demanded an equitable, peaceful and transparent process, especially regarding the distribution of revenues.<sup>159</sup> None of the problems arising in the Pipeline Project were provided for by any of the Bank's policies, since these were primarily aimed at social and environmental protection. The Pipeline Project serves as a

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<sup>151</sup> Uriz (n 22 above) 198.

<sup>152</sup> World Bank Inspection Panel 'Investigation Report, Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD) 2.

<sup>153</sup> Investigation Report, Chad-Cameroon Petroleum and Pipeline Project (n 152 above) 2.

<sup>154</sup> World Bank 'Chad-Cameroon: Petroleum Development and Pipeline Project, Project Appraisal Document' (2000) 20.

<sup>155</sup> Uriz (n 22 above) 211.

<sup>156</sup> Esso Exploration and Production Chad Inc 'Environmental Assessment – Executive Summary and Update' Chapter 9 - 26 <<http://www.esso Chad.com/Chad-English/PA/Files/EAESU9.pdf>> (accessed 13 October 2012).

<sup>157</sup> Investigation Report, Chad-Cameroon Petroleum and Pipeline Project (n 152 above) 61.

<sup>158</sup> Uriz (n 22 above) 225.

<sup>159</sup> Uriz (n 22 above) 214.

perfect example that the problems faced by institutions such as the Bank, are often far beyond the reach of environmental and social safeguards.

### **3.3 Environmental and social protection**

Environmental protection frameworks aim to protect nature, both for itself and for the benefit of humankind.<sup>160</sup> The discussion on the safeguard policies highlighted that the World Bank created these policies to protect people and the environment against the negative impact of its development projects. While it is the opinion of the author that any effective environmental and social protection network is reliant on a supporting human rights framework, the current position of the Bank is that it focuses on environmental and social protection in abstraction from human rights. Is it really viable to protect the environment and society at large without paying heed to human rights? Answering this question would require an analysis of the essence of social and environmental protection, as well as its overlapping principles with human rights. If such an existing substantive overlap between environmental and social protection with human rights could be proven, it would imply that the World Bank has already begun providing for human rights protection by adopting tailored policies. The next crucial step for the Bank would be to articulate this commitment explicitly, and in the process strengthen the safeguard system as a whole.

#### **3.3.1 The World Bank and environmental and social protection**

Upon first impression, environmental and social protection may be perceived as two different concepts. These two concepts are, however, very much interdependent. This interdependency has been recognised in international environmental law as well, serving as the basis for the anthropocentric nature of environmental law. The anthropocentric approach to environmental law places the human being at the centre of environmental protection, supporting the notion that nature needs to be preserved for current and future generations of people. The right to a safe and healthy environment has also been recognised in numerous international instruments and the majority of national constitutions. Environmental sustainability and human rights are not mutually exclusive, but they are also not straightforwardly compatible. This view becomes particularly clear when environmental sustainability is to be added to the list of human rights proclaimed in the contemporary human rights regime.<sup>161</sup> This argument is rather reflective of the World Bank's position on environmental protection. Even if the push for the adoption of an environmental protective framework came from civil society, which included human rights NGOs, it is rather certain that the Bank did not necessarily have human rights in mind when it adopted the first

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<sup>160</sup> P Cullet 'Definition of an Environmental Right in a Human Rights Context' (1995) 13 *Netherlands Quarterly Human Rights* 25.

<sup>161</sup> K Woods *Human Rights and Environmental Sustainability* (2010) 128.

policies on environmental preservation. The question however, is whether the expansion of the Bank's mandate, its safeguard policies, and the international understanding of environmental protection may have led to the application of environmental protection frameworks to the protection of human rights? Furthermore, does the inclusion of 'social protection' give the environmental protection policies of the Bank a greater human rights dimension?

The nexus between social and environmental protection seems apparent from its appearance under environmental protection frameworks.<sup>162</sup> The World Bank was in fact one of the spearheads when it came to accepting social protection at the core of environmental protection. The Bank took a proactive stance by adopting Operational Policy 4.01 (OP 4.01), which provides for both environmental and Social Impact Assessments (SIA). This indivisibility of social and environmental impacts is also prevalent from the Bank's decision to not only include both into the same framework, but to combine it under one impact assessment policy. One of the three pillars of the World Bank Environment Strategy is 'improving the quality of life'.<sup>163</sup> The Bank's intention to apply its environmental strategy across a broader range of issues - than purely environmental issues - reverberates throughout its safeguard policies. Human rights were conceptualised with the aim to improve quality of life, especially through the understanding of social, cultural and economic rights and it is clear that the Bank's environment strategy shares common goals with basic human rights aims.

