Eva Brems, Christophe Van der Beken
and Solomon Abay Yimer (Eds.)

Human Rights and Development

Legal Perspectives from and for Ethiopia

International Studies in Human Rights

BRILL | NIJHOFF

Human Rights and Development

International Studies in Human Rights

VOLUME 111

The titles published in this series are listed at *brill.com/ishr*

Human Rights and Development

Legal Perspectives from and for Ethiopia

Edited by

Eva Brems
Christophe Van der Beken
Solomon Abay Yimer

BRILL
NIJHOFF

LEIDEN | BOSTON

With the support of
THE BELGIAN
DEVELOPMENT COOPERATION .be

Library of Congress Cataloging-in-Publication Data

Human rights and development (Brill Academic Publishers)
Human rights and development : legal perspectives from and for Ethiopia / edited by Eva Brems, Christophe Van der Beken, Solomon Abay Yimer.
pages cm. -- (International studies in human rights ; v. 111)
Includes bibliographical references and index.
ISBN 978-90-04-28024-3 (hardback : alk. paper) 1. Human rights--Ethiopia. 2. Economic development--Ethiopia. 3. Economic development--Social aspects--Ethiopia. 4. Law and economic development. I. Brems, Eva. II. Beken, Christophe van der. III. Yimer, Solomon Abay, 1971- IV. Title. V. Series: International studies in human rights ; v. 111.
JC599.E8H86 2015
323.0963--dc23

2014045364

This publication has been typeset in the multilingual "Brill" typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities.
For more information, please see www.brill.com/brill-typeface.

ISSN 0924-4751
ISBN 978-90-04-28024-3 (hardback)
ISBN 978-90-04-28025-0 (e-book)

This book is printed on acid-free paper.

Contents

Integrating Human Rights in Development

Human Rights for Development: A Wide Range of Fora

List of Tables and Charts

Tables

Charts

List of Contributors

Eva Brems
(LL.M. Harvard 1995, Ph.D. KU Leuven, Belgium, 1999) is a Professor of Human Rights Law at Ghent University. Her publications and research interest cover most areas of human rights law, in European and international law as well as in Belgian and comparative law.

Christophe Van der Beken
(Ph.D. Ghent University, Belgium, 2006) is an Associate Professor at the Institute of Federalism and Legal Studies, Ethiopian Civil Service University. He is the author of several publications on federalism and constitutional law in Ethiopia. His research interest includes comparative constitutional law, federalism, minority rights and law in Ethiopia.

Koen De Feyter
is the Chair of International Law at the University of Antwerp, Belgium, where he initiated the Law and Development Research Group. He coordinates an international research network on localizing human rights that currently includes socio-legal research in China, the DRC and India. He has published widely on international law and development issues, including most recently: Globalization and Common Responsibilities of States (Ashgate, 2013).

Adolphe Kilomba Sumaili
(MA in International Law and Settlement of Disputes, the UN Mandated University for Peace, Costa Rica) is currently a Ph.D. candidate in international law at the Vrije Universiteit Brussel. He is also Chef de Travaux at the Faculty of Law of the Catholic University of Bukavu (DRC). His research interest is in transitional justice in the DRC.

Abdi Jibril Ali
(LL.M., University of Pretoria, 2009, and Postgraduate Diploma, Åbo Akademi) is a lecturer at the School of Law and Associate Dean for Undergraduate Programs at the College of Law and Governance Studies of Addis Ababa University. His research interest and publications focus on international human rights law and its domestic implementation.

Assefa Fiseha Yeibyio
(Ph.D., Utrecht University, The Netherlands) is an Associate Professor at the Center for Federal Studies, College of Law and Governance Studies, Addis

Ababa University. He is author of journal articles, book chapters and a book. His research interest includes comparative constitutional law, comparative federalism, management of diversity in multiethnic societies and customary law.

Dorothée Cambou
(Ph.D. candidate at the Vrije Universiteit Brussel, Belgium) has published articles on the rights of indigenous peoples. Her research interest lies in the fields of human rights and international law, indigenous studies and the governance of resources.

Genny Ngende
(Ph.D. candidate at the Vrije Universiteit Brussel, Belgium) has published articles on business and human rights, and land grabbing in Africa. Her research interest is in the fields of human rights, international law and corporate social responsibility.

Solomon Abay Yimer
(Ph.D., University of Amsterdam, The Netherlands, 2011) is Assistant Professor of Financial and Economic Law at the Institute of Federalism and Legal Studies, Ethiopian Civil Service University, and School of Law, Addis Ababa University. His publications and research interest cover areas of financial and economic law and interdisciplinary issues of human rights.

Lieselot Verdonck
(Bachelor and Masters Degree in law from Ghent University and LL.M. from Harvard University) is a doctoral researcher at the Human Rights Centre of Ghent University and a fellow of the Research Foundation – Flanders (FWO). Her research interest relates to business and human rights, socio-economic rights and development.

Solomon Nigussie Abesha
(Ph.D., Utrecht University, The Netherlands, 2006) is Associate Professor at the Institute of Federalism and Legal Studies, Ethiopian Civil Service University. His publication includes 'Fiscal Federalism in the Ethiopian Ethnic-Based Federal System, 2008'. His research interest includes Federalism, Public Law, Human Rights, and Taxation and Development.

Zerihun Yimer Geleta
(LL.B. 2007 and MA 2010, Ethiopian Civil Service University, Ethiopia) is a lecturer at the Institute of Federalism and Legal Studies, Ethiopian Civil Service

University. He has published on federalism with greater emphasis on local government in Ethiopia. His research interest includes federalism, human rights, and environmental law.

Laurens Lavrysen
(Ph.D. candidate, Human Rights Centre, Ghent University, Belgium) works on the concept of Positive Obligations under the European Convention on Human Rights.

Mohammed Abdo Mohammed
(Ph.D. Candidate, Human Rights Centre, Ghent University, Belgium) teaches at the Institute of Federalism and Legal Studies, Ethiopian Civil Service University, Ethiopia. He has published monographs on administrative law and civil procedure, and articles and book chapters on human rights, legal pluralism and international watercourses law.

Nicky Broeckhoven
(Ph.D. candidate, Department of Public International Law, Ghent University, Belgium) works on the integration of gender considerations in international environmental law and policy. Her research interest includes international human rights law, especially women's human rights and gender equality, and the intersection between human rights and the environment.

Introduction

The Nexus between Human Rights and Development from International and Ethiopian Perspectives

Eva Brems, Christophe Van der Beken and Solomon Abay Yimer

1 General Overview of the Nexus

With its focus on human rights and development, this book aims to contribute to the academic debate on the linkage between human rights and development. At the international level, most notably at the level of the United Nations (UN), the prevailing view is that both concepts are strongly intertwined in that realizing human rights is both a tool and an objective of development. Pursuant to this view, development is no longer perceived in narrow terms as mere economic growth but encompasses all aspects of human development. The objectives of human rights law and development are, therefore, overlapping in the sense that the achievement of human development requires the realization of all human rights such as civil and political rights as well as economic, social, and cultural rights.[1] This complies with the meaning given to development by the UN Declaration on the Right to Development, which defines the right to development as:

> An inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[2]

Human rights should not only be realized by the development outcome; they are simultaneously part of the process to achieve this outcome.[3] Human rights are more than mere political commitments, since they are enshrined in international legal documents that create binding obligations on duty-bearers and empower right-holders.[4] International development goals such as reducing

1 Siobhan MCinerney-Lankford, "Human Rights and Development: a Comment on Challenges and Opportunities from a Legal Perspective," *Journal of Human Rights Practice* 1/1 (2009): 53.

2 Article 1 of the Declaration on the Right to Development, GA Resolution 41/128, December 4, 1986, A/RES/41/128.

3 Peter Uvin, "From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development," *Development in Practice* 17/4–5 (2007): 603.

4 Philip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals," *Human Rights Quarterly* 27/3 (2005): 779.

 | DOI 10.1163/9789004280250_002

hunger, reducing child mortality, improving maternal health, and achieving universal primary education, can be translated into human rights terms such as the right to food, the right to life, women's right to life and health, and the right to education, respectively.[5] Although such development objectives, which are part of the Millennium Development Goals, are primarily related to the realization of economic and social rights, a human rights-based approach to development does not neglect the importance of civil and political rights. Traditional development approaches emphasize principles such as inclusion, participation, accountability, rule of law, and good governance in order to design appropriate development policies and to guarantee their effective implementation. A human rights-based approach allows providing practical substance to these somewhat opaque principles by translating them into concrete civil and political rights such as equality, non-discrimination, right to association, right of access to information, freedom of speech, voting rights, and access to justice. It is evident that inclusive development processes require a non-discriminatory approach where the voices of potentially vulnerable groups in society such as women, ethnic minorities, indigenous people, and persons with disabilities are effectively heard. These people could either participate directly or indirectly through their respective associations, hence the need for a protection of the freedom of association. Participation is a hollow concept without protection of freedom of speech and the right of access to information, whereas genuine popular accountability will be strengthened when state officials face the prospect of being voted out of office. The rule of law is a very encompassing concept, but in any case requires the right to bring a justiciable matter to an impartial and independent adjudicatory body. Good governance equally transcends a strict technocratic meaning and in fact requires the fulfillment of all the aforementioned civil and political rights.

A human rights-based approach to development holds a lot of promise in realizing the development objectives of states and non-state actors and in ensuring that both the process leading to development as well as the development outcomes are human rights sensitive. As such, this approach allows for development and human rights to mutually enforce each another.

A human rights-based approach to development may be increasingly popular at the level of international organizations such as the UN and international financial institutions such as the World Bank, but states facing development challenges are usually not that enthusiastic about it. This is due to the fact that human rights law imposes binding obligations upon them, violation of which

5 Office of the High Commissioner for Human Rights, *Claiming the Millennium Development Goals: A Human Rights Approach* (New York and Geneva: United Nations, 2008), 3.

leads to international accountability, loss of reputation, and possible sanctions. States, therefore, prefer to express their development objectives in non-legally binding political commitments. The achievement of development is then portrayed as a mere technocratic process, whereby human rights are often perceived and discarded as an impediment rather than as a useful instrument. Governments attempt to legitimate this stance by referring to so-called outside imposition of human rights, i.e. imposition by certain international organizations, foreign countries, and foreign human rights advocacy groups. This argument emanates from a narrow conception of human rights, which exclusively considers civil and political rights. These rights are alleged to originate in Western liberal democracy and are, therefore, considered alien to non-Western polities. Although this argument neglects that many of the values founding the classical civil and political rights are equally present in many non-Western governance traditions, the observation that the international/universal human rights regime has not sufficiently incorporated non-Western values and traditions is legitimate. This constitutes the rationale behind the adoption of regional/continental human rights documents such as the African Charter of Human and Peoples' Rights. The latter Charter does include the classical international human rights, but has added a significant African dimension.[6] Yet, irrespective of the legitimacy of some of the criticisms about 'Western' propagation of human rights – its selectivity, the use of human rights as a mechanism to mask hegemonic interests, and the use of double standards – the fact remains that most human rights are enshrined in several internationally binding legal documents. Both the so-called first (civil and political rights) and second (economic, social, and cultural rights) generation of human rights are enshrined in the Universal Declaration of Human Rights as well as in two international covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which have been ratified by 168 and 162 states, respectively, including most developing countries.[7] All member states of the African Union (except South Sudan) have furthermore ratified the African Charter on Human and Peoples' Rights.[8] Through their ratification, the

6 Giles Mohan and Jeremy Holland, "Human Rights and Development in Africa: Moral Intrusion or empowering opportunity?" *Review of African Political Economy* 28/88 (2001): 177–196.

7 Information available at: https://treaties.un.org/Pages/Treaties.aspx?id=4 (last visited May 1, 2014).

8 Information available at: http://www.achpr.org/instruments/achpr/ratification/ (last visited May 1, 2014).

State Parties have incurred the legal obligation to respect, protect, and fulfill the human rights enshrined in the respective treaty. A human rights-based approach to development does, therefore, not create new obligations for states, but aims at utilizing existing human rights obligations to guide the development process and ensuring that the development outcome complies with these obligations.

Ethiopia has also ratified the major international human rights conventions such as the ICCPR, the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD). As a member of the African Union, Ethiopia has additionally ratified the African Charter on Human and Peoples' Rights. Important to point out in this regard is that all ratified international agreements (including human rights conventions) are an integral part of the law of the land as per Article 9(4) of the Ethiopian constitution.[9] Ethiopia's commitment to human rights is also strongly reflected in its constitutional provisions. The preamble to the constitution proclaims its objectives as:

> Building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development.

The preamble continues that the "fulfillment of this objective requires full respect of individual and people's fundamental freedoms and rights." Based on these two statements, it can be argued that a human rights-based approach is engrained in the constitution. Realizing human rights, encapsulated in such concepts as 'rule of law' and 'democratic order' is both an objective of the constitution as well as a requirement to achieve this objective. It is notable that the constitution mentions both individual and peoples' rights or group rights. Group rights, subsumed under the heading of right to self-determination of 'nations, nationalities and peoples',[10] feature prominently in the constitution

9 See Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, *Federal Negarit Gazeta*, Year 1, No 1 Addis Ababa, August 21, 1995 (hereinafter referred to as the 1995 constitution).

10 The terms 'nations, nationalities, and peoples' are defined in Article 39(5) of the 1995 constitution.

and constitute the background to the establishment of the federal state structure. The attention given to human rights by the constitution is furthermore reflected by its Article 10, which proclaims the respect of human rights as one of the fundamental principles of the constitution. The logical consequence of this is that Chapter Three of the constitution, spread over 31 Articles, contains an extensive list of human rights, including – according to the traditional taxonomy – first, second, and third-generation human rights. Some of the major civil and political rights enshrined in the constitution are the right to life, the prohibition of torture, due process of law, right to equality, right to privacy, freedom of religion, freedom of speech, freedom of association, freedom of movement, access to justice, and voting rights. Confirming the Ethiopian state's commitment expressed by its ratification of the ICESCR, the constitution has enshrined economic, social, and cultural rights in its Article 41. According to Article 41, every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory; every Ethiopian has the right to choose his or her means of livelihood, occupation, and profession; every Ethiopian has the right to equal access to publicly funded social services. But, apart from these rights, most other provisions of Article 41 are designed as obligations resting upon the Ethiopian state rather than as individual rights. For instance, Article 41(4) provides that the state has the obligation to allocate ever increasing resources to provide for public health, education, and other social services. Similarly, Article 41(5) obliges the state, within the available means, to allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardians. There is neither a right to social security (as in Article 9 of the ICESCR), nor a right to education (Article 13 of the ICESCR) nor the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12 of the ICESCR). This formulation might hamper the justiciability of social and economic rights in Ethiopia.[11] Article 41(5) of the federal constitution seems to qualify the obligation of the state to realize the fulfillment of socio-economic rights by including the phrase 'within available means'. This provision gives leeway to the state, but is nevertheless in line with the formulation of Article 2(1) of the ICESCR, which spells out the obligation of State Parties under the Covenant. Article 2(1) stipulates that a State Party to the covenant undertakes to take steps to achieve progressively the full realization of the rights recognized in the present Covenant to the maximum of its available resources. The

11 Adem Kassie Abebe, "Human Rights under the Ethiopian Constitution: A Descriptive Overview," *Mizan Law Review* 5/1 (2011): 54.

Committee on Economic, Social and Cultural Rights, which supervises the compliance with the ICESCR, has made clear, however, that this does not absolve State Parties from their immediate obligations. It is their immediate obligation to take measures to realize the fulfillment of the rights and states have to guarantee a minimum standard of protection.[12] With regards to cultural rights, there is a constitutional responsibility for the state to protect and preserve historical and cultural legacies and to contribute to the promotion of the arts and sports.[13] Although the equality principle (enshrined in Article 25) prohibits discrimination based upon sex, the Ethiopian constitution has followed international legal developments and included a specific Article guaranteeing women's rights (Article 35). This explicit constitutional guarantee reiterates Ethiopia's commitment to women's rights as already articulated through the ratification of the CEDAW. The constitutional protection of women's rights even entails the possibility of affirmative measures to achieve genuine equality between men and women. The constitution also reiterates the respect for children's rights expressed through Ethiopia's ratification of the CRC by including a specific Article on the rights of children (Article 36). Several children's rights, protected by the CRC, are explicitly mentioned in the constitution: the right to life (Article 6 CRC), the right to a name, nationality, and to parental care (Article 7 CRC), and the right to be protected from economic exploitation and any hazardous work (Article 32 CRC). The most notable – and hotly debated – group right incorporated in the constitution is the right to self-determination as provided by Article 39. Although the right to self-determination designed by the Ethiopian constitution is most notorious for its inclusion of a controversial right to secession, it is argued that a reductionist approach, which focuses exclusively on secession, does not do justice to the comprehensive nature of self-determination as constitutionalized in Ethiopia. Article 39(1) of the federal constitution stipulates that: "Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession." Article 39 comprises four rights clusters. It includes the right of a nation, nationality, or people to speak, write, and develop its own language (1); it includes the right to a full measure of self-government, which is composed of two elements: the right to establish institutions of government in the territory that it inhabits (2) and the right to equitable representation in (regional) state and federal governments (3). And finally, it includes the right to secession (4). As mentioned above, Ethiopia has also ratified the African

12 Stefaan Smis, Christine Janssens, Sophie Mirgaux and Karen Van Laethem, *Handboek Mensenrechten* (Antwerpen/Cambridge: Intersentia, 2011), 113.

13 Article 41(9) of the 1995 constitution.

Charter on Human and Peoples' Rights, which in addition to the first and second generation of human rights also contains the third-generation human rights or the so-called solidarity rights. The third generation of human rights is represented in the Ethiopian constitution by the right to development[14] (Article 22 of the African Charter) and the right to a clean and healthy environment[15] (Article 24 of the African Charter).

Besides this extensive listing of human rights, the constitution contains, in its Chapter Ten, National Policy Principles and Objectives. The rationale behind a constitutionalization of policy principles and objectives is to ensure that all government organs, irrespective of the political majority of the day, uphold these principles and objectives while carrying out their activities. This is an effective mechanism for guaranteeing the continuity of policies, which are thus shielded from shifting political majorities and their potentially divergent policy views and strategies. Articles 88–92 of the constitution list political objectives, economic objectives, social objectives, cultural objectives, and environmental objectives, respectively. A noteworthy feature of these objectives is that they are formulated as the corollary of a range of human rights listed in Chapter Three. To put it differently, the constitutionally mandated objective of the Ethiopian government policies overlaps significantly with the realization of human rights. Article 88, for instance, assigns the government the duty to respect the identity of nations, nationalities, and peoples. Translated in human rights terms, the government has the duty to respect the right to self-determination of ethnic groups. Related to this is the duty of the government to provide special assistance to Nations, Nationalities, and Peoples least advantaged in economic and social development,[16] which aims at achieving genuine equality between the country's diverse ethnic groups. As one of the economic objectives, the constitution mentions the duty of the government to ensure that all Ethiopians have equal opportunity to improve their economic conditions and to promote an equitable distribution of wealth among them.[17] This phrasing strongly reflects the equality and non-discrimination principle. The social objective included in Article 90(1) is the corollary of the aforementioned Article 41(4). The environmental objective included in Article 92(1) – "Government shall endeavour to ensure that all Ethiopians live in a clean and healthy environment" – is the corollary of Article 44(1), which endows all persons with the right to a clean and healthy environment. The policy principles

14 Article 43 of the 1995 constitution.

15 Article 44 of the 1995 constitution.

16 Article 89(4) of the 1995 constitution.

17 Article 89(2) of the 1995 constitution.

and objectives do not only relate to the policy outcome; they also emphasize the importance of human rights in the policy development process. Article 89(6), for instance, requires the government to promote the participation of the people in the formulation of national development policies and practices. Popular participation is part of the right to development enshrined in Article 43. The government shall furthermore ensure the participation of women equally with men in all economic and social development matters,[18] as such mainstreaming women's rights in the development process. The above overview legitimates the argument that the Ethiopian constitutional drafters have mandated present and future Ethiopian governments to pursue a human rights-based approach to development.

This volume intends to further explore the link between human rights and development by including new legal research on various aspects of human rights and their relation and interaction with development. The next section provides an overview of the different contributions to the volume.

2 Overview of the Chapters

2.1 *The Right to Development*

In the first chapter of the volume, Koen De Feyter focuses on the legal status and components of the right to development. Although the right to development is the subject of a UN Declaration, there is, as yet, no universal treaty enshrining the right. The right to development is nonetheless included in a number of regional human rights documents such as the African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights. The right is furthermore included in a number of African constitutions, such as the constitution of Malawi and the Democratic Republic of the Congo as well as – notably – the Ethiopian constitution (Article 43). The paper investigates both the domestic and global components of the right to development. In its discussion of the domestic component, the paper refers to the jurisprudence of the African Commission on Human and Peoples' Rights in which the concept of 'peoples' as bearers of the right to development has been clarified. According to the African Commission 'peoples' does not only refer to the whole population of a state but also to sub-groups such as indigenous communities and other 'marginalized and vulnerable' groups. In the case of development projects affecting indigenous communities, the state has a duty not only to consult the concerned community, but also to obtain their free, prior, and informed

18 Article 89(7) of the 1995 constitution.

consent. Pertaining to the global component of the right to development, the paper points out that there is still disagreement on the 'international solidarity' dimension. It remains difficult to establish the legal responsibility of third states and non-state actors such as intergovernmental organizations and private players for the fulfillment of the right. Yet, the global dimension of the right to development is also addressed through domestic constitutional provisions imposing a duty on states to ensure that the right to development is not affected by their international agreements and relations (e.g. Article 43(3) of the Ethiopian constitution). This implies *inter alia* that the right to development should not be adversely affected by a state's foreign investment policies. To illustrate this interaction between the accountability of non-state actors and the state's duty to shield its population from policies affecting the right to development, the paper discusses the World Bank Inspection Panel mechanism, which is currently investigating the relationship between World Bank funding and the 'villagization' program carried out by the Ethiopian government in the Gambella region.