Global development is very much dependent on the understanding of environmental protection and human rights, their capability of coexisting, and their common objectives.<sup>164</sup> Authors such as Kane have written extensively about the clear nexus between environmental degradation and human suffering.<sup>165</sup> Environmental protection consists of a collective of different objectives and by maintaining a policy of environmental preservation, mainly for the protection of human health, the World Bank would create a mutually reinforcing framework.<sup>166</sup> By expanding its mandate to include poverty alleviation and sustainable development, the Bank committed itself to the fulfilment of human rights. Furthermore, the Bank clearly provides for some human rights protection through its safeguard policies. However, by failing to adopt an explicit human rights mandate with specific policies to accompany it, the human rights dimensions to the Bank's work would always have to be

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<sup>162</sup> Cullet (n 160 above) 25.

<sup>163</sup> 'Environmental Assessment in Operational Policy 4.01'

<<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/EXTENVASS/0,,menuPK:407994~pagePK:149018~piPK:149093~theSitePK:407988,00.html>> (accessed 7 October 2012). See also Ciorciari (n 52 above) 355. Ciorciari draws attention to the Bank's inclusion of 'quality of life' into its understanding of sustainable development.

<sup>164</sup> M Parker 'Two sides of the same coin: Considering human rights when designing environmental policy' (2010) 25 *Journal of Land Use & Environmental Law* 13. © University of Pretoria

<sup>165</sup> MJ Kane 'Promoting Political Rights to Protect the Environment' (1993) 18 *Yale Journal of International Law* 389.

<sup>166</sup> Parker (n 164 above) 113.

deduced from current existing practices. The effectiveness of the Bank's development mandate is contingent on its ability to provide for a collection of interlocking concepts of very broad environmental, socioeconomic, legal and institutional implications, including the promotion and protection of human rights.<sup>167</sup> The Bank is missing an important opportunity to demarcate its own human rights obligations, as well as setting its own human rights mission. As long as the Bank ignores this issue, international critics will always have an open-ended field of reference for criticising the Bank's reluctant approach to human rights.

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<sup>167</sup> Brodnig (n 141 above) 9.

## CHAPTER FOUR: INTEGRATING HUMAN RIGHTS

The consequences of globalisation and the impact of the policies of the World Bank in Africa have been identified as a critical human rights issue that needs to be addressed in the third millennium.<sup>168</sup> The first step towards addressing the issue would be by defining the human rights responsibilities or obligations of the Bank. In this chapter the importance and challenges of identifying the human rights obligations of the Bank are discussed, drawing attention to the crucial differences between the duties to respect, protect, promote or fulfil. By analysing the susceptibility of the existing structures, it would also attempt to point out the compatibility of the safeguards with the proposed policy. This analysis is followed by a brief discussion of the basic characteristics of an effective human rights framework, and concludes by providing a concise discussion of the Inspection Panel's ability to serve as a redress mechanism for human rights violations.

### 4.1 Defining the human rights obligations of the World Bank

The process of defining the human rights obligations of the World Bank is guided by the Articles of Agreement, which effectively set the boundaries for the formulation of such a mandate. The Articles of Agreement have been used by the Bank to expand its mandate to areas in which it feels comfortable, but have also been used to avoid certain responsibilities, in particular human rights responsibilities. At this point it might be useful to remember that the main argument for using the Articles of Agreement to avoid these responsibilities, was the alleged nature of human rights as being political.<sup>169</sup> However, this argument has been proven futile and it is widely accepted that the Articles of Agreement do not expressly prohibit the Bank from engaging with human rights. The direct impact of Bank operations on human rights in Africa prompts the Bank to take up its place as an important role-player in this field.<sup>170</sup>

There seems to be an emerging consensus among academia that the World Bank is under an obligation to adhere to fundamental human rights principles by virtue of its nature as an international organisation.<sup>171</sup> The conferment of international legal personality implies an obligation to respect legal duties, including human rights obligations.<sup>172</sup> The obligation to respect these legal duties becomes even more relevant in situations where the Bank's policies, programs

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<sup>168</sup> OK Dingake 'Protection of Human Rights in Africa' (2000) 10 *Transnational Law & Contemporary Problems* 383.

<sup>169</sup> 'The World Bank, the IMF, and Human Rights' (n 27 above) 82.

<sup>170</sup> Dingake (n 168 above) 378.

<sup>171</sup> Tan (n 23 above) 81.

<sup>172</sup> Tan (n 23 above) 82.



and projects may negatively impact on human rights in borrowing states.<sup>173</sup> The Bank furthermore has an obligation to respect the principles enshrined in the UN Charter due to its function as a specialised agency of the UN.<sup>174</sup> The Bank must therefore take measures to ensure that its operations do not undermine its members' compliance with their international legal obligations under customary international or treaty law.<sup>175</sup>

The World Bank is a creation of its member states. As with any other international organisation, the power and influence within the organisation is not always evenly divided among its members. It is unrealistic to expect otherwise, since some member states hold better positions in the global economy hierarchy, and are therefore better able to contribute or invest financially in the Bank. Likewise, the agenda of any international organisation is greatly influenced by its powerful members. The Bank should be no exception. Economic superpowers have always played an important role in the global development paradigm, directly and indirectly supporting development across the third world. In the same sense, they should also be able to use their influence to set the agenda of the Bank to promote human rights. Such an exercise would be mutually beneficial, since at the end of the day it would be the member states, and not the Bank, that would primarily be responsible for the fulfilment of human rights.

Nonetheless, the member states cannot evade their responsibilities under international law by acting collectively and should respect any international legal obligation, including international human rights obligations, through the operations of the Bank.<sup>176</sup> Reciprocally, the Bank should take care to ensure that its members do not violate any international legal obligations in their cooperation with the Bank. It should ensure that its own operations are in conformity with international human rights standards, to avoid its members being drawn into involvements that might threaten their own legal duties.<sup>177</sup> The member states are first and foremost bound by their international legal responsibilities when formulating the institution's policies.<sup>178</sup> The Bank, supported and assisted by its members, should thus take care to ensure that its policies do not contribute to a member state's negligence of its international human rights responsibilities.<sup>179</sup>

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<sup>173</sup> Para 5 of the Tilburg Guiding Principles (n 30 above).

<sup>174</sup> Tan (n 23 above) 82.

<sup>175</sup> 'The World Bank, the IMF and Human Rights' (n 27 above) 63.

<sup>176</sup> Ball (n 133 above) 347.

<sup>177</sup> 'The World Bank, the IMF, and Human Rights' (n 27 above) 11.

<sup>178</sup> Para 7 of the Tilburg Guiding Principles (n 30 above).

<sup>179</sup> Para 25 of the Tilburg Guiding Principles (n 30 above).

## 4.2 Obligations to respect, protect, promote and fulfil

Engaging with human rights could have many different meanings. The question has been posed in the past whether the World Bank should condition its loans to development projects based on a state's human rights record, assigning it a role as a human rights enforcer.<sup>180</sup> This approach is greatly discouraged, as it has been criticised for being an abuse of the Bank's powers and funds, completely disregarding the purpose for which it was created. The mandate of the Bank currently focuses on sustainable development and poverty alleviation – a mission that requires the Bank to often take far-reaching actions in order to achieve these goals. Even when complying with the safeguard policies of the Bank, its projects and operations may occasionally lead to severe human rights violations. The Bank has faced past allegations of human rights violations (even within the Bank itself) with unease, denial and ambiguity.<sup>181</sup> The Bank seems to be taking the stance that its lack of an explicit human rights mandate excuses it from any liability, should human rights violations occur.

It is of fundamental importance to distinguish between respecting, protecting and fulfilling human rights. In respecting rights, the actor must refrain from interfering directly or indirectly with the right in question.<sup>182</sup> Fulfilment would require an actor to take positive steps to implement a right to which the right bearer is entitled. The World Bank has been directly involved in offering technical assistance to states in an attempt to protect citizens from human rights violations. Its role in the fulfilment of human rights differs completely, and the distinction between the duties to respect, protect, promote and fulfil human rights is of the utmost importance when it comes to defining the human rights obligations of the Bank. Establishing an international human rights framework requires caution, and is usually a progressive process.<sup>183</sup> This might explain the eagerness of the Bank to embrace its duty to respect, as this obligation apparently requires little of the Bank. Nonetheless, even this obligation cannot be met without the necessary provisions. It may also raise further concerns about the indivisibility of different human rights obligations, which would have to be addressed by the Bank at some point or another.

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<sup>180</sup> Ball (n 133 above) 333.

<sup>181</sup> Brodnig (n 141 above) 3.

<sup>182</sup> Tan (n 23 above) 84.

<sup>183</sup> International commentators often complain about the lack of strict human rights provisions in human rights instruments such as the African Charter on Human and Peoples' Rights. However, the realities and international political situation at the time of drafting required the drafting team to take into account that the objective was to get African states to sign and ratify such a document, and would be unlikely in the event of a strict and enforceable instrument. Thus, a progressive approach is often used.