In the second chapter, Adolphe Kilomba points out the potential role of regional organizations in the fulfillment of the right to development by focusing on the Common Market for Eastern and Southern Africa (COMESA), of which Ethiopia is a member. The paper argues that besides states, regional organizations are also duty-bearers of the right to development. COMESA's primary objective is:

> to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programs to raise the standard of living of its peoples and to foster closer relations among its Member States.

Such objective, argues the paper, entails the co-accountability of COMESA and its member states for the fulfillment of the right to development. People can therefore claim the right to development both against their respective state and against COMESA. Important in this regard is the existence in the COMESA institutional structure of a court facilitating the effective enforcement of this right. Although COMESA focuses on food security, trade liberalization, infrastructure development, and gender mainstreaming in development, the paper concludes that the organization's achievements have not been encouraging. One of the primary reasons is the lack of concerted action among the member states. The paper therefore calls for awareness creation about the opportunities which COMESA and other regional organizations offer in realizing the different aspects of the right to development.

Abdi Jibril Ali continues the discussion on the right to development by focusing on the right to development as enshrined in Article 43 of the Ethiopian constitution. His contribution starts out by referring to Article 13(2) of the Ethiopian constitution, which establishes a linkage between the international and the Ethiopian domestic human rights regime. The Article stipulates:

> The fundamental rights and freedoms specified in this Chapter (i.e. Chapter Three on Fundamental Rights and Freedoms) shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.

This constitutional provision exhibits the relevance of the right to development as included in Article 22 of the African Charter and as interpreted by the African Commission on Human and Peoples' Rights for the interpretation given to Article 43 of the constitution. Before delving into the analysis of Article 43, the paper provides a definition of development, emphasizing the human dimension, and a brief overview of the international growth and codification of the right to development. The paper identifies two components of the 'Ethiopian' right to development: a substantive and a procedural component. The substantive component is the right to improved living standards and to sustainable development while the procedural component entails the right of nationals/citizens to participate in development, which particularly implies the right to be consulted with respect to policies and projects affecting their community. Pursuant to Article 13(2), the paper analyzes both components in light of the African Charter and the jurisprudence of the African Commission. From this perspective, it furthermore discusses relevant Ethiopian policies and assesses their outcomes. Pertaining to the procedural component, the paper particularly emphasizes the importance of participation and consultation in case development projects affect vulnerable (indigenous) communities such as mobile pastoralists – an issue that was also raised by De Feyter and that is addressed by a number of other contributors to this volume. As to the right-holders, Article 43 allots the right to improved living standards and to sustainable development to each Nation, Nationality, and People (or ethnic group) in Ethiopia. Although the constitution uses three terms, they are treated equally and are identically defined in Article 39(5). Whether groups that do not fulfill the criteria of Article 39(5) can also claim the right to development on the basis of the Ethiopian constitution is a contentious question, which seems to be answered in the positive by the paper.

2.2 *Development as a Threat to Human Rights*

In his paper 'Ethiopia: Development with or without Freedom' Assefa Fiseha Yeibyio elucidates the concept of 'developmental state', which is the novel policy direction adopted by the Ethiopian government, and assesses its implications for human rights. The paper starts with an elaboration of the different constituent elements of developmental state with reference to Asian states such as Singapore, China, South Korea, and Japan. The analysis of the main features of the developmental state is used as a framework to assess the Ethiopian experience. As one of the major impediments to the achievement of the development outcome in Ethiopia, the paper identifies the strong politicization of the civil service, which reduces the importance of merit and affects the civil service's capacity to effectively implement the government's development policies. The second point addressed by the paper is the ramification of this new policy direction for the complete protection of human rights. The paper observes that the development state approach pursued by the Ethiopian government is characterized by a strong commitment to economic development to the detriment of civil rights and political freedoms, which seriously affects the democratization process in the country. The attention to economic development has effectively led to high economic growth figures and the reduction of poverty indicators, yet this has taken place in a context of limited political pluralism. Yet, the paper rightly argues that economic needs and political freedoms can be achieved concurrently without the need for prioritizing one over the other. This is also the approach enshrined in the Ethiopian constitution, which explicitly bases economic development on the protection of human rights (including civil and political rights). Of course, constitutionally enshrined civil and political rights do not constitute an effective restraint on the power of the government in the absence of institutions empowered to enforce these rights. In this regard, the paper concludes with a discussion of the weak mechanism of constitutional control in Ethiopia.

The attention given to vulnerable groups, more specifically indigenous peoples, in development processes and outcomes, is an issue investigated by Dorothee Cambou. Her paper starts from the observation that indigenous peoples in Africa have generally not benefited from development policies, but have rather been disaffected by them. The same criticism is often raised in relation to indigenous peoples in Ethiopia. Although the applicability of the rights of indigenous peoples in the Ethiopian context – as well as in other African states – is contested, the paper strongly defends the relevance of the indigenous peoples' rights concept to Ethiopia. The United Nations Declaration on the Rights of Indigenous Peoples and the jurisprudence of the African Commission on Human and Peoples' Rights acknowledging the existence of

indigenous peoples in Africa and pointing out their rights is, with reference to the aforementioned Article 13(2) of the constitution, binding for Ethiopia. The Ethiopian government is therefore legally obliged to recognize the presence of indigenous peoples on its territory and to protect their rights. Applying the definition of indigenous peoples by the African Commission to the Ethiopian context, the indigenous people category comprises the various pastoralist communities that account for 12 percent of the country's total population. Since indigenous peoples are peoples in the context of the African Charter on Human and Peoples' Rights, they are *inter alia* entitled to the right to self-determination, to the right to freely dispose of their wealth and natural resources and to the right to development. With regards to the right to development, the paper emphasizes – as was also mentioned by De Feyter and Abdi Jibril – that participation of indigenous communities in the development process entails their free, prior, and informed consent in the case of development projects affecting their land and other resources. The paper concludes by calling upon the Ethiopian government to ensure that its development policies do not threaten the survival of the indigenous communities living in its territories.

In her contribution, Genny Ngende investigates the link between foreign aid, foreign direct investment, and development for which she uses Ethiopia as a case study. The paper starts out by providing a general overview of the historical development of 'foreign aid' and focuses in particular on the 'structural adjustment program' (SAP), which has been attached as condition to grants or loans by international financial institutions. SAP traditionally involves measures such as decreasing expenditure for public services, devaluation of currencies, trade liberalization, and privatization of state-owned enterprises, measures that are intended to create a favorable environment for foreign direct investment. Yet, the paper argues, SAP has also been characterized by a lack of human rights considerations, which has impacted negatively upon the development objective. This background sets the framework for the study of the Ethiopian case. Foreign aid to Ethiopia has seen a steady increase in recent times. The paper investigates whether this aid has contributed to the socio-economic development of the country by focusing on the programs designed to address food insecurity. The paper also addresses the linkage between foreign aid and investment and recounts that international donors such as the World Bank and the International Monetary Fund have strongly encouraged the Ethiopian government to embark upon economic policy reforms. This has led to various measures intended to attract foreign direct investment. Pertaining to foreign direct investment, the paper focuses on the large-scale investments in the agricultural sector, which have entailed the leasing of

millions of hectares of land to transnational corporations. In this regard, the paper assesses the legal ramifications of state ownership of land, as enshrined in Article 40 of the Ethiopian constitution, on both investors and local landholders in the context of which it evaluates the villagization scheme designed to offer basic socio-economic services to people relocated because of large-scale investment projects. In conclusion, the paper claims that neither foreign aid nor foreign direct investment in agriculture have been able to significantly contribute to the achievement of socio-economic development. This observation induces the paper's call for an infusion of human rights considerations into both international and domestic development policies.

2.3 *Integrating Human Rights in Development*

In his contribution, Solomon Abay Yimer draws attention to the impact of business operations on the protection of human rights in Ethiopia from the perspective of the UN Guiding Principles on Business and Human Rights. The adoption by the Ethiopian government of a free market economy after the fall of the socialist regime in 1991 has resulted in a tremendous increment in the number of domestic and foreign businesses and investment projects. Although these have contributed to the fast economic growth registered by the country, their operations have also led to several human rights violations. The paper mentions a number of violations and argues that, although the government has taken a series of remedial measures, the problem is far from solved. This situation, the paper proposes, has to be addressed, not only by increasing governmental and non-governmental interventions but also by strengthening the human rights commitments of the business entities themselves. It is against this background that the paper recommends the enforcement of the UN Guiding Principles on Business and Human Rights. After outlining the background and development of the UN Principles, the paper analyzes their implications for the human rights responsibilities of business entities and obligations of states, which are complementary. The Ethiopian and foreign business entities and investors, except for one, have to date not subscribed to the UN Principles, which have a voluntary nature. Yet, the business entities and investors are responsible for many human rights violations, which have not been satisfactorily remedied either by themselves or by the government. A major contributory factor to the inadequate government response is the objective to attract investment, although – and this is the central thread running through this book – investments that violate human rights run counter to the objective of development. As was already argued by De Feyter, the right to development should not be adversely affected by a state's investment policies. The current situation of serious human rights violations committed by business entities on

the one hand and the weak government reaction on the other leads the paper to strongly argue in favor of the enforcement of the UN Principles in Ethiopia. The paper also argues that the host states of foreign business entities and investors like Ethiopia need to negotiate with the home states to create a regime whereby both the host and the home state governments shoulder responsibility to enforce the UN Principles.

The fact that non-state actors such as transnational corporations (TNCs) can commit serious human rights violations is also addressed in the paper by Lieselot Verdonck. States are therefore under a duty to regulate the activities of these corporations. Yet, developing countries often lack the technical expertise and, due to their development policies emphasizing the need to attract foreign investments, the willingness to adopt appropriate regulations – a point also raised by Solomon Abay Yimer. This leads the paper to investigate whether victims of human rights violations committed by a subsidiary of a transnational corporation in a developing country can have recourse to effective legal remedies in the home state – which is often a developed country – of the parent company. The paper assesses the availability and effectiveness of such home state remedies, with reference to two recent judicial decisions, by analyzing both procedural and substantive law components. While parent companies can be sued in their home state, suing the foreign-based subsidiary before home state courts faces a number of procedural hurdles. Yet, even if jurisdiction exists, this does not guarantee the availability of effective remedies. In this regard, the paper points out that conflict of law rules usually require courts to apply the substantive law of the country in which the tort was committed. Yet, the foreign substantive law might not offer adequate mechanisms to remedy human rights violations. The second issue raised is that in case the parent company is sued, it will be difficult to hold the parent company liable for the violations committed by its subsidiary. This difficulty arises out of the 'corporate veil' principle, which treats the subsidiary and the parent company as two distinct entities with separate legal personality. The alternative approach could be to hold the parent company directly accountable through the doctrine of 'foreign direct liability', which entails the liability of the parent company due to its lack of diligence in monitoring its subsidiary. The paper concludes that there is currently a lack of effective remedies to sue parent companies in their home states for human rights violations committed by their subsidiaries in developing countries. This leaves the burden of adopting human rights-sensitive corporate regulations and providing effective enforcement mechanisms largely to the developing countries themselves. This finding strengthens Solomon Abay Yimer's argument for a host-home state negotiation to create a regime whereby both the host and the home state

governments shoulder responsibility to enforce the UN Principles on Business and Human Rights.

Solomon Negussie Abesha focuses on the role of local governments in the achievement of development objectives. Ethiopia not only has a federal structure with nine constitutionally empowered regional states, it is furthermore characterized by decentralized local government structures at the intra-regional level. Although important decentralized powers are allotted to the local government administration of the *Woreda* (or districts), the latter generally lack the revenue to pay for their expenditure. They are, therefore, highly dependent on intergovernmental fiscal transfers. This observation constitutes the background to the paper, which aims to analyze whether intergovernmental transfers are utilized to promote local development. The paper emphasizes the importance of a human rights-based approach to development, stressing the need for good governance to achieve sustainable development. Classical elements of good governance are participation and accountability, which require the respect for civil and political rights. The paper offers empirical information on the linkage between fiscal transfers and development through a case study of selected *Woreda* in the Amhara and Oromia regions. After a brief background to and a discussion of the main characteristics of decentralization in Ethiopia, the paper provides an overview of the main features of intergovernmental fiscal relations in Ethiopia. It then turns to the study of the case, which investigates to what extent human rights considerations are mainstreamed in the utilization of the fiscal grants – which the paper considers a prerequisite for the achievement of the development objectives. The research indicates that principles of good governance such as popular participation and accountability are compromised. Lack of supervisory capacity on the part of the local councils and the dominant party structure, which encourages upward accountability, are identified as major contributory factors. This simultaneously impacts on the autonomous exercise by the *Woreda* of its powers and responsibilities, which leads to the conclusion that a better balance has to be found between autonomy and upward accountability. The one should not completely suffocate the other lest the goals of decentralization be undermined. The last issue addressed by the paper is the empowerment of vulnerable groups, which should also be infused into the preparation and utilization of the local government budget.

In his paper, Zerihun Yimer Geleta investigates the relationship between investment and environmental rights in Ethiopia. After clarifying the link between environmental rights and development in general, the paper points out the link between the two concepts in the Ethiopian context. Although the Ethiopian constitution has enshrined both the right to development and

environmental rights, the paper has observed a number of challenges affecting the fulfillment of environmental rights. The first challenge identified by the paper is that the right of the public to participate in a development project potentially affecting environmental rights – a right granted by the constitution and by Ethiopia's environmental policies and regulations – is not yet exercised. Another challenge negatively impacting upon environmental rights is the investment licensing process, which is in complete disregard of the environmental impact assessment law. This situation is corroborated by the investment law itself, which has neglected to mainstream the environmental impact assessment requirements. This leads the paper to conclude that the investment law's objective of bringing about socio-economic benefits is to the detriment of environmental rights. Another challenge discussed by the paper is that although Ethiopian law provides for public interest litigation in the case of violation of environmental rights, this right is not yet exercised in practice. In its last chapter, the paper provides a concrete example of how the floriculture industry – a growing investment sector in Ethiopia – in the absence of environmental rights-sensitive investment policies and laws, is hampering not only the fulfillment of environmental rights but also the sustainability of any development outcome.

2.4 *Human Rights for Development: A Wide Range of Fora*

The paper by Laurens Lavrysen relates to the principle of indivisibility of human rights by discussing how civil and political rights can contribute to the reduction of poverty. In this context, the paper focuses on the jurisprudence of the European Court of Human Rights. Although the jurisdiction of the European Court is formally limited to civil and political rights, the Court's case law has demonstrated the considerable potential of civil and political rights for the realization of socio-economic development. The paper first exhibits how the Court through an interpretation of several Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms (such as the Articles pertaining to the right to life, the prohibition of degrading treatment, and the right to respect for private life and home) has contributed to the protection of social and economic rights. The second issue addressed by the paper is the case law whereby the Court emphasizes the need for procedural guarantees in order to protect the human rights of the poor. The third technique used by the Court for the indirect protection of social and economic rights is the principle of non-discrimination whereas the last technique mentioned by the paper is a poverty-sensitive proportionality assessment. This implies that the Court while assessing the permissibility of human rights limitations considers the implications on the rights of the

poor. Yet, the paper also identifies two major limitations to the potential role of the Court in protecting the socio-economic rights of the poor. The first limitation is the traditional classification of human rights into civil and political rights on the one hand and economic, social, and cultural rights on the other, the competence of the European Court being limited to the first category. The paper argues that although the Court has not accepted a watertight compartmentalization of human rights, it has not wholeheartedly adhered to the principle of indivisibility either. The second limitation is the classical view of civil and political rights as merely imposing negative obligations. Yet, it is obvious that effective measures to combat poverty require the state to take action as well. In this regard, the paper observes that although the Court has rejected a strictly 'negativist' approach to the European Convention, the practice of the Court in overcoming the negative/positive dichotomy is not that impressive. Irrespective of these limitations, the Court's case law is a good illustration of the potential held by civil and political rights to fulfill socio-economic rights. This justifies the paper's conclusion, with reference to Amartya Sen, that civil and political rights are crucial for socio-economic development since they "give people the opportunity to draw attention forcefully to general needs and to demand appropriate public action."

The paper by Mohammed Abdo Mohammed investigates the role of the Ethiopian Human Rights Commission in investigating cases of forced eviction. The paper starts out by recounting the strong commitment to human rights exhibited by the Ethiopian constitution. This constitutional commitment has *inter alia* resulted in a constitutional mandate for the House of Peoples' Representatives (the first chamber of the federal parliament) to establish a Human Rights Commission. The law establishing the Commission was finally adopted in 2000. The Commission is empowered to investigate alleged human rights violations either upon individual complaints or *suo moto*. Although the recommendations issued by the Commission are not legally binding, the available enforcement mechanisms are publication of the recommendations and reporting them to parliament. Even though the Commission has a broad mandate to investigate human rights complaints, the paper observes that the investigation of complaints about forced eviction is the exception rather than the norm. The paper firstly refers to a case involving the forced eviction from and final demolition of houses built without permit. Although the case raised important human rights issues such as the right to housing, the Commission rejected the case for lack of jurisdiction. The Commission has a better record in investigating forced evictions in the context of ethnic conflicts. The paper tentatively argues that the swift reaction of the Commission in this regard is due to the fact that such scenarios often involve private actors rather than state authorities. The

reluctance of the Commission to investigate alleged human rights violations implicating the government or government policies is further demonstrated by the bleak performance of the Commission in the context of evictions arising in the context of large-scale agricultural investment projects and concomitant resettlement and villagization policies. The Commission avoids formally investigating these issues because of their political overtones. Yet, as the paper argues, friction between the Human Rights Commission and the government is not only inevitable, it is moreover a healthy sign of the effectiveness of the Commission, which should carry out its mandate free from government pressure.

Nicky Broeckhoven focuses on the linkage between gender equality, women's rights, and climate change. Climate change is a severe global challenge not only because of its environmental impact, but also because of its social and economic ramifications and therefore constitutes an imminent threat to development. The starting point for the paper is that the adverse impact of climate change is and will be particularly hard-felt by women because of the enduring inequality they are suffering from. The paper observes that in recent years, the link between gender equality, women's rights, and environmental sustainability has been given increasing attention at the international level, both in the international climate change regime and in the international human rights regime. While the international climate change regime has paid attention to gender mainstreaming – e.g. by taking into account gender considerations when developing and implementing strategies and action plans tackling climate change (or its effects) – the paper argues that no sufficient progress has been made to reach the goal of substantial gender equality. The international (UN) human rights regime (particularly through institutions such as the Office of the High Commissioner for Human Rights and the Human Rights Council) has supported a human rights-based approach to fight climate change or to address its effects and has therefore emphasized the link between human rights and climate change. Yet, as the paper contends, a mere human rights-based approach to climate change might not guarantee the effective protection of women's rights. In order to achieve substantial gender equality and a comprehensive protection of women's rights, the paper therefore promotes a gender-sensitive or gender-responsive human rights-based approach to climate change.

3 Conclusion

Although development is increasingly perceived as a comprehensive concept, encompassing the fulfillment of human rights obligations, an antagonistic relationship between human rights and development is often theoretically

assumed as well as exemplified in practice, as several papers in this volume have demonstrated. Yet, this volume has also shown that human rights and development, far from being mutually exclusive, hold a significant potential for complementing each other and for achieving shared objectives. As such, the book adds to the international debate on the nexus between human rights and development by providing insight into the Ethiopian perspective and by discussing how this nexus manifests itself in the Ethiopian context. It is furthermore hoped that this book may provide a resource for the debate on human rights and development in Ethiopia, which is currently taking place in the context of the developmental state approach pursued by the Ethiopian government. In that respect, the international and comparative frameworks and examples throughout this volume may prove useful, as well as the nuanced and practice-based discussion that is the result of the collaboration of Ethiopian and international scholars.

Bibliography

Adem Kassie Abebe. "Human Rights under the Ethiopian Constitution: A Descriptive Overview." *Mizan Law Review* 5/1 (2011): 41–71.

Alston, Philip. "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals." *Human Rights Quarterly* 27/3 (2005): 755–829.

Alston, Philip, and Mary Robinson, eds. *Human Rights and Development – Towards Mutual Reinforcement*. Oxford: Oxford University Press, 2005.

Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, *Federal Negarit Gazeta*, Year 1, No 1 Addis Ababa, August 21, 1995.

Declaration on the Right to Development, GA Resolution 41/128, December 4, 1986, A/RES/41/128.

Donelly, Jack. "Human Rights, Democracy and Development." *Human Rights Quarterly* 21/3 (1999): 608–632.

MCinerney-Lankford, Siobhan. "Human Rights and Development: a Comment on Challenges and Opportunities from a Legal Perspective." *Journal of Human Rights Practice* 1/1 (2009): 51–82.

Mohan, Giles, and Jeremy Holland. "Human Rights and Development in Africa: Moral Intrusion or empowering opportunity?" *Review of African Political Economy* 28/88 (2001): 177–196.

Office of the High Commissioner for Human Rights, *Claiming the Millennium Development Goals: A Human Rights Approach*. New York and Geneva: United Nations, 2008.

Smis, Stefaan, Christine Janssens, Sophie Mirgaux, and Karen Van Laethem. *Handboek Mensenrechten*. Antwerpen/Cambridge: Intersentia, 2011.

Uvin, Peter. "From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development." *Development in Practice* 17/4–5 (2007): 597–606.

PART 1

The Right to Development

CHAPTER 1

The Right to Development in Africa

Koen De Feyter

Abstract

This contribution reviews both the domestic and the global dimension of the right to development, discussing the case law of the African Commission on Human and Peoples' Rights, as well as the duty of African governments to take into account the right to development in their international relations. Special consideration is given to the constitution of Ethiopia that includes a promising provision on the right to development.

Keywords

right to development – African Charter on Human and Peoples Rights – World Bank Inspection Panel – foreign investment – constitution of Ethiopia – villagization

1 Introduction

In Africa, the right to development enjoys a legal status equal to all other human rights, due to its inclusion in the African Charter on Human and Peoples' Rights. Scholars from the Global South, including from Africa have strongly impacted on the emergence of the right to development as a global human right. Nevertheless, the practice of implementation of the right to development in Africa remains limited. The potential of the right to development as an instrument to protect the well-being of the population has not been exhausted.

This contribution reviews both the domestic and global dimension of the right to development, discussing the case law of the African Commission on Human and Peoples' Rights, as well as the duty of African governments to take into account the right to development in their international relations. Special consideration is given to the constitution of Ethiopia that includes a promising provision on the right to development.

 | DOI 10.1163/9789004280250_003

2 Review of Primary Sources

In Africa, the right to development is a legal right on a par with other human rights. The right to development is enshrined in the major regional human rights treaty, the African Charter on Human and Peoples' Rights (27 June 1981).[1] As the African Commission has stated, the African Charter is an "innovative and unique" regional document that "substantially departs" from the "narrow" formulations of other regional and universal human rights instruments, for instance by including group and people's rights.[2]

In the African Charter, the right to development is a collective right, held only by peoples. Peoples are entitled "to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind" (Article 22 (1)). Differently from Article 2(1) of the UN Declaration on the Right to Development, the definition of development omits "political" development, possibly in order to avoid scrutiny of the authoritarian character of erstwhile African governments in a right to development context.

Article 22(2) provides that "States shall have the duty, individually or collectively, to ensure the exercise of the right to development." As the African Charter focuses on the responsibilities of African States, the global dimension of the right to development (responsibilities of the international community as a whole, i.e., of third States outside of Africa and of non-State actors) are not addressed.

Article 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[3] contains a unique women's right to sustainable development. The provision requires that States introduce the gender perspective in national development planning procedures; ensure

1 Article 22(1) of the African Charter is further complemented by Article 5 of the African Charter on the Right and Welfare of the Children (July 11, 1990).

2 276/2003, African Commission on Human and Peoples' Rights (ACHPR), Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v. The Republic of Kenya (2009), par. 149. In the Ogoni case, the ACHPR held that international law and human rights must be responsive to African circumstances, and that it was an important task for the African Commission to reflect the uniqueness of the African situation and the special qualities of the African Charter. See 155/96, ACHPR, Social and Economic Rights Centre (SERAC) and another v. Nigeria (2001) par. 68. Claimants in the Ogoni case did not rely on the right to development directly (note, however, ibid., par. 64).

3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003.

participation of women at all levels and stages of development policies and programs; promote women's access to and control over productive resources such as land and guarantee their right to property; promote women's access to credit, training, skills development, and extension services; take into account indicators of human development specifically relating to women in the elaboration of development policies and programs; and ensure that the negative effects of globalization and any adverse effects of the implementation of trade and economic policies and programs are reduced to the minimum for women.

The provision in the Protocol is of interest not only from a gender perspective, but also because it 'updates' the right to development, by adding the sustainability dimension.

Article 37 of the revised Arab Charter on Human Rights (adopted by the League of Arab States on 22 May 2004) declares that the right to development is a fundamental human right. By virtue of this right, every citizen[4] has the right to participate in the realization of development and to enjoy the benefits and fruits thereof. State Parties are required to give effect to the values of solidarity and cooperation among them for the realization of the right.[5]

The right to development also appears in a number of African constitutions. The language used in these provisions differs. Article 58 of the Constitution of the Democratic Republic of the Congo (5 May 2005) contains a succinct individual right to development imposing an obligation on the domestic State:

> All Congolese have the right to enjoy the national wealth.
> The State must equitably distribute the national wealth and guarantee the right to development.

Article 30 of the constitution of Malawi (18 May 1994) takes a more holistic approach:

(1) All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.

4 On the use of the word 'citizen' in the Arab Charter, and related concerns about discrimination, see Dalia Vitkauskaite-Meurice, "The Arab Charter on Human Rights: The Naissance of a New Regional Human Rights System or a Challenge to the Universality of Human Rights," *Jurisprudencija/Jurisprudence* 1/119 (2010): 175.

5 The right to development clause in the ASEAN Human Rights Declaration (see *infra*) includes a similar commitment to regional solidarity.

(2) The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.
(3) The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.
(4) The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.

The Article includes both individuals and peoples as holders of the right. Domestically, vulnerable groups are entitled to special consideration. The final paragraph provides a responsibility of the State to respect the right to development 'in its policies', whether domestic or external. The holders of the right are therefore at least implicitly entitled to hold the government of Malawi accountable when it concludes international agreements or contracts that adversely affect the right to development.

The 1995 constitution of the Federal Democratic Republic of Ethiopia that establishes "an ethnic based federal state consisting of regional states delineated on the basis of settlement patterns, language, identity and consent of the people concerned"[6] includes a remarkable provision on the right to development. Article 43 of the constitution, entitled 'The Right to Development' reads:

1. The Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development.
2. Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.
3. All international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development.
4. The basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs.

6 Adem Kassie Abebe, "Human Rights under the Ethiopian Constitution: A Descriptive Overview," *Mizan Law Review* 5/1 (2011): 42. For a critical view on the legitimacy of the Ethiopian constitution, see Gedion T. Hessebon, "The Precarious Future of the Ethiopian Constitution," *Journal of African Law* 57/2 (2013): 215–233.

The Ethiopian constitution establishes a right to sustainable development for the population as a whole, as well as for the separate peoples that constitute the population.

Individual participatory rights with regard to decision-making on development are allotted to "nationals"; "citizens" are identified as the beneficiaries of development activities.[7]

The constitution provides an explicit duty for the State to safeguard the right to development through international action. Article 13(2) of the constitution requires interpretation of human rights:

> in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.[8]

The reference to international instruments no doubt covers the African Charter on Human and Peoples' Rights.[9]

Other regional and global human rights instruments offer far less legal protection of the right to development. The instruments either omit the right to development (Europe, the Americas)[10] or are non-binding. The

7 'Nationals' presumably refers to the individuals that make up a nation. Article 43(4) of the Ethiopian constitution, like the Arab Charter on Human Rights refers to "citizens." In the UN Declaration on the Right to Development, every human person has a right to participate in development, i.e., to active, free, and meaningful participation in development and in the fair distribution of the benefits resulting therefrom. See Articles 1(1) and 2(3) read together, GA Resolution 41/128, December 4, 1986, A/RES/41/128. As the terminology used in Article 43 of the Ethiopian constitution referring to the individual dimension of the right to development is somewhat unclear, an interpretation of the provision in light of the UN Declaration is appropriate and would be in line with the African Commission on Human and Peoples' Rights practice of clarifying uncertainties regarding the scope of the right to development in the African Charter in light of the UN Declaration (see *infra*).

8 For a detailed discussion of the scope of Article 13(2) of the Ethiopian constitution, see Adem Kassie Abebe, Human Rights under the Ethiopian constitution, 46–49 (see n. 6).

9 Unfortunately, Ethiopia has not yet ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

10 The Charter of the Organization of American States, April 30,1948 (as amended) provides that each *State* has a right to develop its cultural, political, and economic life freely with due respect to the rights of the individual and the principles of universal morality. Inter-American cooperation for integral development is perceived as a common and joint responsibility of the Member States. The human right to development, however, does not appear in the OAS Charter, or in the subsequent American Declaration on the Rights and Duties of Man and the American Convention on Human Rights.

recommendatory ASEAN Human Rights Declaration (18 November 2012) includes a three-article section on the right to development[11] as a right held by both individuals and peoples. The section contains contemporary language on the right to development: ASEAN Member States are encouraged to adopt meaningful people-oriented and gender responsive development programs aimed at poverty alleviation.[12] ASEAN Member States acknowledge that implementation of the right to development requires effective national development policies and equitable economic relations, international co-operation, and a favorable international economic environment.[13]

At the global level, on December 4, 1986, the United Nations General Assembly adopted the Declaration on the Right to Development.[14] According to the Declaration, the right to development entitles every human person and all peoples to participate in, contribute to, and enjoy development, in which all human rights can be fully realized.[15]

Each State has the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free, and meaningful participation in development and in the fair distribution of benefits therefrom.[16] States should take steps to eliminate obstacles to development resulting from the failure to observe human rights.[17]

In addition to their domestic responsibility, States also have a duty to cooperate for the realization of the right to development. Effective international cooperation should act as a complement to the efforts of developing countries.[18] States have the duty to take steps to formulate international

11 ASEAN Human Rights Declaration, November 18, 2012, available at http://aichr.org/documents/, Articles 35–37.

12 Article 36, ASEAN Human Rights Declaration.

13 Article 37, ASEAN Human Rights Declaration.

14 GA Resolution 41/128, 4 December 1986, A/RES/41/128. The resolution was adopted by a majority of 146 to 1 (United States) with eight abstentions.

15 Article 1(1) Declaration.

16 Article 2(3) Declaration.

17 Article 6(3) Declaration.

18 Article 4(2) Declaration. The UN Millennium Declaration includes a largely rhetorical commitment by all governments recognizing that "in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs." See UN General Assembly resolution 55/2, September 8, 2000, adopted without a vote, at par. 2.

development policies, both individually and collectively.[19] Arguably, the duty to cooperate therefore consists of two dimensions.[20] The unilateral dimension of the duty to cooperate pertains to individual State decisions targeting or affecting other States (e.g. a decision to extend official development assistance). The mutual dimension of the duty to cooperate affects bilateral, regional, and multilateral agreements establishing joint action, and activities of intergovernmental organizations.

Except for one reference to duties of individuals,[21] the Declaration only perceives States acting separately or jointly as duty bearers. Intergovernmental organizations are not addressed, and neither are private actors.

The Declaration identifies both individuals and peoples as owners of the right to development. The human person is the central subject of development, and therefore the active participant and beneficiary of the right to development.[22] Popular participation in all spheres of development should be encouraged, and effective measures should be undertaken to ensure that women have an active role in the development process.[23]

As Arjun Sengupta, the former Commission on Human Rights Independent Expert on the right to development observed, the aim of the people's right to development in the Declaration was to stress the need to move from an economic to a human development approach. Development as a process was to center on raising the living standards of the majority of the population in developing countries who were poor and deprived, leading to the improvement of the well-being of the entire population.[24] Entitlements of sub-national groups within States to specific development policies reflecting their separate identity were not incorporated in the text of the Declaration. No references to indigenous peoples are included.

After the adoption of the Declaration on the Right to Development, various institutional developments took place at the United Nations within the Commission on Human Rights, and its successor body, the Human Rights Council.[25]

19 Article 4(1) Declaration.

20 Article 4(1) of The Declaration speaks of an individual and collective duty to cooperate – but the terms 'individual' and 'collective' may cause confusion as they are also used to identify the holders of the right to development, i.e., individuals and peoples.

21 Article 2(2) Declaration.

22 Article 2(1) Declaration.

23 Article 8 Declaration.

24 Arjun Sengupta, "On the Theory and Practice of the Right to Development," *Human Rights Quarterly* 24 (2002): 848.

25 For a brief history, see Stephen Marks, *The Politics of the Possible. The Way Ahead for the Right to Development* (Berlin: Friedrich Ebert Stiftung, 2011).

They included the establishment of an open-ended working group on the right to development in 1988 mandated with monitoring and reviewing the implementation of the right to development.[26] The working group was assisted in its task first by an Independent Expert[27] (1988–2004) and later by a High-Level Task Force[28] (2004–2010), also composed of individual experts. The working group continues until today. At the normative level, the right to development appeared in a number of important soft law instruments, such as the World Conference on Human Rights Vienna Declaration,[29] the Millennium Declaration[30] and the Rio+20 Outcome Document.[31] These documents were adopted by consensus, not by a split vote, but provide insufficient evidence of a genuine legal conviction (*opinio juris*) supporting the right to development,[32] and implied no commitment on behalf of developed States to move towards law-making on the right to development.

In 2007, the Human Rights Council agreed by consensus that future standards on the right to development:

> …could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement.[33]

The Human Rights Council did not commit to treaty-making on the right to development, but did not rule out treaty-making either. The Non-Aligned

26 CHR resolution 1988/72, April 22, 1998.

27 Ibid.

28 CHR resolution 2004/7, April 13, 2004.

29 World Conference on Human Rights, Vienna Declaration and Programme of Action, June 25, 1993, A/CONF.157/23, par. 10.

30 GA resolution 55/2, September 8,2000, par. 11: "We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want."

31 Rio+20 UN Conference on Sustainable Development Outcome Document, A/CONF. 216/L.1, June 19, 2012 par. 8: "We also reaffirm the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food, the rule of law, gender equality, the empowerment of women and the overall commitment to just and democratic societies for development."

32 Not only because the Declarations are recommendatory in nature, but also because the provisions on the right to development appear as part of a very broad package deal.

33 HRC Council resolution 4/4, March 30, 2007, par. 2(d).

Movement (in favor) and the European Union (against) remain divided on the issue today.[34]

3 The Domestic Dimension of the Right to Development

The domestic dimension of the right to development addresses the relationship commonly dealt with in human rights law, i.e., the relation between the State as duty bearer and the rights holders within its jurisdiction. Development policies should be designed and implemented in a manner that is consistent with the principle of equality and non-discrimination, paying special attention to groups in society which are particularly vulnerable.[35] Human rights are by their nature inclusive of all, and therefore allow challenging social orders based on exclusion – leading to claims to equal treatment by those previously or currently excluded. Although some distinctions between nationals (or citizens) and foreigners are permissible, the State owes human rights obligations to all those within its jurisdiction.

In some of the primary sources on the right to development reviewed above, the rights holders include both individuals and peoples. The individual right to development emphasizes the duty of the domestic State to respect, promote and fulfill individual human rights through its national development policy.

Individual human rights are applicable to any field of government policy, so it could be argued that the added value of the individual right to development is limited; it is somewhat redundant to state that what applies to all State policies, also applies to the State's development policy. Nevertheless, it may be useful to remind governments that they should exercise sovereignty in such a way as to contribute to development, which includes the realization of all human rights. Historically, the statement in the UN Declaration that States should eliminate obstacles to development resulting from the failure to observe human rights served as a rebuttal to the argument of authoritarian States that development would come first, and human rights later. In the global debate on the right to development, the developed countries insist on the accountability of the governments of developing countries to their own people as a precondition to discussing any global responsibility for the realization of the right to

34 See in detail Koen De Feyter, *Towards a Framework Convention on the Right to Development* (Berlin: Friedrich Ebert Stiftung, 2013) available at library.fes.de/pdf-files/bueros/genf/09892.pdf.

35 Anthony Woodiwiss, "The Law cannot be Enough," in *The Legalization of Human Rights*, eds. Saladin Meckled-Garcia and Basak Cali (New York: Routledge, 2006), 45.

development. The United States has consistently held the position that the only right to development that it is willing to consider is a classic human right held by individuals vis-à-vis their own government.

For a State to be able to design a rights-based domestic development policy, it needs to collect development data at the national level. The State needs to invest in an active poverty monitoring program, including disaggregating of data, allowing determination of poverty levels of different groups. Raising awareness and ensuring transparency of domestic development data, issues and decisions, is a necessary precondition for the exercise of the right to development. Legislation should be adopted on the disclosure of public information, the organization of public hearings among affected populations, etc.

Since the African Charter on Human and Peoples' Rights only includes a peoples' right to development, the African Commission's case law has inevitably focused on the collective dimension of the right to development.[36]

In a 2003 decision on an inter-State complaint filed by the Democratic Republic of the Congo with regard to human rights violations committed by the armed forces of three foreign powers on Congolese territory, the ACHPR found a cursory violation of the right to development of the Congolese population as a whole.[37] With regard to incidents of indiscriminate dumping and mass burials of victims perpetrated against the "peoples of the eastern province," the Commission found a "reckless violation of Congolese peoples' rights to cultural development."[38]

The ACHPR engaged more thoroughly with the domestic implications of Article 22 of the African Charter in a string of cases[39] decided in 2009.

In the *Darfur* case,[40] the element of race was a determinant factor in identifying the population in the Darfur region as a people that was entitled to claim

36 Compare Serges Alain Djoyou Kamga and Charles Manga Fombad, "A Critical Review of the Jurisprudence of the African Commission on the Right to Development," *Journal of African Law* 57/2 (2013): 196–214.

37 See 227/99, Democratic Republic of the Congo v. Burundi, Rwanda and Uganda, AHRLR 19 (ACHPR 2003) par. 95 (in full): "The deprivation of the right of the people of the Democratic Republic of the Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation – their right to economic, social and cultural development and of the general duty of states to individually or collectively ensure the exercise of the right to development, guaranteed under article 22 of the African Charter."

38 Ibid., par. 87.

39 See also *infra:* 266/03, ACHPR, *Kevin Mgwanga Gunme et al. v. Cameroon*, (2009), AHRLR 9 (ACHPR 2009).

40 279/03, ACHPR, *Sudan Human Rights Organisation and COHRE v. Sudan* (2009), AHRLR 153 (ACHPR 2009).

the right to development. The population in the Darfur region was made up of three major tribes, described as being "people of black origin."[41] A large population in Sudan was of Arab stock. In States with mixed racial composition race became "a determinant of groups of peoples."[42] The tribes of Darfur in their collective were a people for the purposes of the African Charter, and thus entitled to protection "against both external and internal abuse."[43] The people of the Darfur region did not deserve to be dominated by a people of another race in the same State and to see its demands that underdevelopment and marginalization be addressed met with attacks and displacement by both government forces and an Arab militia.[44] Given the nature and the magnitude of violations, the Commission found a violation of Article 22.[45]

The milestone decision offering a full analysis of the right to development however is the *Endorois* case,[46] when the African Commission was offered the opportunity to clarify that a marginalized sub-national group 'of black origin' could claim the right to development from its government[47] in the absence of an element of racial discrimination.

In *Endorois* the ACHPR sets off by reiterating that in the African Charter the category of peoples is not synonymous with the entire population of a State. The Commission holds that there is a need to protect "marginalized and vulnerable groups in Africa" suffering from particular problems. These are groups that are not accommodated by dominant development paradigms, are victimized by mainstream development policies, and have their basic human rights violated.[48] Groups within this category qualify as peoples in the context of

41 Ibid., par. 219.

42 Ibid., par. 220.

43 Ibid., par. 222.

44 Ibid., par. 223.

45 Ibid., par. 224.

46 276/2003, ACHPR, Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v. The Republic of Kenya (2009) AHRLR 75 (ACHPR 2009).

47 The Endorois decision thus went beyond the Declaration on the Right to Development, by placing neither the individual nor the population as a whole, but the survival of an (African) indigenous group at the centre of development. See Jeremie Gilbert, "Indigenous Peoples' Human Rights in Africa: the pragmatic revolution of the African Commission on Human and Peoples' Rights," *International and Comparative Law Quarterly* 60 (2011): 268.

48 276/2003, ACHPR, *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v. The Republic of Kenya* (2009), par. 148.

the African Charter, and enjoy collective rights, including the right to development.