It is undisputed that the World Bank has the obligation to respect human rights. The Bank has affirmed this position, committing to respect human rights in all of the projects that it supports.<sup>184</sup> Yet this commitment to respect has not been articulated in any of the Bank's policies or impact assessments. Due to this oversight, the Bank has failed in its obligation to respect numerous times. The Bank has been rather hesitant to display this same commitment when it comes to obligations relating to the promotion and protection of human rights. However, these obligations, including the obligation to fulfil, should be seen in the context of the Bank's mission and in relation to its projects and programs. The obligation to respect and the obligation to protect human rights may overlap significantly in the case of the Bank. Under international law, the obligation to respect human rights would impose a negative duty on the state to abstain from interfering in the rights of its people. The obligation to protect would impose a positive duty on the state to protect the people's enjoyment of human rights from third parties. In the case of the Bank, the obligation to respect would require the Bank to ensure that its projects do not negatively impact (interfere) with people's enjoyment of human rights. The Bank's obligation to protect only applies to the extent of its own involvement, and imposes a duty to protect people from third party interference in the course of its operations that may possibly lead to human rights violations. The Bank may not be held responsible for the protection of human rights in abstraction from its operations and involvement.

The World Bank has been equally hesitant to accept any duty to fulfil human rights. This may be due to the normal implications of such an obligation under international law, which requires that states take positive action to fulfil certain human rights. The duty to fulfil ordinarily goes hand in hand with heavy expenditure and continuous involvement. The Bank often emphasises its facilitative role, and when it comes to the obligation to fulfil, rightly so. It provides assistance to states in implementing development projects, aimed at directly fulfilling certain human rights, or generating revenue to allow for the fulfilment of other rights. Consequently, the Bank may not be held responsible for the independent fulfilment of human rights. Nonetheless, as the inextricable nexus between development, poverty alleviation and human rights has proved, projects of the Bank would certainly work toward the fulfilment of human rights, indirect as this may be. In a facilitative capacity, the Bank has already played this role in numerous occasions, often imposing contractual obligations on borrowing states to invest in the fields of public health, social affairs, education, infrastructure, rural development and environmental sustainability.<sup>185</sup> The Bank should acknowledge this obligation without exception, and commit itself to include revenue management schemes and contractual obligations regarding the appropriation of funds towards the fulfilment of

<sup>184</sup> Uriz (n 22 above) 206.

<sup>185</sup> Uriz (n 22 above) 223.

human rights in all of its projects and programs. The Bank plays a facilitative role by ensuring provisions for revenue, employment management, and social development. Social and financial gains also have to be evaluated through regular project and program reporting.

The World Bank has always been at the forefront of promoting human rights, and has displayed its leading role by integrating principles of transparency and good governance into its operations. The Bank would not have any problem accepting and taking up its role to promote human rights. As such, it would fit in perfectly within the Bank's mandate. The Bank has been working and cooperating with human rights institutions, such as the UN OHCHR for many years, occasionally publishing documents exactly intended for the promotion and celebration of human rights.<sup>186</sup> It is important to understand the context of these obligations, as opposed to examining them in theory under public international law. When looking at the duties of the Bank to respect, protect, promote and even fulfil these rights with relation to its projects, there is no need for the Bank to be hesitant about accepting its human rights obligations. It is possible for the Bank to accept these obligations with the purpose of strengthening its own operational framework, but this would require the Bank to formulate, draft and adopt its own human rights policy.<sup>187</sup> The Bank cannot set its agenda or attempt to stipulate its own human rights terms without dealing with the issue directly. Since the safeguard policy framework was created to 'prevent and mitigate undue harm to people and their environment in the development process', it would make sense to turn to it as a prospective platform for human rights integration.<sup>188</sup>

### **4.3 Integrating human rights into the safeguard policies**

The safeguard policies of the World Bank have been criticised in the past for lacking in coherence.<sup>189</sup> This is due to the fact that the policies were developed one by one, to address issues that needed attention at different points in time. As illustrated earlier, the initial focus of the safeguard policies were set on environmental protection, which later evolved to include social protection and a wide range of other recurring problems.<sup>190</sup> Although the safeguard policies of the Bank may be considered to lack coherence, it would be unfair and irrational to discard them completely and to start over again in an attempt to shift the focus to human rights.<sup>191</sup> These policies were developed along many years, involved wide consultation, and have proved to be very effective at times. Due to

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<sup>186</sup> Amongst other things, the Bank released a report titled 'Development and Human Rights: The Role of the World Bank' (n 26 above) to commemorate the 50<sup>th</sup> anniversary of the Universal Declaration of Human Rights.

<sup>187</sup> Kinley (n 144 above) 371.

<sup>188</sup> 'Safeguard Policies'

<<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html>> (accessed 14 October 2012).

<sup>189</sup> 'The World Bank, the IMF, and Human Rights' (n 2 above) 18.

<sup>190</sup> *A guide to the World Bank* (n 7 above) 40.