The Rio+20 Outcome document equally promotes support for developing countries "in their efforts to eradicate poverty and promote empowerment of the poor and people in vulnerable situations."[49] Circumstances of vulnerability or marginalization establish a priority: the likelihood of violations of the right to development of peoples in vulnerable situations is higher. As Okafor has argued, such sub-state groups are "often forced by circumstances" to struggle against their own state for the development of their communities.[50]

On the basis of a review of the evidence submitted to it, the ACHPR concludes that the Endorois are an indigenous community: they consider themselves a distinct people, sharing a common history, culture, and religion. They are (also) a 'people', a status that entitles them to benefit from provisions of the African Charter that protect collective rights.[51]

The decision implies that indigenous communities will usually qualify as peoples under the African Charter, but that other groups in Africa may also be 'marginalized and vulnerable', and thus entitled to claim peoples' rights, including the right to development. The *Southern Cameroon* case[52] is particularly informative in this respect. As a legacy of colonialism, people in South Cameroon are Anglophone, while North Cameroonians speak French. The Southerners are not, however, ethno-anthropologically different from the Northerners. In the *Southern Cameroon* case complainants do not claim to be indigenous, and indigenous rights are not discussed in the decision. Nevertheless, the Commission finds that the people of South Cameroon are a

49 Ibid., par. 23.

50 Obiora Chinedu Okafor, "'Righting' the right to development: a socio-legal analysis of Article 22 of the African Charter on Human and Peoples' Rights," in *Implementing the Right to Development. The Role of International Law*, ed. Stephen Marks (Geneva: Friedrich Ebert Stiftung, 2008), 58.

51 Ibid., par. 162. On the concept of indigenous people in Africa, see also African Commission on Human and Peoples' Rights, Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples, 41st Ordinary Session of May 2007, available at http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf.

52 266/03, ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon* (2009), AHRLR 9 (ACHPR 2009). The requesters also invoked the right to development, arguing that the denial of basic infrastructure to several towns in Cameroon amounted to a violation (Ibid., par. 9). The ACHPR did not agree: it noted that the State had explained its allocation of resources in various socio-economic sectors and accepted that not all parts of the territory might be reached "to the satisfaction of all individuals and peoples, hence generating grievances" (Ibid., par. 206). This alone, the Commission stated, could not be a basis for the finding of a violation of Article 22.

people in the sense of the African Charter. In the African Commission's view, a 'people' may manifest ethno-anthropological attributes, but that is not the only determinant factor.[53] It is sufficient that the people of Southern Cameroon:

> manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. More importantly they identify themselves as a people with a separate and distinct identity.[54]

In its decision, the African Commission found that the relocation of business enterprises and location of economic projects to Francophone Cameroon, which generated negative effects on the economic life of Southern Cameroon constituted a violation of Article 19 of the African Charter, the people's right to be treated equally.[55]

Clearly, both indigenous peoples and other vulnerable and marginalized sub-national groups not accommodated by the State's mainstream development paradigm qualify as peoples under the African Charter. Do they also enjoy the same rights? On the basis of a purely textual interpretation of the African Charter, the answer must be positive. None of the provisions on collective rights in the African Charter differentiate among various groups qualifying as peoples. In Article 22, *all* peoples have the right to development. In general international human rights law, however, the rights of indigenous peoples to (and in) development go significantly beyond the rights of other groups.

In *Endorois*, the complainants argued that the Endorois' right to development was violated as a result of the Respondent State's double failure to adequately involve the Endorois in the development process and ensure the continued improvement of the Endorois community's well-being.[56] The claim clearly echoes Article 2(3) of the UN Declaration on the Right of Development. On the duty to ensure the well-being of the Endorois, the African Commission finds that the State failed to provide adequate assistance at the post-dispossession settlement. The African Commission also held that the Respondent State was required to ensure mutually acceptable benefit-sharing.[57]

---

53 Ibid., par. 178.

54 Ibid., par. 179.

55 Ibid., par. 162.

56 276/2003, ACHPR, *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v. The Republic of Kenya* (2009), par. 125.

57 Ibid., par. 296.

On the issue of adequate involvement, the African Commission found that consultations had been inadequate and did not meet the standard of effective participation.[58] The State did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve.[59] Strikingly, the African Commission was of the view:

> that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[60]

Arguably, in reaching this conclusion, the African Commission interpreted Article 22 of the African Charter in the light of the UN Declaration on the Rights of Indigenous Peoples.[61] Article 32(2) of the UN Declaration provides that States shall consult and cooperate in good faith with indigenous peoples in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization, or exploitation of mineral, water, or other resources.

Even if one believes, as the African Commission apparently does in *Endorois*, that the duty to obtain free, prior, and informed consent from indigenous peoples has evolved into a binding rule of international law,[62] clearly no such duty

58 Ibid., par. 282.

59 Ibid., par. 290.

60 Ibid., par. 291.

61 GA resolution 61/295, September 7, 2007. Article 60 of the African Charter on Human and Peoples' Rights enables the African Commission to draw inspiration from international law on human and peoples' rights.

62 In a recent case (not dealing with the right to development) concerning oil exploration by a foreign company on indigenous land, the Inter-American Court held that "in order to ensure the effective participation of the members of an indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement." See IACtHR, Kichwa Indigenous People of Sarayaku v. EcuadorC245 (2012), par. 177. In the context of the UN-REDD Programme on reducing emissions from deforestation and forest degradation, the Guidelines on Stakeholder Engagement in REDD+ Readiness, April 20,2012, provide that countries are expected to uphold the principle of free, prior, and informed consent of indigenous peoples, as an element of stakeholder engagement.

is owed in current international law to other sub-national groups. As explained above, at the time of the drafting of the Declaration on the Right to Development, it was not envisaged that sub-national communities would be able to claim even the lesser right in Article 2(3) to 'active, free and meaningful participation' in decision-making on development. In 1994, in its general comment on Article 27 of the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee cautiously argued that States in regulating the use of land resources, *may* have an obligation to ensure participation as an element of the individual rights of members of a minority:

> The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[63]

When confronted with a future claim by a non-indigenous vulnerable and marginalized group not accommodated by the State's mainstream development paradigm, the African Commission will need to decide whether the State's duty to obtain free, prior and informed consent under Article 22 of the African Charter equally applies to such groups. As these groups are also peoples under the African Charter, the only way to introduce a distinction between indigenous and non-indigenous peoples under the African Charter, is to interpret Article 22 in the light of general international law. The argument would then be that for non-indigenous peoples, Article 22 only requires 'active, free and meaningful participation' as in Article 2(3) of the Declaration on the Right to Development, or 'effective participation' as in Article 27 ICCPR.

In the constitution of Ethiopia peoples as holders of the right to development clearly include, but are not limited to indigenous peoples. Article 39(5) of the constitution defines a 'Nation, Nationality or People' as

> a group of people who have or share a large measure of common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

See par. 6 of the Guidelines, available at http://www.un-redd.org/Stakeholder_Engagement/Guidelines_On_Stakeholder_Engagement/tabid/55619/Default.aspx.

63 Human Rights Committee, General Comment No 23: The rights of minorities (art. 27), April 8, 1994, CCPR/C/21/Rev.1/Add.5 par. 7.

The provision does not perceive vulnerability as a condition for the recognition of a people as a holder of the right to development; each people as defined in the constitution holds a right to improved living standards and to sustainable development. This is a logical consequence of the starting point that sovereignty in Ethiopia is shared among the constituent peoples. The constitution explicitly provides that every people has a right to self-determination (including secession) (Article 39(1)), and in any case 'a measure of self-government' including the right to establish institutions of government in the territory it inhabits (Article 39(3)).

4 The Global Dimension of the Right to Development

As explained above, the global dimension of the right to development does not figure directly in the African Charter on Human and Peoples' Rights, as the treaty only addresses the legal responsibilities of African States.

Among African States the right to development nevertheless has a cross-border effect, as, according to Article 22(2), States have a collective duty to ensure the exercise of the right. This 'regional' dimension of the right to development came up in a communication brought by ASP-Burundi (Association for the Preservation of Peace in Burundi) against a number of African States that in 1996 imposed an embargo on Burundi after an unconstitutional change of government in the country.[64] The complainants argued that the sanctions violated Article 22 of the African Charter as they prevented Burundians from having access to means of transportation by air and sea. The ACHPR held that the sanctions were not indiscriminate and that the Respondent States did not violate any provision of the African Charter.[65] The decision nevertheless demonstrates the ACHPR's willingness to contemplate the impact of third States (that are parties to the African Charter) on the holders of the right to development in another Member State.

International law has not fully settled on the global dimension of the right to development, due primarily to disagreement within the international community on the specific content of the 'international solidarity' dimension of the right to development. Margot Salomon's description of the state of play[66] remains accurate today: the Global South directs the debate towards issues

64 157/96, African Commission on Human and Peoples' Rights, *Association pour la sauvegarde de la paix au Burundi/Kenya, Uganda, Rwanda, Tanzania, Zaire* (*drc*), *Zambia* (2003), AHRLR 111 (ACHPR 2003).

65 Ibid., par. 76.

66 Margot Salomon, *Global Responsibility for Human Rights* (Oxford: Oxford University Press, 2007), 99.

such as inequalities in the international financial system, greater participation of developing countries in global decision-making on economic policy, and promoting a fairer trade regime. The North insists on suitable domestic conditions in developing countries such as good governance, democracy, and responsible economic management. Bonny Ibhawoh has criticized both the North for deflecting attention from calls for changes to the international economic system, and the South for resisting calls for domestic reform.[67] In its consolidated findings, the High Level Task Force, which advised the UN Working Group on the Right to Development, argued sensibly that the domestic and global dimensions of the right to development should be seen as complementary:

> Those with political reasons for favoring the international dimension and a collective understanding of the right must seek adjustments in their national policies and take the individual rights involved seriously. Similarly, those that stress that this right is essentially a right of individuals through human rights-based national policies must do their part to ensure greater justice in the global political economy by agreeing to and achieving outcomes of the various development agendas consistent with the (…) Declaration.[68]

In international debates, a number of features of the global dimension of the right to development have been identified, that demonstrate the potential added value of the right to development as compared to existing individual human rights. It is worth highlighting some of these features, as they may be of relevance to the future interpretation of the duty of African States to protect their own population against external adverse impact on the right to development.

Under the (proposed) global dimension of the right to development, each individual has a duty to observe the human rights held by those outside of its jurisdiction. This third State duty consists primarily of a duty to do no harm externally through policies adopted domestically.[69]

---

67 Bonny Ibhawoh, "The Right to Development: The Polemics of Power and Resistance," *Human Rights Quarterly* 33 (2011): 102.

68 A/HRC/15/WG.2/TF/2/Add.1, par. 82. Ironically, the African Commission's *Endorois* decision does not reinforce the political position of either the North or of the South: the case deals neither with the individual, nor with the global dimension of the right to development.

69 The added value of this aspect of the right to development depends largely on the view one takes on whether 'extraterritorial' obligations are already incorporated into existing

A second feature relates to the duty of States to mutually agree action – through multi- or bilateral treaties or within international organizations – for the realization of the right to development.[70] To the notion of mutual interstate accountability for development, the *right* to development adds a typical human rights element: the requirement that duty holders are accountable to rights holders, i.e., to individuals and peoples. The partners in an intergovernmental agreement are accountable to each other, but a rights respective requires that they are also jointly accountable to the rights holders. No mechanisms have been established as yet under human rights law to hold partnerships accountable; human rights mechanisms currently provide only for individual State responsibility. Taking this feature of the global dimension

human rights treaties. A significant initiative in this area is the Maastricht Principles on extraterritorial obligations of States in the area of economic, social and cultural rights (September 28, 2011) available at http://www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf.

For a sympathetic, semi-authoritative commentary see Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights," *Human Rights Quarterly* 34 (2012): 1084–1169. With regard to third States, Principle 37 of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, September 28,2011 on the 'general obligation to provide effective remedy' suggests that "where the harm resulting from an alleged violation has occurred on the territory of a State other than the State in which the harmful conduct took place, any State must provide remedies to the victim." On extraterritorial human rights obligations, see Malcolm Langford, Wouter Vandenhole, Martin Scheinin and Willem van Genugten eds., *Global Justice, State Duties* (Cambridge: Cambridge University Press, 2013).

70 Joint action by States for the realization of shared objectives belongs to the realm of classic (i.e., non-human rights) public international law. Mutual accountability is one of the five core pillars in the OECD Paris Declaration on Aid Effectiveness (Paris Declaration on Aid Effectiveness, March 2, 2005, par. 47–50 available at: http://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm).

The concept was included in the Paris Declaration in order to signal a move away from the traditional one-way donor to recipient accountability towards a contractual approach, where each party is understood to have obligations, and where mutual progress is jointly assessed. The principle of mutuality creates a bias in favor of joint action. Measures required to realize the right to development are of the type that normally requires international cooperation. Bi- or multilateral solutions based on international cooperation and consensus are the most effective way to tackle a problem of a global nature, such as development.

of the right to development seriously therefore requires further normative development.[71]

Thirdly, when the idea of a human right to development was originally launched in the 70s, Karel Vasak[72] and Keba M'Baye[73] emphasized the need for the involvement of a variety of actors in the realization of the right to development. The desired effect was to humanize the international economic order. Only if all actors on the international social scene (including intergovernmental organizations and private actors) participated as duty bearers would the right to development be realized.[74] Today, it remains difficult under current international law to establish the legal responsibility of these actors, but there is a growing consensus that at least some minimum form of accountability should be available.[75]

These trends in identifying the global dimension of the right to development have an impact on the State duty to protect the rights holders within its own jurisdiction against external threats caused by third States, international organizations, and private actors. It is worth recalling the relevant provisions in the constitutions of Malawi and Ethiopia:

---

71 On this issue, see Koen De Feyter, *Towards a Framework Convention on the Right to Development* (Berlin: Friedrich Ebert Stiftung, 2013).

72 Karel Vasak, *For the Third Generation of Human Rights: The Rights of Solidarity* (Strasbourg: International Institute of Human Rights, 1979).

73 Keba M'Baye, "Le droit au développement comme un droit de l'homme," *Revue des Droits de L'Homme* (1972): 503–534.

74 Compare Saladin Meckled-Garcia and Basak Cali, "Lost in Translation," in *The Legalization of Human Rights*, eds. Saladin Meckled-Garcia and Basak Cali (New York: Routledge, 2006), 16.

75 An agent is deemed accountable, when the agent recognizes that it is subject to a duty to publicly justify its conduct against previously agreed public standards; is prepared to have its conduct assessed by a credible, sufficiently independent assessment mechanism, and commits to taking some form of remedial action when its action cannot be justified. Compare Bovens who describes accountability as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences" in Mark Bovens, "Analyzing and assessing Accountability: a Conceptual Framework," *European Law Journal* 13 (2007): 450. Non-State Actors have created a number of accountability mechanisms that vary in scope and credibility. Compare Koen De Feyter, "Globalisation and Human Rights," in *International Human Rights Law in a Global Context*, eds. Gomez Isa and Koen De Feyter (Bilbao: Deusto University Press, 2009), 83–86. The World Bank Inspection Panel (referred to *infra*) is an example of an accountability mechanism established by an intergovernmental organization.

Article 30(4) constitution of Malawi:

> The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.

Article 43(3) constitution of Ethiopia:

> All international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development.

In addition, as already indicated, the ACHPR has held that the right to development requires that African States protect the rights of the African peoples against both external and internal abuse.[76] The Women's Rights Protocol to the African Charter explicitly requires State parties to:

> Ensure that the negative effects of globalization and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.[77]

The growing international concern about the human rights impact of third States, IGOs, and private actors thus solidifies the duty of African States under the right to development to shield their populations from external adverse impacts through the adoption of domestic policies (including legislation) and by undertaking international action (including the conclusion of international agreements).

Regulation of foreign investment may serve as an example: domestic policies to attract foreign investment should not adversely impact on the right to development. As UNCTAD recently argued 'new-generation investment policies'[78] should:

---

76 279/03, ACHPR, *Sudan Human Rights Organisation and cohre v. Sudan* (2009), AHRLR 153 (ACHPR 2009).

Ibid., par. 222. Traditionally, external threats were associated primarily with external aggression, oppression, and colonization.

77 Article 19(f), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003.

78 UNCTAD, *Investment Policy Framework for Sustainable Development* (United Nations, 2012) available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf.

> create synergies with wider economic development aims or industrial policies and integration in development strategies; foster responsible investor behavior and incorporate principles of corporate social responsibility (CSR); and ensure policy effectiveness in the design, implementation and institutional environment within which investment policies operate.[79]

Investment liberalization and promotion should be balanced against "the need to protect people and the environment."[80] Efforts to improve the investment climate should not lead to a lowering of regulatory standards on social or environmental issues,[81] including the right to development. In addition, Article 43(3) of the Ethiopian constitution clearly applies to international investment agreements. African governments should ensure that trade and investment agreements which they conclude (with developed or developing States) do not harm the right to development of their own people.[82] As the UNCTAD report states, international investment agreements should not unduly constrain 'national economic development policymaking'.[83] The State must ensure that sufficient national space remains open under investment agreements to allow the domestic realization of the right to development.

An interesting example of the potential interaction between an accountability mechanism applicable to non-State actors and the duty of the State to protect its own population is the World Bank Inspection Panel investigation of the Bank's support of the provision of basic social services in the Gambella region in Ethiopia.

The World Bank created the Inspection Panel in 1993.[84] The Inspection Panel receives requests for inspection presented to it by an affected party[85] demonstrating:

---

79 Ibid., iii.

80 Ibid., 8.

81 Ibid., 13.

82 Article 43(3) speaks of *'Ethiopia's'* right to development, but Article 43 makes it clear that the peoples of Ethiopia are the owners of the right, not the Ethiopian State. Any other interpretation would be inconsistent with the principles of the African Charter on Human and Peoples' Rights.

83 Ibid., 7.

84 Resolution No. 93–10 of the Executive Directors establishing the Inspection Panel for the IBRD, September 22,1993 and Resolution No. 93–6 for the IDA, September 22,1993. All Panel-related documents, including Panel reports and recommendations can be found at www.inspectionpanel.org.

85 Interestingly, the constituent resolution of the Inspection Panel provides that at least two persons should file the request. This requirement is an indication that the aim of the

> That its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.[86]

The Inspection Panel is limited to reporting on Bank compliance with its own policies. The World Bank Inspection Panel has no competence to deal with issues of State responsibility for human rights violations. In fact, the borrowing country does not play any role in the procedure.

Only IBRD Operational Policy 4.10 on Indigenous Peoples[87] refers explicitly to human rights in its opening paragraph:

---

procedure is to deal with collective, rather than individual harm. The mechanism is not so much about protecting the personal interest of a single individual, but about creating a platform for communities that are politically and economically marginalized in the borrowing country.

86 Resolution No. 93–10, September 22, 1993, par. 12. Nothing prevents the requesters from arguing that the rights affected by Bank action or omission are their *human* rights, including the right to development.

87 The indigenous peoples' policy was revised in April 2013. The document is available at: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html. The World Bank denies that it has a direct legal responsibility under international human rights law. Nevertheless, the Bank has increasingly recognized the relevance of human rights to its work. In a paper released at the occasion of the 50th anniversary of the Universal Declaration of Human Rights, the Bank acknowledged that "creating the conditions for the attainment of human rights is a central and irreducible goal of development" and that "the Bank contributes directly to the fulfilment of many rights articulated in the Universal Declaration." See Anthony Gaeta and Marina Vasilara, *Development and Human Rights: the World Bank.* (Washington: IBRD, 1998), 2–3. See also Legal Opinion on Human Rights and the Work of the World Bank, January 27,2006, indicating that human rights may constitute legitimate considerations for the Bank where they have economic ramifications or impacts, and confirming the facilitative role the Bank may play in supporting its members fulfill their human rights obligations. For a recent NGO analysis of the World Bank's involvement with human rights, see Human Rights Watch, *Abuse-Free Development. How the World Bank Should Safeguard Against Human Rights Violations* (New York: Human Rights Watch, 2013).

> This policy contributes to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples. For all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation. The Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples.

In addition, Operational Manual Statement 2.20 on Project Appraisal requires that a project's possible effects on the environment and on the health and well-being of its people are considered at an early stage. Interestingly OMS 2.20 adds that if:

> international agreements exist that are applicable to the project and area, such as those involving the use of international waters, the Bank should be satisfied that the project plan is consistent with the terms of the agreements.

In its Investigation Report on the *Honduras : Land Administration project*, the Panel thus investigated whether the Bank, 'consistently with OMS 2.20' adequately considered whether the proposed Project was consistent with ILO Convention No. 169 (the Indigenous and Tribal Peoples' Convention) to which Honduras was a party.[88] Consequently, although the Panel is not competent to directly establish violations of international law, it is not barred from taking into account the applicable international obligations of the borrower, e.g., under the African Charter on Human and Peoples' Rights.

The Panel procedure is administrative rather than judicial in nature, allowing an important role for the Bank's highest executive body in the different stages of the procedure. Panel reports are drawn up independently, but are recommendatory only. The Executive Directors have decision-making power, both in whether or not to allow an investigation after the Panel's eligibility report, and in deciding on action after completion of the Panel's investigation. Board decisions are potentially a source of legal obligation for Bank staff, while the Inspection Panel's findings are not. In practice, the Board does not take an express position on the findings of the Inspection Panel. The Board decides on

88 World Bank Inspection Panel Investigation Report, Honduras: Land Administration Project, June 12, 2007, par. 258, available from the World Bank Inspection Panel website.

action, not on law. Decisions on action after a Panel investigation are "case by case, tailor-made,"[89] and in response to action points proposed by Management. The Inspection Panel procedure does not provide for compensation by the Bank to persons adversely affected by Bank action that was held to be in violation of Bank operational policies. Neither does the Inspection Panel have a role in monitoring the implementation of the remedial action plan as approved by the Board following an investigation.