<sup>191</sup> Para 30 of the Tilburg Guiding Principles (n 30 above).

the nexus between environmental and social protection and human rights, the safeguard policies have managed to provide some degree of human rights protection in the past. Nonetheless, it took immense mobilisation of environmental organisations, human rights organisations, churches, universities and civil society at large to bring the Bank to address human rights complaints, exactly because the current policies were not sufficiently clear on the topic.<sup>192</sup> This process is time consuming, expensive and has no assurance of success. Summarily, it is unsustainable and ineffective, and the time has come for the Bank to explicitly adopt human rights into its policies.

Suggestions have been made to adopt an overarching human rights provision to be read into every one of the existing policies, which would refer to existing international human rights instruments.<sup>193</sup> This approach is discouraged, since it would deprive the World Bank of the opportunity to set its own human rights mandate and design a specific human rights policy that would make provision for the particular needs of the Bank. Adding a single provision may also lead to extreme difficulties in interpretation, seeing that the policies would be used as a basis for human rights redress by the Inspection Panel. The Bank has occasionally argued that the safeguard policies are only applicable to project financing and not to program lending, which would also have to be clarified by the Bank, especially as the safeguard policies should be applied as widely and consistently as possible.<sup>194</sup> It is imperative that provision be made for human rights protection in both project and program lending.

The upcoming policy review process would allow an opportunity for the World Bank to reformulate all of the existing safeguard policies and to design its own human rights policy. The safeguard policies could then be restructured to achieve better coherence, improved synergy and effectiveness.<sup>195</sup> Incorporating human rights into the operational policies, which are implemented by states and overseen by the Bank, would resonate with the position of the Bank that the duty bearers of human rights remain state actors, and not international organisations.<sup>196</sup> The success of creating such a policy will greatly depend on a synthesis of principle, pragmatism, practice and politics across all the levels of Bank operations and activities.<sup>197</sup> It would require one to establish a common ground from which to build a policy that would incorporate all the relevant factors.<sup>198</sup> The goal should be to develop a sustainable human rights policy to enable the Bank to provide for its

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<sup>192</sup> Uriz (n 22 above) 199.

<sup>193</sup> See generally the Tilburg Guiding Principles (n 30 above).

<sup>194</sup> 'World Bank's Program-for-results loan instrument: Good intentions?' <<http://cleantechnica.com/2012/02/01/world-banks-program-for-results-loan-instrument-good-intentions/>> (accessed 14 September 2012).

<sup>195</sup> Ball (n 133 above) 355.

<sup>196</sup> Tan (n 23 above) 90.

<sup>197</sup> Kinley (n 144 above) 375.

<sup>198</sup> Parker (n 164 above) 112.

human rights concerns over the long run, making the rights entrenched in the UDHR 'a common standard of achievement for all peoples of all nations'.<sup>199</sup>

#### 4.4 Characteristics of an effective human rights framework

While it is vital for the World Bank to provide the best possible human rights protection, it is important to remember that very repressive governments are often quite reluctant to accept any radical change in policy, and as such could cause these states to take actions that would effectively achieve the opposite result of what was intended.<sup>200</sup> These policies must be sensitive to the realities of international politics, domestic politics and global needs if they are to be effective.<sup>201</sup> Certain elements and principles are vitally important to the effectiveness of a human rights policy framework. The framework would have to recognise and keep up with international legal developments, best practices and standards. The policy would have to undergo regular and periodic reviews, to allow for the Bank to adapt to developing global needs. A comprehensive human rights policy would also have to address all the different stages of the development process. It should pay attention to the events leading up to the project, implementation and monitoring of the project, as well as provide a mechanism for redress should any of the policies be breached.

The concept of prevention is extremely important in both human rights and environmental protection.<sup>202</sup> Nonetheless, even if protection frameworks such as the safeguard policies are created to avert social and environmental damage, it is common practice to only address the damage after it has been done.<sup>203</sup> Unfortunately, with regards to development projects the damage done to people or the environment is often impossible to undo, and equally difficult to compensate for. It is thus important for the safeguard policies, and the World Bank's future human rights policy, to provide for effective pro-active measures.<sup>204</sup> The Bank has been using environmental and social impact assessments in the majority of its projects for the last two decades, with varying success rates. EIAs and SIAs are used by the Bank to 'identify, avoid, and mitigate the potential negative...impacts associated with Bank lending operations'.<sup>205</sup> Following the same reasoning, the Bank should evaluate the human rights impact of their projects before, during, and after its completion in an attempt to identify, avoid and mitigate human rights violations.<sup>206</sup> Human rights impact assessments

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<sup>199</sup> DM Fraser & JP Salzberg 'Foreign Policy and Effective Strategies for Human Rights' (1979) 1 *Universal Human Rights* 18.

<sup>200</sup> Fraser & Salzberg (n 199 above) 12.

<sup>201</sup> Fraser & Salzberg (n 199 above) 13.

<sup>202</sup> Cullet (n 160 above) 34.

<sup>203</sup> Cullet (n 160 above) 34.

<sup>204</sup> Uriz (n 22 above) 201.

<sup>205</sup> 'Environmental Assessment'

<<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTSAFEPOL/0,,contentMDK:20543912~menuPK:1286357~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html>> (accessed 14 October 2012).

<sup>206</sup> Para 38 of the Tilburg Guiding Principles (n 30 above).

(HRIAs) are few and relatively untested, but it has been emerging as a viable possibility since the 1990's.<sup>207</sup> Another institution of the WBG, the IFC, started experimenting with HRIAs in 2006, and adopted its newest revised version of its Guide to Human Rights Impact Assessment and Management in 2010.<sup>208</sup>

HRIAs have the potential to improve the current impact assessment process of the World Bank in four ways.<sup>209</sup> Firstly, it underscores the concepts of needs assessment, human rights standards, meaningful consultation and participation of stakeholders. Secondly, it grounds the assessment in international legal obligations. Thirdly, it demands greater accountability, and finally, it would bring the human rights elements of the SIA and EIA to the fore. Previously, individuals could only rely on the environmental and social aspects of impact assessments, whereas HRIA would provide for more detailed assessments and better cognisance of potential human rights threats. Providing that these impact assessment frameworks be used in unison, and taking into account the rapid development of HRIAs, it is suggested that it would serve as a very useful tool for human rights analysis and protection prior to the development projects and programs of the World Bank.

It would be futile for the World Bank to adopt a comprehensive human rights policy, including HRIAs, but no means to ensure state compliance with the policy and assessment findings. It is crucial for the Bank to monitor policy compliance during the implementation of the project or program. The Bank already has structures set in place to regulate and monitor compliance with its current safeguard policies, and these structures could easily be adjusted to allow for the monitoring of compliance with a human rights policy.<sup>210</sup> After the completion of a project, the Bank could continue monitoring of the project's compliance with Bank policies by demanding regular and thorough reporting procedures. The Bank's involvement at this stage would be limited, with little input or control over the borrowing state's actions.<sup>211</sup> Non-compliance may still pass any system unnoticed, and for this reason the Bank would have to allow complaints based on the proposed human rights policy. The Inspection Panel serves as a redress mechanism for individuals negatively affected as a result of non-compliance with the safeguard policies, and by adopting a human rights

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<sup>207</sup> Tomaševski (n 113 above) 395.

<sup>208</sup> L Baker 'Bretton Woods Project' (2007) 4 and 'Guide to Human Rights Impact Assessment and Management' <[http://www1.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/ifc+sustainability/publications/publications\\_handbook\\_hria\\_wci\\_1319577931868](http://www1.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_hria_wci_1319577931868)> (accessed 20 September 2012).

<sup>209</sup> Halifax Initiative Coalition 'Risk, responsibility and human rights: Taking a rights-based approach to trade and project finance' (2004) 14.

<sup>210</sup> The safeguard policies are monitored by the Environmentally and Socially Sustainable Development (ESSD) network, and compliance with all the policies of the World Bank are monitored by the Operations Policy and Country Services (OPCS).

<sup>211</sup> Before implementation the Bank would have its investment (funds) to use as a bargaining tool or incentive to demand policy compliance and adherence.

policy into the safeguard framework, the Bank would immediately allow for the Panel to hear complaints based on human rights violations.

#### **4.5 Redressing human rights violations - the capacity of the Inspection Panel**

Since its inception, the Inspection Panel has served as a successful redress mechanism for people negatively affected by the projects of the World Bank. However, the Panel is explicitly bound to the content of the operational policies of the Bank, and therefore could not hear complaints based on human rights violations. The Panel has been faced with cases of alleged human rights violations, but scrupulously avoided drawing any conclusions that relate to matters other than the Bank's compliance with its own policies.<sup>212</sup> The current Indigenous Peoples Policy of the Bank refers to human rights, but this reference is unique to this particular safeguard policy and only becomes relevant once the environmental screening process activates it. The absence of any reference to, or existence of, international human rights principles within the safeguard policies severely limits the scope for which the Bank may be held accountable.<sup>213</sup> To strengthen the hands of the Panel as an effective redress mechanism for human rights violations, the Bank would have to adopt a human rights policy, drafted in a clear and unambiguous way.<sup>214</sup>

Some of the cases regarding alleged human rights violations that appeared before the Inspection Panel might give some ideas as to where and how the World Bank could address the defects that prevented effective adjudication. The Panel considered human rights in several of its cases, but none more distinctly than the *Honduras Land Administration Project* (2007), the *Chad Petroleum Development and Pipeline Project* (2002) and the *China Western Poverty Reduction Project* (2000).<sup>215</sup> All of these cases had important human rights dimensions, but were severely hindered by the lack of human rights in the content of the safeguard policies. The Panel interpreted the safeguard policies to establish implied principles of human rights, but even found this to be a difficult task. It is clear from the Panel's reports that it is currently frustrated by the ambivalent status of human rights within the structures of the Bank, and urgently needs clarification on the matter.