On September 24, 2012, the Inspection Panel received a Request for Inspection[90] related to 'the World Bank-financed Ethiopia Protection of Basic Services Project' in support of the government's Promoting Basic Services (PBS) Program. The Request was submitted by two local representatives on behalf of 26 Anuak people from the Gambella region of Ethiopia. The representatives were authorized by two groups of Anuak living in different locations to submit the Request. The requesters were supported by a US based non-governmental organization, Inclusive Development International (IDI).

One of the components of the contested bank-financed project provides financial support to recurrent (salaries, operations, and maintenance) expenditures of regional governments in five basic social service sectors. In Gambella and other regions, local authorities carry out a 'villagization' plan (VP) that has allegedly relocated more than 100,000 households to village clusters for the professed purpose of ensuring their access to basic services. According to the requesters, villagization has been carried out by force and accompanied by gross violations of human rights.[91] They argue that the underlying reason for villagization is to dispossess the Anuak of their fertile lands so that they can be transferred to domestic and foreign investors.

The Request states that the Anuak indigenous peoples have been harmed by the Bank-supported PBS Program because the program contributes directly to the Ethiopian government's Villagization Program in the Gambella Region.

The legal analysis annexed to the Request (prepared by IDI) invokes the African Charter on Human and Peoples' Rights as a whole (without specifically mentioning the right to development), and a number of other international

89 Alvaro Umaña, "Some Lessons from the Inspection Panel's Experience," in *The Inspection Panel of the World Bank*, eds. Gudmundur Alfredsson and Rolf Ring (The Hague: Martinus Nijhoff Publishers, 2001), 139. The author is a former Chairperson of the Inspection Panel.

90 IPN Request RQ 12/05, 9 October 2012, available from the World Bank Inspection Panel website.

91 See also Human Rights Watch, *Waiting Here for Death. Displacement and 'Villagization' in Ethiopia's Gambella Region* (New York: Human Rights Watch, 2012).

human rights treaties to which Ethiopia is a party, making use of OMS 2.20 and the Indigenous Peoples Policy.

After conducting initial fieldwork in January 2013, the Inspection Panel issued an eligibility report[92] on February 8, 2013 and recommended a full investigation. The Board approved this recommendation on July 12, 2013.[93] The Panel carried out a second visit to the Gambella area in February 2014, and at the time of writing had not yet completed its investigation report.[94] In its eligibility report, the Panel found that there was a plausible link between the PBS project support by the Bank and the villagization plan carried out by the Ethiopian government.[95] The report identifies four issues of potential serious harm caused to the requesters: the involuntary taking of land,[96] the use of force and intimidation, the lack of services at relocation sites, and the deterioration of livelihood.[97] To what extent these harms occurred and were linked to the World Bank supported program deserved further investigation. The Panel expressed the view that:

> Management's assessment of possible links and risks associated with the contemporaneous implementation of PBS and VP, and identification of actions to address these risks, raises issues of potential serious non-compliance with Bank policy.[98]

The facts under review in the World Bank Panel investigation raise interesting issues with regard to the obligations of Ethiopia as a duty bearer under the right to development, in both its domestic and global dimension.[99] On the

92 The Eligibility Report is available at: http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/EthiopiaPBS3_RandR.pdf.

93 See http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/InvestigationPlan_EthiopiaPBSIII_August7_2013.pdf.

94 A Board decision may be available by the end of 2014.

95 World Bank Inspection Report and Recommendation, Ethiopia: Protection of Basic Services Program Phase II Project Additional Financing and Promoting Basic Services Phase III Project, February 8, 2013, par. 85.

96 Interviewees expressed strongly divergent views on whether villagization served the purpose of freeing up land for domestic and foreign investors; see ibid., par. 87–90.

97 Ibid., par. 86–98.

98 Ibid., par. 102.

99 As already noted, the Inspection Panel is barred from dealing with issues of State responsibility, although it can take account of the Borrower's international obligations when assessing World Bank accountability.

basis of the facts alleged by the requesters a case could be built under the right to development provisions in the African Charter on Human and Peoples' Rights and the constitution of Ethiopia. There is little doubt that the Anuak qualify as a people, and thus as holders of the right to development under both instruments. Following *Endorois*, the government of Ethiopia would need to show that consultations with the Anuak on the villagization program reached the threshold of active, free, and meaningful participation. If the Anuak are considered an indigenous people (as the requesters claim), the higher standard of free, prior, and informed consent to the relocation applies. In addition, the government would need to show that it provided adequate assistance at the post-dispossession settlement, and that the program contributed to an improvement of the group's living standards.

If it were to be established in addition that the loan agreement between the government and the World Bank caused human rights harm to the Anuak, and that the aim of the harmful relocations was at least in part to attract foreign investment in agriculture – issues on which this paper as such allows no conclusion – then it could be argued that the government failed to protect its people's right to sustainable development both through its international agreements and through the conduct of its international relations. Such a finding by the African Commission on Human and Peoples' Rights – again, if it were to be supported by evidence – would strengthen African governments in protecting their populations against the potential adverse human rights effects of economic globalization.

5 Conclusion

The African Charter on Human and Peoples' Rights creates legal obligations for African States to implement the right to development. Clearly, the constitutional protection of the right to development matters as well, either directly through the inclusion of the right to development in the constitutional bill of rights, or indirectly, by ensuring applicability and justiciability of the African Charter in domestic law.

The potential of the right to development in Africa remains largely untapped. This is a matter of some regret for several reasons, firstly because the right to development is a contribution from the Global South, and from Africa in particular, to the global normative human rights framework. Non-Western contributions to that framework are important from a universality perspective. Implementation in practice would demonstrate commitment, and show that the right to development has real added value.

Secondly, and perhaps more importantly, the right to development, when properly implemented, can assist in improving human dignity. The domestic dimension of the right to development entitles the people(s) of Africa to meaningful participation and benefit-sharing in the development effort. The global dimension of the right to development protects them against external adverse impact, by establishing a State duty to provide protection against abuses by third parties, including foreign States, intergovernmental organizations, and private actors.

Bibliography

Adem Kassie Abebe. "Human Rights under the Ethiopian Constitution: A Descriptive Overview." *Mizan Law Review* 5/1 (2011): 41–71.

Bovens, Mark. "Analyzing and Assessing Accountability: a Conceptual Framework." *European Law Journal* 13 (2007): 447–468.

De Feyter, Koen. "Globalisation and Human Rights." In *International Human Rights Law in a Global Context*, edited by Felipe Gomez Isa and Koen De Feyter, 51–96. Bilbao: Deusto University Press, 2009.

De Feyter, Koen. *Towards a Framework Convention on the Right to Development*. Berlin: Friedrich Ebert Stiftung, 2013.

De Schutter, Olivier, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, and Ian Seiderman. "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights." *Human Rights Quarterly* 34 (2012): 1084–1169.

Gaeta, Anthony, and Marina Vasilara. *Development and Human Rights: the World Bank.* Washington: IBRD, 1998.

Gedion T. Hessebon. "The Precarious Future of the Ethiopian Constitution." *Journal of African Law* 57/2 (2013): 215–233.

Human Rights Watch. *Abuse-Free Development. How the World Bank Should Safeguard Against Human Rights Violations.* New York: Human Rights Watch, 2013.

Human Rights Watch. *Waiting Here for Death. Displacement and 'Villagization' in Ethiopia's Gambella Region.* New York: Human Rights Watch, 2012.

Ibhawoh, Bonny. "The Right to Development: The Polemics of Power and Resistance." *Human Rights Quarterly* 33 (2011): 76–104.

Kamga, Serges Alain Djoyou, and Charles Manga Fombad. "A Critical Review of the Jurisprudence of the African Commission on the Right to Development." *Journal of African Law* 57/2 (2013): 196–214.

Langford, Malcolm, Wouter Vandenhole, Martin Scheinin, and Willem van Genugten, eds. *Global Justice, State Duties*. Cambridge: Cambridge University Press, 2013.

M'Baye, Keba. "Le droit au développement comme un droit de l'homme." *Revue des Droits de L'Homme* (1972): 503–534.

Marks, Stephen. *The Politics of the Possible. The Way Ahead for the Right to Development*. Berlin: Friedrich Ebert Stiftung, 2011.

Meckled-Garcia, Saladin, and Basak Cali. "Lost in Translation." In *The Legalization of Human Rights*, edited by Saladin Meckled-Garcia and Basak Cali, 11–31. New York: Routledge, 2006.

Okafor, Obiora Chinedu. "'Righting' the right to development: a socio-legal analysis of Article 22 of the African Charter on Human and Peoples' Rights." In *Implementing the Right to Development. The Role of International Law*, edited by Stephen Marks. Geneva: Friedrich Ebert Stiftung, 2008.

Salomon, Margot. *Global Responsibility for Human Rights*. Oxford: Oxford University Press, 2007.

Sengupta, Aryun. "On the Theory and Practice of the Right to Development." *Human Rights Quarterly* 24 (2002): 838–889.

Umaña, Alvaro. "Some Lessons from the Inspection Panel's Experience." In *The Inspection Panel of the World Bank*, edited by Gudmundur Alfredsson and Rolf Ring, 127–142. The Hague: Martinus Nijhoff Publishers, 2001.

UNCTAD. *Investment Policy Framework for Sustainable Development*. United Nations, 2012.

Vasak, Karel. *For the Third Generation of Human Rights: The Rights of Solidarity*. Strasbourg: International Institute of Human Rights, 1979.

Vitkauskaite-Meurice, Dalia. "The Arab Charter on Human Rights: The Naissance of a New Regional Human Rights System or a Challenge to the Universality of Human Rights." *Jurisprudencija/Jurisprudence* 1/119 (2010): 165–180.

Woodiwiss, Anthony. "The Law cannot be Enough." In *The Legalization of Human Rights*, edited by Saladin Meckled-Garcia and Basak Cali, 32–48. New York: Routledge, 2006.

CHAPTER 2

Human Rights and Development in Africa

Assessing COMESA's Experience

Adolphe Kilomba Sumaili

Abstract

States have always been considered sole duty-bearers of the right to development. Therefore, they often receive any kind of complaint from their respective citizens related to the implementation of such a right. Yet, states are not the only duty-bearer of this right. Besides states, this paper emphasizes that regional organizations are also duty-bearers of such right. The analysis of this paper is focused on COMESA's experience. It assesses its experience in its various attempts to develop people's rights in terms of food security, the right to good infrastructures, and gender mainstreaming within its geographical zone. This paper concludes that people originating from COMESA's member states should henceforth know that they can also claim their right to development from regional organizations as they usually do from their respective states.

Keywords

right to development – regional organization – food security – trade issues – gender mainstreaming – COMESA

1 Introduction

The wellbeing of people irrespective of their country contributes to sustainable peace and stability. The respect of their fundamental rights allows them to have a high standard of living as well as pursue their highest ambitions. The International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) provides that:

> The states parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family including adequate food, clothing and housing, and the continuous improvement

 | DOI 10.1163/9789004280250_004

> of living conditions. The states parties will take appropriate steps to ensure the realization of the right, recognizing to this effect the essential importance of international cooperation based on free consent.[1]

The ICESR and International Covenant for Civil and Political Rights (hereinafter ICCPR) promotes the idea that human rights flow from the inherent dignity of every human being.[2] The Declaration on Social Progress and Development adopted in 1969 enhanced such idea by affirming loudly that:

> social progress and development shall be founded on respect for the dignity and value of the human being and shall ensure the promotion of human rights and social justice[3]

regardless of culture and religion. Elsewhere, all over the world, all religions and cultures seem not yet able to share such aspiration.[4]

To create a real viable relationship between human rights and development, the African Union has recently designed the New Partnership for Africa's Development (hereinafter NEPAD).[5] NEPAD is "an African Union strategic framework for pan-African socio-economic development. It is both a vision and a policy framework for Africa in the twenty-first century."[6] NEPAD has been designed to address African contemporary challenges such as poverty, development, and Africa's marginalization internationally. This document is regarded the basic African document putting human rights as a stepping stone to development.

In assessing NEPAD and surveying human rights implementation in Africa, Wilfred Nderitu states that poverty constitutes a gross human rights violation.[7] For him, the synergy between and among international organizations and states in the struggle against poverty should be enhanced for the purpose of

1 ICESCR, Article 11, paragraph 11.

2 Subrata Roy Chowdhury and Paul J.I.M de Waart, "Significance of the Right to development: An introductory view," in *The Right to Development in International Law*, ed. Subrata Roy Chowdhury et al. (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992), 9.

3 UN General Assembly Resolution 2542(XXIV) of December 11, 1969, Article 2.

4 "Meeting of Experts on the place of human rights in cultural and religious traditions," final report, Doc.SS-79/Conf.607/10 of February 6, 1980, 25 and 27.

5 http://www.nepad.org/about accessed on September 7, 2013.

6 http://www.nepad.org/about accessed on September 7, 2013.

7 Wilfred Nderitu, "The International Justice System and Human Rights in Africa," in *Human Rights in Africa, Legal Perspectives on their Protection and Promotion*, ed. Anthon Bösl and Joseph Diescho (Windhoek, Macmillan, 2009), 83.

human rights protection. We are in agreement with Nderitu in that the struggle against poverty should always integrate a global human rights strategy. It seems quite impossible to talk about respecting human rights without mention of poverty and people's misery. We strongly believe that every development program should start by addressing human rights concerns because the right to development is one of the fundamental human rights, as we will demonstrate later on.

While numerous African states still consider human rights as a political issue, the United Nations Human Rights Commission (hereinafter UNHRC) in 1977 gave the right to development[8] the status of a human right.[9] This was confirmed by the United Nations General Assembly (hereinafter UNGA) in 1979 through its resolution 34/66 of November 23, 1979. Henceforth, human rights and the right to development have become inseparable from states as duty-bearers. It was through this resolution that the right to development became qualified as an inalienable human right.[10] That being said, the following question deserves to be raised: are states the exclusive duty-bearers of the right to development?

The working hypothesis of this reflection is the following: We strongly believe that regional organizations are also duty-bearers of the right to development even though this is often ignored by most inhabitants of their geographical zone of influence.

As the scope of this hypothesis is vast, we must also bind it in time and space. This paper will exclusively deal with the situation in the COMESA member states. For its smoothest understanding, the paper will first summarize the current development issues (I). It will then demonstrate how regional organizations such as COMESA can be held accountable for the right to develop (II). The following point will entirely be dedicated to COMESA's duty to developing its member states (III).

2 Understanding Development Issues

The expression "Development issues" relates to several development challenges in the contemporary world. Indeed, the globalization process has

8 Keba Mbaye, "Le Droit au développement comme Droit de l'Homme," [The Right to Development as a Human Right] *Revue des Droits de l'Homme* (1972): 505.

9 UNHRC Resolution 4(XXXIII) of February 1977.

10 Robert Charvin, *L'Investissement International et le Droit au Développement* [The International Investment and the Right to Development] (Paris: L'Harmattan, 2002), 113.

communized development challenges among states around the world. They nowadays share numerous challenges. This is the case for instance when development relates directly to millennium development goals (MDGs). Most international cooperation aims at promoting them in recipient countries. They have become the final goal of almost all international cooperation.

Current development issues center on the following topics: food security; scarcity of arable lands; the spike in oil prices; ground water depletion and climate change challenges; the challenge of increasing agricultural productivity; international trade with specific issues of trade restrictions to access the market; the increasing number of violent conflicts that jeopardize the investment climate; the population access to healthcare; the building of common infrastructure to further financial exchange; the lack of access to jobs for women; poverty reduction; the energy crisis as a threat to development; good governance issues and many more.[11] Indeed, these are the current main development issues in the contemporary world.

To address these challenges, the African Union has laid out the NEPAD program. This new partnership aims to address these challenges at the continental level. COMESA is one of the African regional organizations that work in partnership with NEPAD to address issues with its member states. Apart from development issues, it seems informative and instructive to understand how regional organizations can be considered duty-bearers of the right to development.

3 Regional Organizations and the Right to Development

As previously stated, states are commonly known as the main duty-bearers of the right to development. They are supposed to be the main implementers of such a right and of the so-called new international economic order. In 1981, the UNCHR decided to link human rights with the new international economic order in the context of the right to development.[12] Therefore, it organized the Global Consultation on the Realization of the right to development as a human right in 1990 as well. This Consultation recommended inter alia that:

11 http://www.globaldashboard.org/2010/10/12/10-key-issues-for-international-development/ accessed on October 14, 2013.

12 Resolution 36(XXVII of March 11, 1981) establishing the Working Group of Governmental Experts on the Right to Development.

> ...United Nations bodies and agencies, including related financial and trade institutions, should respect the international covenants on human rights and other basic conventions in the field of human rights as if they themselves were parties.[13]

It follows that international organizations such as the United Nations organizations become actors in the process of implementing international human rights instruments. By legally regarding international organizations as parallel structures to the UN, regional organizations are therefore under the same obligations as the UN in implementing the right to development.

> The growing interdependence of states leads to a situation in which human beings, individually or collectively, should be able to claim 'as of right' liberties, immunities and benefits from international organizations as societies which affects their lives. This holds true in particular for economic, social and cultural rights.[14]

The 1990 UN Declaration on international economic co-operation and development drew by consensus the logical conclusion from this development by stating:

> the United Nations is a unique forum in which the community of nations can address all issues in an integrated manner. Its many specialized agencies make an indispensable contribution to development. They have a major responsibility in the great task of revitalizing growth and development in the 1990s.[15] In other words this Declaration brings to the fore the responsibility of international organizations as organs of the community of states and not as mere extracts of individual sovereign states.[16]

It goes without saying that human rights have become "the common responsibility of states and non-state actors under the aegis of the international community"[17]

13 Doc. E/CN.4/1990/9/Rev.1, paragraph 192.

14 See Chowdhury and de Waart, *supra* n. 2, 16.

15 Doc.A/RES/S-18/3 of June 4, 1990, paragraph 36.

16 See Chowdhury and de Waart, *supra* n. 2, 16.

17 Id., 17.

> UN's specialized agencies such as International Labor Organization (right to work and related rights, e.g. the right to enjoy just and favorable conditions of work and to form trade unions); Food and Agriculture Organization (right to food); United Nations Educational, Scientific and Cultural Organization (right to education, freedom of thought) and World Health Organization (right to enjoy the highest attainable standard of physical and mental health) may or even should be considered as institutionalizing the duty of states to co-operate with a view to achieving progressively the full realization of these rights.[18]

Subrata Roy Chowdhury and Paul J.I.M de Waart argue that:

> [with respect to] individuals, the right to development is a principle of international human rights law that expresses the indivisibility and inseparability of all human rights as the development dimension of human rights.[19]

Moreover,

> [with respect to] states, the right to development is a principle of interstate law including the law of international organizations that expresses the instrumentality of those branches of international law to the protection of the inherent human dignity. In doing so it withdraws development co-operation from the ambit of charity.[20]

A development strategy that disregards or interferes with human rights is the very negation of development.[21] In addition to the aforementioned arguments, one should add the founding treaty of regional organizations that usually define their main purposes. The case of COMESA is adequately illustrative. This regional organization aims at promoting regional integration through trade and other development projects. It works jointly with its member states to promote development through its different programs. Therefore, it has become as

18 Yash Ghai and Y.R. Rao, "Whose Right to Development?" *Common Wealth Secretariat Human Rights Unit Occasional Paper* (London: Common Wealth Secretariat, 1989), 1–12; Pieter H. Kooijmans, "Human Rights-Universal Panacea? Some Reflections on the so-called human rights of the third generation," *NILR* 37/3 (1990), 239.

19 See Chowdhury and de Waart, *supra* n. 2, 21.

20 Ibid.

21 Ibid.

accountable as its member states in promoting development, trade, food security, and energy supply within its member states. The accountability of providing development is clearly shared. In other words, people of member states can simultaneously claim such a right to COMESA and to their respective member states.

For COMESA, development is one of its main objectives as demonstrated in this paper. The enlightenment of the fact that regional organizations are also duty-bearers of the right to development leads us to question COMESA's development strategies and policies vis-à-vis its member states. Let us first examine COMESA's historical background to facilitate our understanding.

4 COMESA and the Right to Development

Almost all COMESA programs are devoted to development issues. However, before providing explanations on how it implements the right to development, let us quickly portray COMESA's historical background, objectives, and Court.

4.1 *The COMESA's Historical Background, Objectives, and Court*

At the moment of its creation in 1981, COMESA was called the Preferential Trade Area (hereinafter PTA) for Eastern and Southern Africa. In 1994, the name was changed to COMESA which stands for the Common Market for Eastern and Southern Africa. The "wise men and Elders" were the Presidents and Ministers of the different member countries. To date, COMESA comprises 19 member states: Burundi, Comoros, DR Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

COMESA's foremost objective is:

> to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programs to raise the standard of living of its peoples and to foster closer relations among its Member States.[22]

In setting up several development programs, this organization tries to improve people's living conditions. However, one should not forget that there is no provision in COMESA's founding treaty that clearly affirms the right to

22 COMESA founding Treaty, Article 3, paragraph b.

development as a human right nor does it have a human rights agenda vis-à-vis its member states.