In the Pipeline Project between Chad and Cameroon, a request for inspection by the Inspection Panel was submitted to the World Bank in March 2001. The submission claimed that the Pipeline Project constituted a threat to local communities, their cultural property and the environment and that people in the oil field region were being harmed, or were likely to be harmed because of the

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<sup>212</sup> Herz & Perrault (n 4 above) 2.

<sup>213</sup> Ball (n 133 above) 356 and Brodnig (n 142 above) 5. © University of Pretoria

<sup>214</sup> Tan (n 23 above) 89 and Para 39 of the Tilburg Guiding Principles (n 30 above).

<sup>215</sup> See generally Herz & Perrault (n 4 above).



absence, or inadequacy, of environmental assessment and compensation.<sup>216</sup> The requesters also claimed that the Bank's directives on proper governance and human rights brought the alleged human rights violations within the purview of the Panel.<sup>217</sup> The Panel stated that it does not fall within its mandate to assess the status of governance and human rights in general or in isolation, but that it felt obliged to examine whether the issues of proper governance and human rights violations in Chad were such as to impede the implementation of the Pipeline Project in a manner compatible with the Bank's policies.<sup>218</sup> The Panel continued to examine the relationship between human rights and the Pipeline Project in the overall context of the Bank's policy framework. Unfortunately, the safeguard policies were clearly not equipped to provide the Panel with the necessary tools, and the Panel expressed that it 'appreciates the fact that the frequently imprecise concepts of "governance" and "human rights" acquire special significance in the context of the Bank's mandate and operations'.<sup>219</sup> However, the Panel concluded in its findings that the situation in Chad was 'far from ideal', and raises questions about compliance with Bank policies, warranting renewed monitoring by the Bank.<sup>220</sup> It has been ten years since the Panel's findings in the Chad project, yet the Bank has still not adopted an explicit human rights policy.

The World Bank would only play a facilitative role in the fulfilment of human rights, proposing investments of revenue generated from its development projects to fulfil its human rights obligations.<sup>221</sup> Because of this indirect role, questions may be raised as to how exactly the Inspection Panel would be able to adjudicate cases of non-compliance if the Bank adopted a human rights policy. The Panel only has jurisdiction over the Bank, and cases brought before the panel would concern non-compliance with the Bank's policies. The Panel does not have jurisdiction over the member states of the Bank, and therefore cannot demand any action or redress from member states. However, there are ways for the Panel to address these issues through the Bank, using its review powers over the Bank to recommend specific actions to the Executive Directors. These actions may include the suspension of the right to apply for any future loans. Prompted by international outrage, the Bank has frozen its loans in certain past cases of massive human rights abuses.<sup>222</sup> If human rights obligations are not met by the Bank, which would usually involve non-compliance by the borrowing state as well, the Panel could recommend to the Executive Directors of the Bank that the borrowing state be placed under moratorium, prohibiting it from any future loans until its obligations have been met. If the human rights violations in question are more directly

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<sup>216</sup> Investigation Report, Chad-Cameroon Petroleum and Pipeline Project (n 152 above) ix.

<sup>217</sup> Investigation Report, Chad-Cameroon Petroleum and Pipeline Project (n 152 above) xvi.

<sup>218</sup> Investigation Report, Chad-Cameroon Petroleum and Pipeline Project (n 152 above) xvi.

<sup>219</sup> Investigation Report, Chad-Cameroon Petroleum and Pipeline Project (n 152 above) 62.

<sup>220</sup> Investigation Report, Chad-Cameroon Petroleum and Pipeline Project (n 152 above) 63.

<sup>221</sup> Project Appraisal Document (n 154 above) 39.

<sup>222</sup> The Lawyers Committee for Human Rights 'The World Bank: Governance and Human Rights' (1995) 37 – 40.

attributed to the Bank itself, the Panel could recommend that the Bank pay compensation, or demand restitution where possible.

Much has been said and written about the World Bank's engagement with human rights issues, or rather its lack of engagement, but ultimately it falls on the Bank to decide its way forward. In order for the Bank to succeed in its attempt to incorporate human rights into its structures, various important factors and challenges would have to be taken into consideration. Undeniably, the technical dimensions of the human rights obligations of the Bank raises some questions under public international law, and the Bank is encouraged to carry out the necessary research to clarify the matter. The Bank would also always face the danger of expanding its 'mission creep' to uncontrollable proportions. Yet, the Bank can no longer deny its role in the human rights paradigm, and should use the upcoming policy reform process to settle this dispute once and for all. The safeguard policies provide an excellent platform for the incorporation of a human rights policy, and might benefit holistically from such a move as well. The Inspection Panel, with some minor restructuring, would also be able to serve as a redress mechanism, and an invaluable tool in the monitoring and enforcement of such a policy.