Nevertheless, COMESA's founding treaty aligns the respect of human rights among its fundamental principles. Article 6 provides that in ratifying this treaty, states adhere to all principles listed in this article. Amongst those principles, we find the "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."[23] Another of COMESA's guiding principles binds states to "accountability, economic justice and popular participation in development,"[24] etc. This means that states are bound by such principles in their daily activities and economic programs.

By putting in place numerous development programs, COMESA aims at materializing its ambitions so as to improve the standard of life of all inhabitants of its geographical zone in providing food security, increasing trade facilities, providing good infrastructures, and much more. All of this is supposed to be done in the strict respect for the promotion of human rights and economic justice.

Moreover, by creating a Court, COMESA intends to help people to legally claim those rights as proclaimed by its founding treaty. Thus, people can, for instance, claim the right to food before COMESA's Court through article 4 of the COMESA treaty.

Indeed, this article lists all the specific obligations that member states shall undertake to reach COMESA's aims and objectives. Amongst other specific undertakings in various sectors, member states have to "enhance regional food sufficiency"[25] in the agricultural field. We strongly believe that the expression of food sufficiency explicitly refers to the right to food. In cases where it should mean anything else, the right to food will be part of the new understanding. Based on such provision, any person coming from a member state can, by virtue of article 26 of the COMESA treaty, subpoena his own state before the COMESA Court for failing to provide food security and any other obligation stated in the COMESA founding treaty. In ratifying the COMESA treaty, states are bound by all the obligations vis-à-vis their respective populations.

It seems also important to specify that article 26 of the COMESA treaty allows states, COMESA's secretary general, and inhabitants of member states to refer a case to the Court. The case should somehow be related to the COMESA treaty. Alas, people coming from COMESA's member states still ignore the

23 COMESA founding Treaty, Article 6, paragraph e.

24 COMESA founding Treaty, Article 6, paragraph f.

25 COMESA founding Treaty, Article 5, paragraph 5c.

existence of such legal remedy. The evidence of such ignorance is the fact that there are few cases brought by people before this Court. Elsewhere, few people are aware of its existence. Its jurisprudence remains quite unknown as well. The experience of the ECOWAS should be an incentive for COMESA's Court.[26] Let us now examine one by one the four main development programs of COMESA.

4.2 *COMESA and Food Security*

Regarding the subject of the right to food, Jean Drèze thinks that this right is the most complex right. The responsibility to protect such a right seems unobvious and complex as well. He tries to define this right as:

> an entitlement to be free from hunger, which derives from the assertion that the society has enough resources, both economical and institutional, to ensure that everyone is adequately nourished.[27]

Ideally, this right can be seen as a right to nutrition even if the concept of being free from hunger lends itself to controversy. Dreze argues that the responsibility of its implementation starts with the state, but does not end with it.[28] In other words, it seems to be a shared responsibility among states, other institutions, and individuals. Another huge concern with this right is that it can be difficult to enforce in court.[29] That being said, it remains possible to hold the state responsible through the usual legal arenas like elections, street actions, etc.[30]

In the specific context of COMESA, such a right can be claimed before COMESA's Court. Usually, citizens of COMESA member states ignore such right. They often claim their rights to development from their respective states while forgetting that this is not the only avenue. The African experience shows that

26 http://combatsdroitshomme.blog.lemonde.fr/2009/05/10/le-juge-africain-est-entre-dans-lhistoire-cour-de-justice-de-la-cedeao-par-delphine-dallivy-kelly/ accessed on November 16, 2013.

27 Jean Drèze, "Democracy and the Right to Food," in *Democracy and the Right to Food*, eds. Philip Alston and Mary Robinson (Oxford: Oxford University Press, 2005), 54–55.

28 Ibid.

29 Margret Vidar, "Implementing the Right to Food: Advantages of a Framework Law," paper presented at a Seminar convened by FIAN International, held at the Indian Social Institute, New Delhi, February 24–26, 2003. See also Gerald Moore, "Note on National Framework Legislation," accessed October 14, 2013, http://www.nutrition.uio.no/iprdf/Encounterdocuments/DocO18.html.

30 See Drèze, *supra* n. 27, 58–60.

civil society's activists always address their memoranda advocating for the right to development to their states while they can also address them to regional organizations as duty-bearers of such right and COMESA is one of them.

Its economic agenda asserts that:

> Agriculture is considered to be the engine for economic development in the COMESA region. The sector accounts for more than 32 per cent of COMESA's gross domestic product (GDP), provides a livelihood to about 80 per cent of the region's labour force, accounts for about 65 per cent of foreign exchange earnings and contributes more than 50 per cent of raw materials to the industrial sector.[31]

COMESA's agricultural strategy is implemented through several regional initiatives that focus on:

> the importance of cooperation and coordination of regional agricultural policies, food security responses, product marketing, research and development, plant and animal disease and pest control, training, irrigation development, and exploitation of marine and forestry resources.[32]

To implement its agricultural strategy, COMESA works on the same wavelength as NEPAD's Comprehensive African Agricultural Development Programme (hereinafter CAADP). The CAADP has been ratified by African states as a suitable framework for the restoration of agricultural growth, food security, and rural development across the African continent. It defines four key pillars to improve significantly the agriculture within the African continent:

> extending the area under sustainable land management and reliable water control systems; improving rural infrastructure and trade related capacities for market access; increasing food supply; reducing hunger and improving responses to food emergency crises; and improving agricultural research, technology dissemination and adoption.[33]

Alongside NEPAD, COMESA plans to achieve numerous objectives by 2015 in the agricultural sector. Among others, let us quote *inter alia* the improvement

31 http://programmes.comesa.int/index.php?option=com_content&view=article&id=94&Itemid=111 accessed on October 10, 2013.

32 Ibid.

33 Ibid.

of the productivity of agriculture to attain an average annual production growth rate of 6 percent with particular attention to small-scale farmers, especially women, having dynamic agricultural markets within countries and between regions, having integrated farmers into the market economy, and having improved access to markets to become a net exporter of agricultural products taking into account Africa's comparative and competitive advantages. Also, COMESA's dream is to achieve a more equitable distribution of wealth as a result of rising real incomes and relative wealth for rural populations through more equitable access to land, physical and financial resources, and the knowledge, information and technology for sustainable development, etc.

With such plan, COMESA intends to realize sustainable regional food security and enhance regional integration. Not surprisingly, regional organizations on the African continent are quite ambitious without necessarily having the means to achieve their policy goals. COMESA has not yet achieved these objectives for its 19 member states. From the horn of Africa to its southern part via its central region, COMESA remains somewhat unknown in spite of its ambitious programs. Food insecurity is a reality that its member states still face more than 30 years after its creation. The fact that several waves of refugees and internally displaced persons across the African continent are insufficiently supplied with food shows how far COMESA remains from reaching its objectives.

Despite its low impact, we should however recognize COMESA's efforts in the quest to improve the population's lives. It is currently running numerous programs of food security for its member states such as agricultural market promotion and regional integration projects; irrigation development in the COMESA region funded by the Indian government; regional food security/food reserve initiatives among member states; the food security policy and vulnerability reduction program; coordinated agricultural research and technology interventions with the financial support of the USAID; regional approach towards biotechnology; the Pan-African tsetse and trypanosomiasis eradication Campaign (PATTEC) in collaboration with the AU; livestock sector development in collaboration with the AU and USAID; fisheries sector development in partnership with the Common Fund for Commodities; implementation of NEPAD' s CAADP in the eastern and central African (ECA) region, etc.[34]

Yet, the effects of all these projects on the daily life of COMESA state populations remain quite invisible. In spite of its fascinating appearance, the program has not yet impacted the lives of people within its geographical area.

34 http://programmes.comesa.int/index.php?option=com_content&view=article&id=94&Itemid=111 accessed on October 10, 2013.

In contrast, the situation is increasingly worsening.[35] All reports published on the World Food Day celebrated each year on October 16 have shown how catastrophic the situation in Africa is. The report published by the World Food Programme on hunger is indisputable. Because of the situation, COMESA's accountability is called into question. How far can one hold COMESA accountable amidst such chaos? If the organization can shoulder this failure, let us recognize that the causes are numerous, including *inter alia* the lack of financial support from its member states. The organization has not so far succeeded in imposing its leadership over member states and subsequently impacting their food policies.

Making people aware of their rights vis-à-vis regional organizations such as COMESA might contribute to the quick implementation of COMESA's program. It might also increase population pressure on their respective states to contribute to COMESA's programs. The inhabitants of COMESA member states deserve to know more about their rights vis-à-vis this regional organization.

4.3 *COMESA and Trade Issues*

Trade is one of the most important objectives of COMESA. To make its trade ambition clear, COMESA's secretariat affirms that:

> the final objective of cooperation in Trade, Customs and Monetary Affairs is to achieve a fully integrated, internationally competitive and unified single economic space within which goods, services, capital and labour are able to move freely across national frontiers.[36]

Thus, the trade program of COMESA aims to remove all physical, technical, fiscal, and monetary barriers to intra-regional trade and commercial exchanges. To make its dream come true, COMESA has defined a detailed plan of implementation.

The organization started the implementation by creating a PTA with *lower* tariffs applied to intra-regional trade originating in member countries than to extra-regional trade, a Free Trade Area (FTA), in which *no* tariffs are levied on goods from other member states whilst each member state applies its own regime of tariffs to goods imported from outside the region, a Customs Union (CU) involving free trade amongst the member states but with a Common

35 http://www.un.org/apps/news/story.asp/realfile/story.asp?NewsID=43299&Cr=hunger&Cr1= accessed on October 17, 2013.

36 http://programmes.comesa.int/index.php?option=com_content&view=article&id=94&Itemid=111 accessed on October 10, 2013.

External Tariff (CET) scheme according to which every member state applies the same tariffs on goods from outside the region, a Common Market (CM) with free movement of capital and labor, considerable harmonization of trade, exchange rate, fiscal and monetary policies, internal exchange rate stability and full internal convertibility, and an Economic Community (EU) with a common currency and unified macroeconomic policy. This is to say that COMESA's ambition is to create a unified economic space with fundamental freedoms for goods, services, capital, and labor.

Yet once more, there remains a visible paradox between the situation that COMESA states still face and what the organization is currently doing. Indeed, COMESA states have not yet started enjoying such fundamental economic freedoms. They are still facing trade restrictions among themselves with no hope of overcoming them in the near future. From the horn of Africa to its southern part, customs and fiscal barriers remain obstacles to free trade among states and their respective populations. States' policies usually bypass COMESA's instructions and states do whatever they want in the trade sector. In spite of common official declarations and economic forums, much remains to be done to make this charming agenda real. Instead of weakening this ambitious regional organization, states should enhance their cooperation with COMESA and further financially support its economic agenda.

Raising awareness of populations of COMESA member states might contribute to increasing civil society's pressure on their respective states so that they can financially support COMESA's trade program. We strongly believe that such a synergy will aid the implementation of the right to development by this regional organization. In other words, the population will be the one to pressure its state to fulfill its financial obligations vis-à-vis COMESA. In turn, COMESA might accelerate its program. Indeed, this synergy might help COMESA to correctly implement its development plan in light of the European Union.

4.4 *COMESA and Infrastructure Challenge*

The enforcement of the right to development depends also on the building of good infrastructures. In fact, there is a serious concern about the infrastructures within the COMESA geographical space. There are no transnational roads to link all the member states. How do people of Djibouti easily interact with those in the DR Congo or Mozambique? How do people from South Africa or Zimbabwe easily trade with those in Addis Ababa? The lack of infrastructures entails the exclusive use of air transportation, which is expensive and does not stimulate trade. To frontally address this challenge, COMESA has focused on transport, ICT, and energy, even if its policy on these matters so far remains vague and undefined.

The website[37] of the organization does not however provide any document explaining the plan and ongoing projects related to the transport sector. In the ICT sector, COMESA has outlined the establishment of a Regional Telecommunications Network and the creation of a COMTEL Transmission Network. There are still no clear activities on the agenda.

In the energy sector, COMESA's ambition is to create an energy policy and regulatory harmonization, facilitate trade in energy services, develop regional energy infrastructures, and the eastern Africa power pool (EAPP). These projects have been documented through feasibility studies and the main challenge remains the funding. Meanwhile, there are ongoing parallel initiatives by states in this sector. While Ethiopia has started building a huge power dam on the Nile River, the DR Congo has entered a partnership to build a huge electric dam named *Inga III* with South Africa on the Congo River. Member states of the *Communauté Economique des Pays de Grands Lacs* (CEPGL)[38] in the Great Lakes Region have collaborated on the energy project named *Ruzizi II,* administered by a common society *Société Internationale de l'Electricité des Pays des Grands Lacs* SINELAC[39] that provides electricity for eastern Congo, Rwanda, Burundi, etc.

This shows that parallel energy initiatives within the COMESA geographical area do not offer enough chances for the COMESA energy project to become real one day. Thus, instead of combining their efforts to implement one macro project, COMESA member states prefer to act separately with their own energy policies putting in jeopardy ambitious regional projects.

4.5 *COMESA and Gender Issues*

COMESA is unique in comparison to African regional organizations that have designed a gender policy for their development plans. COMESA has effectively set up a gender policy to encourage women to take part in its activities. By being cognizant of the need to integrate women in economical activities, COMESA has issued a gender-mainstreaming manual.[40] The Gender Policy intends to facilitate the engendering of legislation and development policies in member states in order to promote women's access to and control over production and productivity resources such as land, credit, technology, and information.

37 http://programmes.comesa.int/index.php?option=com_content&view=article&id=131&Itemid=159 accessed on October 10, 2013.

38 The CEPGL was created in 1976 by the Gisenyi Treaty between the DR Congo, Rwanda, and Burundi. Read further at http://www.cepgl-cepgl.org/.

39 See SINELAC at http://sinelac.org/.

40 http://programmes.comesa.int/attachments/article/82/COMESA%20Gender%20Manuals.pdf accessed on October 10, 2013.

The gender policy, in accordance with article 143 of the COMESA founding treaty, has also integrated the mainstreaming of cross-cutting issues such as HIV and AIDS, poverty, governance, environment, information, communication and technology, gender-based violence, substance and drug abuse, and related developmental issues into all its policies, structures, and operations. In order to achieve full implementation of its gender policy, the COMESA Secretariat has developed a Gender Mainstreaming Strategy and a five-year action plan.[41] The implementation of this gender policy within member states remains quite challenging.

If states increasingly adopt gender legislation within the COMESA zone, the implementation so far remains uncertain by *inter alia* traditional customs and beliefs. COMESA's impact on its member states is also disputable due to its invisible impact. Most African states, particularly those in the horn, such as Ethiopia, are nowadays working to promote gender issues. But much remains to be done in this field of gender mainstreaming.

COMESA has yet to address this issue with its member states. Several of COMESA's member states remain among those where it is still difficult for women to blossom and shape their own destinies. Nevertheless, the time has come for COMESA to consider gender issues as a factor of development unlike other African regional organizations.

5 Conclusion

Throughout this paper, we have shown how human beings are not instruments of development but rather the main beneficiaries of it. The Vienna Declaration of 1993 confirms this assertion. It states that the right to development is an individual and universal right fundamental to the rights of human beings. However, one should not overlook the fact that apart from the African Charter of Human and Peoples' Rights of 1981 in its Article 27, this right is not yet internationally recognized by any legally binding international document. Nevertheless, as Alain Pellet states, this right can be extrapolated from several principles of international law such as the right to education, the right to labor, the right to healthcare, the right to decent accommodation, etc.[42]

41 http://programmes.comesa.int/index.php?option=com_content&view=article&id=97&Itemid=116 accessed on October 10, 2013.

42 Alain Pellet, "Note sur quelques aspects juridiques de la Notion de Droit au Développement," [Some Legal Aspects of the Right to Development] in *La Formation des Normes en Droit International du Développement*, ed. M. Nijhoff (Alger: OPU, 1984), 71.

The inherent dignity of a human being is no longer a matter of state consent.

> [This human dignity] implies the existence of an international moral order. The International Bill of Human Rights has given evidence that this moral order coincides with the international public order, thus restraining in the field of human rights the discretionary powers of states.[43]

Through examining COMESA as a case study, this paper has argued that regional organizations are duty-bearers of the right to development. After briefly summarizing the contemporary development issues and the relationship between regional organizations and the right to development, the paper has detailed how COMESA implements this right within its geographical zone. We conclude that COMESA has set up several programs for developing its geographic zone but it still faces numerous financial concerns and its results are not obvious.

It is shown that states are not the only ones to implement the right to development. Their respective populations can also hold regional organizations accountable. These populations should be made aware of their rights vis-à-vis regional organizations such as COMESA to increase accountability. They should also be made aware of the fact that their rights to development can be claimed at COMESA's Court against their respective states since they are mostly ignorant of this. Far from exhaustive, this study should be considered as a starting point of reflection that intends to make more effective the relationship between member states' populations and African regional organizations such as COMESA.

Bibliography

Charvin, Robert. *L'Investissement International et le Droit au Développement* [The International Investment and the Right to Development]. Paris: L'Harmattan, 2002.

Chowdhury, Subrata Roy, and Paul J.I.M. de Waart. "Significance of the Right to development: An introductory view." In *The Right to Development in International Law*, edited by Subrata Roy Chowdhury et al. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992.

43 Chowdhury and de Waart, *supra* n. 2, 9.

Drèze, Jean. "Democracy and the Right to Food." In *Democracy and the Right to Food*, edited by Philip Alston and Mary Robinson, 54–55. Oxford: Oxford University Press, 2005.

Ghai, Yash, and Y.R. Rao. "Whose Right to Development?" *Common Wealth Secretariat, Human Rights Unit Occasional Paper.* London: Common Wealth Secretariat, 1989.

Kooijmans, Pieter H. "Human Rights-Universal Panacea? Some Reflections on the so-called human rights of the third generation." *NILR* 37/3 (1990).

Mbaye, Keba. "Le Droit au développement comme Droit de l'Homme." [The Right to Development as a Human Right] *Revue des Droits de l'Homme* (1972): 505ff.

Moore, Gerald. "Note on National Framework Legislation," accessed October 14, 2013, http://www.nutrition.uio.no/iprdf/Encounterdocuments/DocO18.html.

Nderitu, Wilfred. "The International Justice System and Human Rights in Africa." In *Human Rights in Africa, Legal Perspectives on their Protection and Promotion,* edited by Anthon Bösl and Joseph Diescho, 81–101. Windhoek: Macmillan, 2009.

Pellet, Alain. "Note sur quelques aspects juridiques de la Notion de Droit au Développement." [Some Legal Aspects of the Right to Development]. In *La Formation des Normes en Droit International du Développement*, edited by M. Nijhoff, 420–425. Alger: OPU, 1984.

Vidar, Margret. "Implementing the Right to Food: Advantages of a Framework Law," paper presented at a Seminar convened by FIAN International, held at the Indian Social Institute, New Delhi, February 24–26, 2003.

CHAPTER 3

The Right to Development in Ethiopia

Abdi Jibril Ali

Abstract

International recognition of the right to development is relatively recent. The United Nations General Assembly adopted the Declaration on the Right to Development in 1986. A few years later, the right was reaffirmed in the Vienna Declaration and Programme of Action. However, its codification in a globally applicable human rights treaty is yet to take place. The degree of its recognition at the African regional level is more advanced. Africa has taken the lead in articulating and recognizing the right in a binding multilateral human rights treaty—the African Charter on Human and Peoples' Rights. Ethiopia is a party to the Charter and is one of very few countries that recognize the right to development in their domestic law. The 1995 constitution of Ethiopia[1] guarantees the right to development which should be interpreted in accordance with the African Charter. Although the content and scope of the constitutional right to development has not been canvassed by judicial or quasi-judicial organs so far, the African Charter as interpreted by the African Commission on Human and Peoples' Rights is helpful in the identification of the right-holders and the scope of their rights, and the duty-bearer and the extent of its obligation under the Ethiopian constitution. Such identification can be used to assess Ethiopia's performance in the realization of the right to development.

Keywords

constitutional rights – development – right to development – people – peoples' rights

1 Introduction

The right to development is partly the result of developing countries' struggle for a New International Economic Order. As a bundle of rights, the right is as old as other rights with its origin in the Universal Declaration of Human Rights.

1 Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, *Federal Negarit Gazeta*, Year 1, No 1 Addis Ababa, August 21, 1995 (hereinafter referred to as the 1995 constitution).

 | DOI 10.1163/9789004280250_005

As such, it has been incorporated in binding human rights treaties including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and other subsequent treaties. As a separate right, it has not been incorporated in a binding treaty at global level although the Declaration on the Right to Development (DRD) was adopted more than a quarter of a century ago. Thus, a right to development imposing obligations on developed countries has yet to be developed at the international level.

Africa has made an important contribution to the emergence of the right to development. It is the first continent to articulate the right to development as a separate right under article 22 of the African Charter on Human and Peoples' Rights (African Charter or Charter) even before the adoption of the DRD. The African Commission on Human and Peoples' Rights (African Commission or Commission) has considered communications invoking violations of the right. The Commission has taken the opportunity to canvass the scope and content of the right.

The African Charter is part of Ethiopian law as Ethiopia has been party to the Charter since 1998. Besides, the 1995 constitution of Ethiopia guarantees the right to development under article 43. According to article 13(2) of the same constitution, the constitutional right to development should be interpreted in conformity with the African Charter, the DRD, and other international human rights instruments. However, the scope and content of the right to development under the Ethiopian constitution are not clear as it has not been invoked before courts or the House of the Federation.