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

### 5.1. Conclusion

The World Bank was created at the Bretton Woods conference to provide financial assistance to transition economies in their quest for development. It originally considered its mandate to be of a pure financial nature, and thus only took economic considerations into account. At the end of the 20<sup>th</sup> century the Bank shifted its focus to poverty alleviation and sustainable development. This shift in focus came at the same time the Bank realised that it had to take measures to mitigate and protect nature and society against the negative effects of development. It adopted the safeguard policies, and created the Inspection Panel, both of which are still in operation today. The Panel were mandated to serve as an independent body, to investigate allegations of non-compliance with the Bank's safeguard policies. Although the Panel has been doing very well in holding the Bank accountable, the development projects funded by the Bank still impact negatively on people and the environment on a regular basis.

In expanding its mandate, the World Bank created safeguards for environmental and social protection, but meticulously neglected to incorporate human rights. The decision seems to stem from an institutional fear of committing to human rights, being fully aware that this would impose human rights obligations on the Bank. By avoiding to address this issue, much confusion about the Bank's position have arisen, often leading to unfair blame and criticism directed at the Bank. By failing to address the issue of human rights, the Bank effectively achieved the opposite result of what was intended – by trying to avoid any formal obligations, it attracted more scrutiny for human rights neglect than it ever anticipated. The Inspection Panel has attempted in the past to use the existing safeguard policies to address human rights concerns, but diligently noted that it fell outside the Panel's mandate, leaving it powerless in this regard.

There is no easy, universal and comprehensive approach to development that would provide for all the different requirements of countries worldwide. However, it is clear that there are minimum mandatory standards that should be upheld and defended by all international financial institutions. The World Bank has always been a sterling example when it comes to the promotion and advancement of human development and global needs. It was the first international financial institution that adopted safeguard policies to mitigate the negative impact of its projects and programs. It is constantly committing itself to collaborative projects aimed at sustainable development, poverty alleviation and the fulfilment of human rights.<sup>223</sup> There is no doubt that any

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<sup>223</sup> A good example would be the World Bank's commitment to play a key role in the achievement of the MDGs.

human rights transgressions caused by the Bank's projects, or overlooked by the Bank in the preparatory stages, are not committed intentionally or even apathetically. The main causing factor is a mere structural problem – the unwillingness of the Bank to explicitly engage with human rights, and adopting it into its normative framework.

Throughout the paper it is apparent that the World Bank can no longer ignore this issue - this responsibility. In a world that is constantly aspiring to achieve democracy and the fulfilment human rights, it is paradoxical that the Bank would pay such little attention to these issues. The study demonstrated how the Bank, by making minor adjustments to its existing structures, could successfully integrate human rights into its operations. Such integration would strengthen the existing policy outcomes, provide better social and environmental protection, and improve the cohesion of the safeguard policy framework.

## **5.2. Recommendations**

In light of what has been discussed, the following specific recommendations are made to the management of the World Bank:

In order to address the issues regarding the World Bank's human rights mandate, it is advised that the Bank adopt an explicit human rights policy into the safeguard policy framework. It would also have to focus on the Bank's normative human rights configuration. It has been suggested that the Bank use the IBR as a starting point, bearing in mind international human rights instruments and domestic human rights commitments. The Bank must also consider the legal obligations of its member states, and be cautious not to define its own normative framework in such a way as to force member states to comply with human rights instruments that they have not ratified or agreed to.

The Bank is encouraged to use this policy to clarify its own human rights obligations under international law. It would require the Bank to pay specific attention to its position regarding the duties to respect, protect, promote and fulfil human rights. It should address practical questions relating to activations processes and monitoring compliance. It is highly recommended that the Bank make use of existing structures by modifying these to provide for successful human rights integration.

The human rights reform of the Bank would only succeed if the Bank embarked on a process of capacity building and staff training, to adequately prepare its staff for active involvement in human rights. The Bank has never before explicitly and purposefully engaged with human rights, and its staff are currently not trained for it. In fact, there seems to be a general denial of the Bank's human

rights involvement, and the corporate culture of the Bank would have to be addressed if it wants to be successful in achieving its human rights mission.

The Bank is urged continue to use the Inspection Panel as a redress mechanism for non-compliance with the safeguard policies. The Bank is further encouraged to ensure that the Panel has the necessary expertise and training to adjudicate matters involving human rights. It would require all incumbent Panel members to receive basic training and education on international human rights, as well as revisiting the composition of the Panel to consider including at least one international human rights law expert at all times.

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