This chapter examines the right to development in light of the African Charter and the DRD. It begins the inquiry by discussing the meaning of development in the second section. The third section describes the historical evolution of the right. The fourth section examines substantive contents of the right to development. The fifth section makes a brief comment on the implementation of the right. Some conclusions are drawn in the last section.

2 Defining Development

The right to development is based on the presumption that development should be pursued as a common goal because it is desirable. The characterization of the right to development as a human right denotes that development is inextricably linked to human nature and that it is universal. However, the universality and desirability of development has been challenged. Development—construed as modernization and national economic growth and measured

through increase in gross domestic product—is identified with the West. It is defined as "a set of practices and beliefs that are part of the Western political and cultural imagination, despite being presented as universal, natural and inevitable."[2]

> Even the word 'development' is a misnomer, as it presupposes that some parts of the world are developed whereas some parts of the world are not, an assumption that immediately reveals a Western cultural bias.[3]

The desirability of development has also been questioned and its alternative has been searched because development, for the most part, is a failure "[e]ven when measured in terms of its own stated goals and objectives."[4] One piece of evidence is that by "the beginning of the 1990s, most people in sub-Saharan Africa were poorer than they had been thirty years before."[5] Thus, post-development theorists conclude that "the concept of development is obsolete or bankrupt and that the practice of development has done more harm than good."[6]

Despite the criticisms, attempts have been made to redefine development or adopt a new paradigm. Since the adoption of the Human Development Report by the United Nations Development Programme (UNDP), the focus has been on human development. Sen, a Nobel Prize laureate, views expansion of freedoms as the primary end and the principal means of development.[7] Sen was instrumental in developing the Human Development Index used in the Human Development Report.

Human development focuses on people as 'the real wealth of nations' instead of creating more wealth and achieving higher economic growth.[8] Ban Ki-moon, the Secretary General of the United Nations, emphasizes that

2 Ruth E. Gordon and Jon H. Sylvester, "Deconstructing Development," *Wisconsin International Law Journal* 22 (2004): 4.

3 Erik Berg, "Post-Development Theory in Africa," *Peace Review: A Journal of Social Justice* 19 (2007): 542.

4 Gordon and Sylvester, "Deconstructing Development," 3.

5 Ray Kiely, "The Crisis of Development," in *Globalisation and the Third World,* eds. Ray Kiely and Phil Marflect (1998): 24, quoted in Gordon and Sylvester, "Deconstructing development," 3.

6 Sally Matthews, "Post-development theory and the question of alternatives: a view from Africa," *Third World Quarterly* 25 (2004): 373.

7 Amartya Sen, *Development as freedom* (New York: Alfred A. Knopf, 2000).

8 Kamal Malhotra, "The Purpose of Development," *Michigan Journal of International Law* 26 (2004–2005): 13.

"economic growth and material wealth were mistaken for true development."[9] His statement confirms the shifting of focus from economic growth. Similarly, Helen Clark, UNDP's administrator, re-iterated that "economic growth alone does not automatically translate into human development progress."[10] To translate into human development, economic growth should be accompanied by pro-poor policies and significant investment in people's capabilities through "focus on education, nutrition and health, and employment skills."[11] Achievements in education, health, and income are central to human development and UNDP's Human Development Reports. The reports are based on the Human Development Index which measures average achievement in these areas. The index uses three basic dimensions of human development which are a long and healthy life, knowledge, and a decent standard of living.

3 Evolution of the Right to Development

The conceptual basis of the right to development is to be found in the earlier works of the Roosevelts. It is traced to the 'Four Freedoms' speech of the US President, Franklin Roosevelt, which he delivered to the US Congress in 1941.[12] Mrs. Eleanor Roosevelt also referred to the opportunity for development as one of the important rights in describing the drafting of the Universal Declaration of Human Rights.[13]

The Universal Declaration of Human Rights contributed to the recognition of the right to development at least in two ways. First, the right to development, as discussed below, is a synthesis of rights that were already recognized in the Universal Declaration of Human Rights. Second, article 28 of the Universal Declaration contained some seeds that have grown into the right to development. It guarantees the right of everyone to "a social and international order in which the rights and freedoms set forth in [the] Declaration can be fully realized." The General Assembly considered this provision as one of its

9 Ban Ki-Moon, Remarks at General Assembly Event to Commemorate 25th Anniversary of the Right to Development, November 8, 2011, at http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1367 (accessed July 19, 2013).

10 UNDP, *Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World* (New York: UNDP, 2013): *iv*.

11 Ibid.

12 Winston P. Nagan, "The Right to Development: Importance of Human and Social Capital as Human Rights Issues," *cadmus* 1 (2013): 26.

13 Philip Alston, "Making Space for New Human Rights: The Case of the Right to Development," *Human Rights Year Book* 1 (1988): 5–6.

bases to proclaim the DRD.[14] The requirement under the Universal Declaration to establish an *order* in which human rights should be realized gave rise to a *process* in which human rights should be realized.

The right of all peoples to "pursue their economic, social and cultural development" was recognized as part of the right to self-determination in 1966 when the two covenants on human rights were adopted. Although the right to *pursue* economic social and cultural development is a far cry from the right to economic, social and cultural development, it can be seen as a precursor of the right to development which has been understood as "the economic dimension of the right to self-determination."[15] It is for this reason, it seems, that the General Assembly recalled the right to pursue development in the Declaration.[16] The Declaration establishes a link between the right to development and the right of peoples to self-determination. It provides that "[t]he human right to development also implies the full realization of the right of peoples to self-determination."[17]

The right to development was first articulated by a Senegalese jurist, Kéba M'Baye, in his speech delivered in 1972 and article published in the same year.[18] By framing the right as "a claim of developing countries on a process of equitable development carried out with obligations of cooperation on the international community," M'Baye:

> sought to add the language of rights to 'Third World' voices articulating universal principles and prescriptions for the world economy that they believed would speed economic development in the South.[19]

M'Baye also contributed to the international recognition of the right to development. As a chairperson of the United Nations Commission on Human Rights in 1977, "he was instrumental in securing the first formal recognition of a human right to development."[20] The Commission recommended a study to be conducted by the Secretary General. Based on the Secretary General's report, the Commission recognized the existence of the right to development in 1979.

14 DRD, preamble.

15 Nsongurua J. Udombana, "The Third World and the Right to Development: Agenda for the Next Millennium," *Human Rights Quarterly* 22 (2000): 769.

16 DRD, preamble.

17 Ibid., Art. 1(2).

18 Jack Donnelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development," *California Western International Law Journal* 15 (1985): 474.

19 Bonny Ibhawoh, "The Right to Development: The Politics and Polemics of Power and Resistance," *Human Rights Quarterly* 33 (2011): 83.

20 Donelly, "In Search of the Unicorn," 474.

In its Resolution 34/46, the General Assembly recognized the right to development on 23 November 1979.

M'Baye's contribution to the recognition of the right to development is also evident from the African Charter on Human and Peoples' Rights since he chaired a group of experts that drafted it. In 1979 when the experts were convened in Dakar to draft the Charter, in his opening speech Leopold Sedar Senghor (then President of Senegal) instructed them to pay particular attention to the right to development.[21] Obviously, M'Baye had no difficulty in convincing his co-drafters to incorporate the right to development into the African Charter, the only binding international treaty to contain the right to development to date. The Charter was adopted on June 27, 1981 and came into force on October 21, 1986.

At the global level the pace of recognition was slower. It was only after the entry into force of the African Charter that the DRD was adopted on December 4, 1986.[22] Under article 1, the Declaration defines the right to development as:

> an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

It provides for obligations of states to adopt national and international development policies.[23]

The right to development was affirmed as an inalienable human right in the Vienna Declaration and Programme of Action.[24] The need to implement and realize the right was underlined and the formulation of "comprehensive and effective measures to eliminate obstacles to the implementation and realization of the Declaration" was called for.[25]

The recognition of the right to development in non-binding instruments was relatively quicker because it was suitable for reformulating developing countries' demand for fair international economic order in emerging human rights discourse. Developing countries demanded control over their natural

21 Germain Baricako, "Introductory Preface: The African Charter and African Commission on Human and Peoples' Rights," in *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006*, eds. Malcolm Evans and Rachel Murray (Cambridge: Cambridge University Press, 2008), 6.

22 DRD, UN General Assembly Resolution 41/128, A/RES/41/128, December 4, 1986.

23 DRD, Arts. 2, 4 and 8.

24 Vienna Declaration and Programme of Action, para. 10.

25 Ibid., para. 72.

resources which resulted in the General Assembly Resolution on Permanent Sovereignty over Natural Resources.[26] They made efforts to expand their demand and establish "a New International Economic Order which were embodied in a set of instruments adopted by the United Nations General Assembly."[27] The Declaration represents a set of claims borne of the New International Economic Order.[28] The right of peoples to exercise "full and complete sovereignty over all their natural wealth and resources" forms part of the right to development under the Declaration.[29] It requires states to "realize their rights and fulfil their duties in such a manner as to promote a new international economic order."[30]

However, the right to development has not been confirmed in a binding global human rights treaty. Given the objection to the right by industrialized countries of the north, sufficient state practice and *opinio juris* do not seem to exist as evidence for the recognition of the right in customary international law. Even in Africa where all states are parties to the African Charter that guarantees the right to development, only a few states have recognized the right in their constitutions.[31]

4 Content of the Right to Development

At international level, the right to development is usually discussed as a synthesis of other human rights. The Independent Expert on the Right to Development, Arjun Sengupta, describes it as:

> the right to a process of development, consisting of a progressive and phased realization of all the recognized human rights, such as civil and political rights, and economic, social and cultural rights

26 Permanent Sovereignty over Natural Resources, GA Res 1803 (XVII) of December 14, 1962.

27 Gordon and Sylvester, "Deconstructing Development," 56; The Declaration on the Establishment of the New International Economic Order, GA Res 3201, UN Doc. A/RES/3201(sVI) (1974); The Programme of Action on the Establishment of a New International Economic Order, GA Res 3202, UN Doc. A/9559 (1974); The Charter of Economic Rights and Duties of States, GA Res 3281, Doc. A/RES/3281 (1974).

28 Margot E. Salomon, "From NIEO to Now and the Unfinishable Story of Economic Justice," *International and Comparative Law Quarterly* 62 (2013): 50.

29 DRD, Art. 1(2) and the preamble.

30 Ibid., Art. 3(3) and the preamble.

31 See the constitution of Cameroon (1972), as amended in 1996, preamble; the constitution of Malawi (1994), sec 30; the constitution of Uganda (1995), item ix; and the 1995 constitution of Ethiopia, Art. 43.

as well as a right-based process of economic growth.[32] As a composite right, the realization of the right to development requires realization of all rights together rather than their aggregation since the 'whole is greater than the sum of the parts'.[33] Improvement in the right to development occurs "only when at least one right is improved and none are violated."[34] Improvement of economic growth as an element of the right to development represents "the improvement of all other elements of well-being not covered by the recognized rights."[35] It need not be recognized as a human right.[36]

This understanding seems to flow from the Declaration which recognizes the right to development as an entitlement to development in which "all human rights and fundamental freedoms can be fully realized."[37] Here, development refers to:

> a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals.[38]

The High-Level Task Force on the Implementation of the Right to Development defined the right to development as:

> the right of peoples and individuals to the constant improvement of their well-being and to a national and global enabling environment conducive to just, equitable, participatory and human-centred development respectful of all human rights.[39]

The Task Force's definition seems to affirm that the right to development is a synthesis of other human rights by stressing "development respectful of all human rights." The Task Force adopted Criteria and Operational Sub-Criteria which are expected to become "a comprehensive and coherent set of standards

32 Arjun Sengupta, "The Human Right to Development," *Oxford Development Studies* 32 (2004): 182.

33 Ibid., 183.

34 Ibid.

35 Ibid.

36 Ibid.

37 DRD, Art. 1(1).

38 Ibid., Preamble.

39 "Right to development criteria and operational sub-criteria," Report of the High-Level Task Force on the Implementation of the Right to Development, March 8, 2010, A/HRC/15/WG.2/TF/2/Add.2.

for the implementation of the right to development."[40] A criterion to "promote constant improvement in socio-economic well-being" with its sub-criteria on health, education, housing and water, work and social security, and food security and nutrition requires fulfillment of socio-economic rights as a pre-requisite for the realization of the right to development.[41] However, the Task Force has not used each civil, political, and cultural right as sub-criteria.

The recognition of the right to development as a synthesis of traditional human rights may serve as "a means by which to reinforce the importance of existing rights and to emphasize the interdependence and indivisibility" of human rights.[42] It also has a psychological significance.[43]

> In addition it serves to highlight the need to create a new international order, in social and cultural as much as in economic terms, to accompany the achievement of a new national order through improved respect for human rights.[44]

It "puts established rights in a new light."[45]

The realization of the right to development—defined as a synthesis of other traditional human rights—implies improvement of at least one right and no violation of any other right.[46] Thus, a violation of one single human right (e.g., freedom of expression) implies violation of the right to development.

If one adopts this view, a conclusion that Ethiopia has been violating the right to development may be drawn. According to Freedom House Report of 2013, which rates countries on the basis of respect for political rights and civil liberties, Ethiopia is among the countries of the world that were not free by 2012.[47]

---

40 General Assembly Resolution 67/171 on The right to development, March 22, 2013, A/RES/67/171, para 9.

41 Right to development criteria and operational sub-criteria, criterion 1(a).

42 Philip Alston, "Development and the Rule of Law: Prevention versus Cure as a Human Rights Strategy," *Development, Human Rights and the Rule of Law*, Report of the Conference held in The Hague by the International Commission of Jurists (April 27–May 1, 1981), at 102, 107, quoted in Donelly, "In Search of the Unicorn," 501.

43 Ibid.

44 Ibid.

45 Ibid.

46 Sengupta, "The Human Right to Development," 183. However, the right to development is not understood as a composite right in Africa. It is defined as a stand-alone right. See Section 4.1.

47 Freedom in the World: Country Ratings (1972–2012), at http://www.freedomhouse.org/report-types/freedom-world (accessed July 25, 2013).

After a cursory look at the latest reports of major human rights organizations, a similar conclusion may also be drawn. For example, Amnesty International reported the prevalence of arbitrary arrest and detention, torture and ill-treatment, excessive use of force, and violation of the freedom of expression.[48] Human Rights Watch reported violation of the freedom of expression, association, and assembly, and prevalence of extrajudicial execution, torture, and other abuses in detention.[49] The US Department of State also issued a similar report.[50]

4.1 *Nature and Scope of the Right to Development in Ethiopia*

The right to development, as discussed above, is understood as a synthesis of other rights. However, the texts of the Ethiopian constitution and that of the African Charter do not engender such understanding. That is, the constitutional right to development is not formulated as a composite right. Article 22 of the African Charter does not refer to any other rights recognized in the Charter or elsewhere as a constituent element of the right to development. Neither does article 43 of the Ethiopian constitution refer to implementation of other rights as a pre-condition for the realization of the right to development. Article 43 provides:

(1) The Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development.
(2) Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.
(3) All international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development.
(4) The basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs.

The substantive content of the right to development under article 43 should be understood in light of international human rights law and human rights

48 Amnesty International, Annual Report 2013: The state of the world's human rights, Ethiopia, at http://www.amnesty.org/en/region/ethiopia/report-2013 (accessed July 31, 2013).

49 Human Rights Watch, World Report 2013 (events of 2012): Ethiopia, at 114–119.

50 US Department of State, Bureau of Democracy, Human Rights and Labor Country Reports on Human Rights Practices for 2012: Ethiopia, http://www.state.gov/documents/organization/204330.pdf (accessed July 31, 2013).

instruments because article 13(2) of the constitution requires such understanding.[51] The African Charter forms part of international human rights law and since its ratification in 1998 it became part of Ethiopian national laws pursuant to article 9(4) of the constitution. Article 22(1) of the Charter guarantees the right of all peoples to "economic, social and cultural development."

The right to development under the constitution comprises both substantive and procedural rights. It is similar to the African Commission's interpretation of the African Charter. In *Centre for Minority Rights Development and Others* v. *Kenya* (*Endorois* case), a communication concerning eviction of the indigenous Endorois Community of Kenya from their ancestral land to establish a game reserve, the Commission emphasized equal importance of procedural and substantive aspects of the right to development.[52] It held that the right to development:

> is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development.[53]

The substantive rights under the constitution are the right to improved living standards and the right to sustainable development while the procedural right is the right to participate in national development including the right to be consulted on development policies and projects. Besides, the constitution gives directions to the government on the conclusion of international treaties and on aims of development activities.[54]

4.1.1 Right to Improved Living Standards

The right to 'improved living standards' under the constitution can be compared with a similar right recognized in international human rights instruments. The Universal Declaration of Human Rights guarantees the right to a "standard of living adequate for the health and well-being" of an individual and that of his or her family "including food, clothing, housing and medical care and necessary social services, and the right to security."[55] The right to an

51 See Abdi Jibril Ali, "Distinguishing Limitation on Constitutional Rights from their Suspension: A Comment on the *cud* Case," *Haramaya Law Review* 1 (2012): 16.

52 *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

53 Ibid., para. 277.

54 The 1995 constitution, Art. 43(3&4).

55 Universal Declaration of Human Rights, Art. 25(1).

"adequate standard of living" recognized under the ICESCR guarantees the right to 'adequate food, clothing and housing'[56] and it has been interpreted to include the right to water.[57] The ICESCR seems to depart from the Universal Declaration in treating the right to social security and the right to health as separate rights.[58] The right to development under the African Charter implies economic, social, and cultural rights although the texts of the Charter do not establish a clear connection with other rights.[59]

The constitutional right to improved living standards corresponds to the right to an adequate standard of living under the ICESCR as understood by the government in its combined report to the Committee on Economic, Social and Cultural Rights (CESCR).[60] An adequate standard of living encompasses, as a minimum, basic needs of individuals.[61] Under the constitution, the basic aim of development activities is to meet the basic needs of citizens.[62] It emphasizes improvement in standards of living which requires improvement in the realization of the right to food, clothing, housing, and water. This understanding is buttressed by social objectives of the constitution which require the government to formulate policies that ensure access of all Ethiopians to food, housing, and clean water.[63]

The constitutional right to improved living standards is akin to the right to continuous improvement of living conditions under the ICESCR or the requirement of constant 'improvement of the well-being' of all individuals and groups under the DRD.[64] Although the African Charter does not expressly state such a requirement, the interpretation by the African Commission has given it similar content. In the *Endorois* case, the Commission held that the "right to development is violated when the development in question decreases the well-being of the community."[65] A decrease in well-being of a certain community, for

56 ICESCR, Art. 11. See also the Convention on the Rights of the Child, Art. 27(1).

57 CESCR, General Comment 15 (2002), E/C.12/2002/11.

58 ICESCR, Arts. 9 and 12.

59 Sisay Alemahu Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Human Rights System: Theories, Laws, Practices and Prospects* (Åbo: Åbo Akademi University Press, 2011), 113.

60 Combined Report of Ethiopia under the ICESCR (July 28, 2009), E/C.12/ETH/1-3, para. 200.

61 Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge/New York: Cambridge University Press, 2002), 871.

62 The 1995 constitution, Art. 43(4).

63 The 1995 constitution, Art. 90.

64 ICESCR, Art. 11; DRD, Art. 2(3).

65 *Endorois* case, para. 294.

instance, occurs when such community is deprived of its means of subsistence due to implementation of development projects.[66]

The *Endorois* case concerned interference through development projects that violated the state's duty to respect the right to development and consequently caused a reduction of well-being that could have been avoided by forbearance. Ensuring improved living standards requires the state's involvement through a variety of positive measures to carry out its duty to protect and fulfill. Thus, the Ethiopian government should take legislative, administrative, financial, educational, and social measures, and provide judicial remedies to improve the realization of the right to food, housing, and clean water.[67]

Combating and reducing poverty is an important key in improving living standards.[68] The government has increased pro-poor spending, expanded infrastructure, and put in place food security programs.[69] Although reduction in poverty has been reported, its prevalence remains so high that the CESCR recommends the government to take "all necessary steps to further reduce poverty and extreme poverty."[70] Unfortunately, Ethiopia is the poorest nation on Earth with the highest percentage of people (87 percent) living in multidimensional poverty.[71]

Measures have been taken to improve the realization of the right to food, housing, and water. Although several measures such as building household assets, supporting voluntary resettlement, providing productive safety net programs, and introducing non-farm activities have been taken to implement the right to food, the prevalence of chronic food insecurity and malnutrition, in particular amongst children, remains a serious challenge.[72] Legislative and policy measures have been taken with respect to water.[73] The target is to increase national water supply coverage from 68.5 percent in 2009/2010 to 98.5 percent by 2014/15.[74] Lack of rural households' access to safe drinking water remains the main concern.[75] An acute housing shortage, overcrowding, the poor quality of accommodation, the lack of basic services, and the high

66 Ibid., para. 288.

67 CESCR, General Comment 3 (1991), U.N. DOC. E/1991/23.

68 CESCR, Reporting Guidelines (March 24, 2009), E/C.12/2008/2.

69 Ibid., paras. 216–218.

70 Ibid., paras. 204–207; CESCR, Concluding Observations on Ethiopia (May 31, 2012), E/C.12/ETH/CO/1-3, para. 19.

71 Human Development Report (2013), 146.

72 Combined Report, para. 226; Concluding Observation on Ethiopia, para. 22.

73 Ibid.

74 Growth and Transformation Plan, 77.

75 Concluding Observation, para. 23.

percentage of the urban population living in slums are challenges to the realization of the right to housing.[76]

4.1.2 Right to Sustainable Development

The constitution guarantees the right to sustainable development. It does not adopt the language used by the African Charter: right to 'economic, social, and cultural' development. Then the question is whether *sustainable* development under the constitution includes *economic*, *social*, and *cultural* development. The answer is positive when one reads the constitution in light of article 22 of the African Charter. Such understanding is buttressed by references of the constitution to 'economic and social development' in other provisions.[77] This reading also conforms to the meaning internationally given to sustainable development which is defined as "development that satisfies the needs of present generations without jeopardizing the ability of future generations to meet their own needs."[78] According to this definition, its components are economic development, social development, and environmental protection.[79]

The environmental protection component of the right to sustainable development requires the government to conserve the environment. The constitution provides for a separate right to a clean and healthy environment along with the duty of the government and individuals to protect the environment.[80] The government has adopted an environmental policy, established institutions, and taken several legislative measures to implement the right to a clean and healthy environment.[81] The legislative measures include laws on control of pollution, environmental impact assessment, conservation of forest and wildlife, public health, water resources, and waste management.

Since projects are the main vehicle of development,[82] the constitution provides that the "design and implementation of programmes and projects of development shall not damage or destroy the environment."[83] Utilization of resources is central to environmental protection as well as the design and

76 Ibid., para. 20.

77 The 1995 constitution, preamble, Arts. 18(4)(d), 41(8), 51(2), and 89(4)&(7).

78 World Commission on Environment and Development, Our Common Future (Brundtland Report) (1987), 43; Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (Cambridge: Cambridge University Press, 2006), 52.

79 Copenhagen Declaration on Social Development, para. 6.

80 The 1995 constitution, Art. 44(1).

81 Combined Report of Ethiopia to the African Commission, paras. 428–441.

82 James C.N. Paul, "The Human Rights to Development: Its meaning and Importance," *The John Marshall Law Review* 25 (1991–1992): 237.

83 The 1995 constitution, Art. 92(2).

implementation of development projects. Although the constitution does not refer to resources as a component of the right to development, it emphasizes the duty of the government to ensure that citizens benefit from the intellectual and material resources of the country.[84] It also stresses that land as one type of natural resource is held on behalf of the people and is used for their development.[85] Illegal exploitation or looting of natural resources including land is a violation of the right to development if one understands the constitution in light of *Democratic Republic of the Congo* v. *Burundi, Rwanda and Uganda* where the African Commission found violation of the right to development guaranteed under article 22 of the African Charter.

Social development focuses on the eradication of absolute poverty, support of full employment, promotion of social integration, and access to education and healthcare as well as achieving equality and equity between women and men.[86] In this sense, social development can be partly achieved through the realization of socio-economic rights. A component of social development goals may aim at achieving an adequate standard of living. Although individual social rights are not guaranteed under the constitution, the provisions on social objectives and obligations under international human rights instruments reinforce the duty of the government to achieve social development.

Economic development may refer to an increase in gross national product accompanied with a decline in the role of agriculture and increase of manufacturing and service industries.[87] A report by the African Development Bank shows:

> Ethiopia's economy saw a ninth straight year of robust growth in 2012, which was estimated at 6.9%.[88] The growth was broad based with an increasing role for services and industry.[89]

However, cultural development does not feature among the components of sustainable development.

Since State Parties' reports under article 22 of the African Charter refer to economic, social, and cultural rights, it seems that at least some states view the

84 The 1995 constitution, Art. 89(1).

85 The 1995 constitution, Art. 89(5).

86 Copenhagen Declaration on Social Development, para. 29.

87 Michael P. Todaro, *Economic Development* (London/New York: Longman, 1997), 13–14.

88 African Development Bank, *Ethiopia Economic Outlook*, at http://www.afdb.org/en/countries/east-africa/ethiopia/ethiopia-economic-outlook/ (accessed on December 1, 2013).

89 Ibid.

right to economic, social, and cultural development as equivalent to economic, social, and cultural rights.[90] Such understanding of the Charter is in line with its drafting history.[91] However, Ethiopia's Combined Report to the African Commission does not show any relationship between the right to development and economic, social and cultural rights. It refers to constitutional rights to development as a single legislative measure taken to implement article 22 of the African Charter.

The African Commission does not distinguish between economic development, social development, and cultural development in its jurisprudence. In *Gunme and Others v Cameroon,* the Commission dealt with a communication alleging violation of the right to development due to economic marginalization of Southern Cameroon and denial of basic infrastructure to several towns in that part of the country.[92] Although the Commission did not find violation for lack of evidence, it was of the opinion that economic marginalization and lack of economic infrastructure amount to a violation of the right to development. In *Sudan Human Rights Organisation and Another* v. *Sudan* (*Darfur* case), the Commission held that underdevelopment and marginalization of the Darfur region and the attacks and forced displacement of Darfurian people, which "denied them the opportunity to engage in economic, social and cultural activities," violated article 22 of the African Charter. However, in *Democratic Republic of the Congo* v. *Burundi, Rwanda and Uganda*, the Commission was more specific when it found violation of the right to cultural development. It held that "indiscriminate dumping of, and/or mass burial of victims of the series of massacres and killings" are violations of the "Congolese peoples' rights to cultural development guaranteed by article 22 of the African Charter."[93]

Therefore, it can be submitted that economic marginalization of certain parts of the country would be a violation of the constitution. Such conclusion, however, should not be understood as prohibiting affirmative action

90 See Uganda's 5th Periodic Report, 2013 (stating constitutional provisions on economic, social, and cultural rights as legislative measures taken to guarantee the right to economic, social, and cultural development); South Africa's 1st Periodic Report, 2001; Gabon's Initial Report, 2012; Nigeria's 3rd Periodic Report, 2008 (referring to constitutional provisions on fundamental objectives and directive principles of state policy).

91 Sisay, *The Justiciability of Economic, Social and Cultural Rights in the African Human Rights System,* 113.

92 Gunme and Others v. Cameroon (2009) AHRLR 9 (ACHPR 2009), paras. 9, 205–206.

93 Democratic Republic of the Congo v. Burundi, Rwanda and Uganda (2004) AHRLR 19 (ACHPR 2003), para. 87.

benefiting parts of the country that are least advantaged in social and economic development.[94]

4.1.3 Right to Participate in Development

The constitution guarantees the right to participate in development and the right to be consulted in development policies and projects. It enshrines the right of nationals "to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community."[95] The constitution supplements this right with the duty of the government to "promote the participation of the people in the formulation of national development policies and programmes" at all times.[96] It gives particular emphasis to women's rights. It guarantees the right of women:

> to full consultation in the formulation of national development policies, the designing and execution of projects, and particularly in the case of projects affecting the interests of women

and imposes a duty on the government to "ensure the participation of women in equality with men in all economic and social development."[97]

The right to participate in development includes participation in all stages of development since the constitution does not make any distinction between stages of development such as formulation, adoption, and implementation of development policies, programs, and projects. The duty of the government to ensure participation of women in development is also framed in general terms. The duty of the government under the economic objectives which refers to participation of people in the formulation of national development policies and programs and the rights of women to be consulted in the formulation of national development policies should be understood as an aspect of the right to participate in development.

The constitution does not qualify participation in national development. Understanding it in accordance with the African Charter requires reference to the jurisprudence of the African Commission which has relied on the DRD and noted that the right to development includes "active, free and meaningful

94 The 1995 constitution, Art. 89(4).

95 The 1995 constitution, Art. 43(2). Compare with Art. 1(1) the DRD which provides for the right 'to participate in, contribute to, and enjoy economic, social, cultural and political development'.

96 The 1995 constitution, Art. 89(6).

97 The 1995 constitution, Art. 35(6) and 89(7).

participation in development."[98] It requires effective participation in the process of development.[99] To ensure the effective participation of a people in development within their territory, states have a duty to actively consult the concerned people according to their customs and traditions.[100] Referring to the judgment of the Inter-American Court in *Saramaka People* v. *Suriname*[101] with approval, the Commission held that such "consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement."[102]

General policies on economic and social development in Ethiopia are approved by representatives of peoples in the House of Peoples' Representatives.[103] Representatives in regional councils also approve economic and social development policies of regional states.[104] The House of Peoples' Representatives and the regional councils supervise implementation of the policies which they approve since the executives are accountable to them. The question is whether this indirect participation of the people through their representatives is sufficient to exercise their right to participate in development. In the views of the African Commission, establishing a participatory model of community through regular competitive elections for representatives based on adult suffrage in which representatives of communities affected by development projects can also take part is not sufficient to constitute effective participation.[105]

The objectives and results of discussions with people are important in ensuring their right to participate in development. The objectives should not be limited to disseminating information about the development policies, programs, and projects. It should enable the concerned people to make choices and decisions. The results should not be the imposition of some visions of state technocrats. Thus, duties of states go beyond active consultation. According to the African Commission, states have a duty not only to consult the people concerned, "but also to obtain their free, prior, and informed consent, according to

98 *Endorois* case, para. 283; DRD, Art. 2(3).

99 *Endorois* case, para. 281.

100 Ibid., para. 289.

101 Saramaka People v. Suriname, Inter-American Court of Human Rights (IACtHR), (Judgment of November 28, 2007).

102 *Endorois* case, para. 289.

103 The 1995 constitution, Art. 55(10).

104 See, for example, constitution of the Regional State of Oromia (2001), Art. 49(2)(i); constitution of the Regional State of Amhara (2001), Art. 49(3.10).

105 *Endorois* case, para. 270.

their customs and traditions."[106] States should obtain the consent of all the people affected by a development project.[107]

Therefore, it is submitted that an understanding of the constitutional right to participate in development in light of the African Charter and jurisprudence of the Commission requires both the state and federal governments of Ethiopia to ensure effective participation of nationals and to obtain their free, prior, and informed consent while formulating, adopting, and implementing development policies, programs, and projects. In particular, such participation, consultation, and consent are mandatory when development projects concern indigenous communities such as Afar, Borana, Kereyu, Nuer, and Somalis as identified by the African Commission.[108]

The constitutional right to participate in development and to be consulted is only one element of the procedural aspect of the right to development as explained by the African Commission. The Commission adopted a rights-based process of development that has been summarized by the Independent Expert on Human Rights "in terms of five principles: equity, non-discrimination, participation, accountability and transparency."[109] The Commission noted that development must be "equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development."[110]

4.2 *Subject of the Right to Development*

Subjects of human rights can be either active subjects (right-holders) or passive subjects (duty-bearers).[111] The duty bearer is usually a state and it has three levels of duties: the duties to respect, protect, and fulfill.[112] The holders of the right usually make their claims against a state except when national

106 Ibid., para. 291.

107 Ibid., para. 290.

108 *Indigenous Peoples in Africa: The Forgotten Peoples?* The African Commission's work on indigenous peoples in Africa (2006) 15.

109 Sengupta "The Human Right to Development," 181.

110 *Endorois* case, para. 277.

111 Donelly, "In Search of the Unicorn," 478.

112 Committee on Economic, Social and Cultural Rights, General Comment 12, Right to Adequate Food, (Twentieth Session, 1999), U.N. DOC. E/C.12/1999/5 (1999). The African Commission identified four levels of state duties under the African Charter. The Commission considered the duty to promote separately from the duty to fulfill. *Social and Economic Rights Action Centre* (*serac*) *and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), para. 44.

constitutions provide for horizontal application of the rights.[113] As a human right, the right to development has the same characteristics as other human rights with a few distinguishing features.

4.2.1 Right-holders

Individuals

In most cases, human rights are rights of individuals since they arise from the inherent dignity of the human person. They are usually framed as rights of individuals in international human rights instruments except the right of peoples to self-determination under article 1 of both Covenants.[114] The right to development is no exception. Thus, an individual is recognized as a subject of the right to development under the DRD.[115] The Ethiopian constitution, however, does not frame the right to development as a right of individuals.

Peoples

The right to development is the right of peoples in the Ethiopian constitution, the African Charter, and the DRD. The Charter does not define 'people' or 'peoples'. Based on how the African Commission employed the term, some possible meanings have been suggested.[116] The term may denote 'everyone within a state' or a 'distinct minority group' within a state.[117] Although the term may also denote 'inhabitants of the African territory under colonial rule', the end of colonialism in Africa renders such interpretation less important.[118]

In *Gunme* v. *Cameroon*, the African Commission dealt with a communication in which Anglophone Southern Cameroonians alleged violation of several provisions of the African Charter including the right to development (article 22) by Francophone Northern Cameroonians.[119] The Commission interpreted 'people' as a distinct group of individuals in a state. To enjoy collective rights guaranteed under articles 19 to 24 of the Charter, a collective of individuals should have some common characteristics to be identified as a 'people'.

113 See constitution of South Africa (1996), sec 8 according to which bills of rights are binding on natural or juristic persons.

114 ICCPR, Art. 1; ICESCR, Art. 1; Donelly, "In Search of the Unicorn," 497.

115 DRD, Art. 1(1). It uses the term "every human person."

116 Frans Viljoen, *International Human Rights Law in Africa*, (Oxford: Oxford University Press, 2007), 242.

117 Ibid., 243–244.

118 Ibid., 244.

119 Gunme v. Cameroon, paras. 170–180.

Based on a report by International Law Experts commissioned by UNESCO,[120] the Commission identified these common characteristics which include "a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life."[121] The same characteristics were also used later in the *Endorois* case.[122] To this list, the Commission added ethno-anthropological attributes and political outlook.[123] It is sufficient to have some of the above characteristics for a collective of individuals to be considered as a 'people'.[124]

The Commission has also emphasized self-identification of a group. A group of individuals may "identify itself as a people, by virtue of their consciousness that they are a people."[125] A group of individuals may recognize another group as a 'people' but lack of such recognition does not have any effect. Even the state's refusal to recognize a group of individuals in its territory as a 'people' cannot preclude the African Commission from considering such group as a 'people'.

Based on these common characteristics and self-identification, the African Commission held that Southern Cameroonians:

> qualify to be referred to as a 'people' because they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. More importantly they identify themselves as a people with a separate and distinct identity.[126]

The Commission concluded that peoples' rights enumerated under articles 19 to 24 of the African Charter, which include the right to development,

> can be exercised by a people, bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds.[127]

120 United Nations Educational, Scientific and Cultural Organization, *Final Report and Recommendations of International Meeting of Experts on further study of the concept of the rights of peoples,* UNESCO, Paris, 27–30 November 1989, SHS-/CONF.602/7, para. 22, available at http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf (accessed July 18, 2013).

121 Gunme v. Cameroon, para. 170.

122 *Endorois* case, para. 151.

123 Gunme v. Cameroon, para. 178.

124 Ibid.

125 Ibid., para. 170.

126 Ibid., para. 179.

127 Ibid., para. 171.

In its earlier decisions, the African Commission adopted similar views.[128] In *Legal Resources Foundation* v. *Zambia*, the Commission dealt with a communication which alleged violation of, *inter alia*, the right of peoples to equality (article 19) by an amendment of the Zambian constitution which requires presidential candidates to prove that their parents are Zambian by birth or descent.[129] According to the Commission, article 19 applies when there is evidence that:

> the effect of the measure was to affect adversely an identifiable group of Zambian citizens by reason of their common ancestry, ethnic origin, language or cultural habits.[130]

The right to development under the Ethiopian constitution is a collective right. The constitution recognizes the right of 'each Nation, Nationality and People in Ethiopia' to improved living standards and sustainable development.[131] Although the constitution does not define the meaning of 'nation', 'nationality', or 'people' separately, these three terms are used together throughout the constitution.[132] Under article 39(5), 'nation, nationality, or people' is defined as:

> a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

The list of characteristics used to define 'nation, nationality, and people' in the constitution is limited when compared with the African Commission's list. The Commission's list, one may argue, is wider (and should be so) because it applies to African states in general. It should consider realities in different African states and adopt a wider list of characteristics. On the other hand, the territorial reach of the constitution does not transcend the Ethiopian border. Thus, it seems reasonable to limit the number of defining characteristics of 'nation,

128 Malawi African Association and Others v. Mauritania (2000) AHRLR 149 (ACHPR 2000); Legal Resources Foundation v. Zambia (2001) AHRLR 84 (ACHPR 2001); Katangese Peoples' Congress v. Zaire (2000) AHRLR 72 (ACHPR 1995).

129 Legal Resources Foundation v. Zambia, para. 3.

130 Ibid., para. 73.

131 The 1995 constitution, Art. 43(1).

132 The 1995 constitution, Arts. 3(2), 8(1), 39, 40 (3)&(6), 47(2)&(3), 61(1)&(2), 62, 87(1), 88(2), and 89(4).

nationality, and people' in the constitution to those that represent features along which Ethiopian communities identify themselves.

Factors used to define 'nation, nationality, and people' in the constitution are not only limited to a few factors but are also exhaustive. As a result, whether a group that identifies itself on grounds not listed in the constitution can claim a right to development is not clear from the constitution. For example, the constitution does not define 'nation, nationality, or people' on the ground of religious affinities. Given that drafting and adoption of the constitution were shaped by ethno-nationalist forces rather than religious tides, one may surmise, it was not necessary to include 'religion' as one of the defining characteristics of 'nation, nationality, or people'. Yet a group in Ethiopia that identifies itself on religious affinities can claim the right to development under the African Charter before the Commission. Similarly, one may argue that the same group can make its claim in Ethiopia for two reasons. First, the African Charter forms part of Ethiopia's law; secondly, the article 39(5) which defines 'nation, nationality, or people' should be understood in a manner conforming to the African Charter.

Part of the right to development under the constitution is the right of nationals "to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community."[133] Here, the right-holders are *nationals*, not 'nation, nationality, or people'. The right is still the right of a group. As the use of the plural form of 'national' indicates, the provision refers to Ethiopian nationals as a group, particularly those affected by development projects.[134] To participate in development policies, it is not necessary to be a nation, nationality, or people. It suffices to be Ethiopian citizens.

States

In principle, states cannot be active subjects (right-holders) of human rights. The reason is simple. Human rights are "those rights which are inherent in the mere fact of being human."[135] As states are not human beings they are not entitled to human rights including the right to development. Nevertheless, the right to development was recognized due to demands of developing countries for a New International Economic Order.

The DRD does not frame the right to development as a right of states. Although the Declaration requires states to "realize their rights and fulfil their

133 The 1995 constitution, Art. 43(2).

134 Compare Arts. 32(2), 32(2)&(3), 38(1), and 41(3) of the 1995 constitution.

135 Magdalena Sepúlveda et al., *Human Rights: Reference Handbook* (Ciudad Colón: University for Peace, 2004), 6.

duties in such a manner as to promote a new international economic order" under article 3(3), it does not suggest the existence of states' right to development. Recognition of the right of states to development may have a negative impact on other human rights as such recognition shifts the focus from states as violators of human rights, and "represents a radical reconceptualization of human rights—and an especially dangerous one."[136]

The African Charter does not recognize the right to development and other peoples' rights as rights of states. Some decisions of the African Commission imply that the term 'peoples' may be understood as referring to all inhabitants in any member state.[137] In *Democratic Republic of the Congo* v. *Burundi, Rwanda and Uganda*, the complainant, a State Party to the African Charter, submitted to the Commission that the occupation of its territory by military forces of the respondent states and concomitant killings, deportations, lootings, and other acts violated, *inter alia*, article 22 of the African Charter.[138] The Commission found violation of the 'right of the peoples of the Democratic Republic of Congo'.[139] In *Jawara* v. *The Gambia,* it adopted a similar view in condemning the military *coup d'état* in The Gambia as a grave violation of 'the right of Gambian people' to freely choose their government.[140] However, the Commission underlined that the term 'peoples' is not "to be equated solely with nations or states."[141]

Under the Ethiopian constitution, the 'Peoples of Ethiopia as a whole' are entitled to the right to development.[142] It could have been morphologically correct if the constitution had referred to 'the people of Ethiopia' instead of the 'peoples'.[143] Irrespective of its morphological flaw, the constitution requires the government "to protect and ensure Ethiopia's right to sustainable development" in all international treaties and relations.[144] Although these texts seem to suggest that Ethiopia as a state is a right-holder, it can be submitted that they mean the right of the people of Ethiopia. Such understanding flows from

136 Donelly, "In Search of the Unicorn," 499.

137 Viljoen, *International Human Rights Law in Africa,* 243–246.

138 Democratic Republic of the Congo v. Burundi, Rwanda and Uganda (2004) AHRLR 19 (ACHPR 2003).

139 Ibid., paras. 68, 73, and 87.

140 Jawara v. The Gambia (2000) AHRLR 107 (ACHPR 2000), paras. 72–73.

141 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, adopted at the 50th Ordinary Session, 2011.

142 The 1995 constitution, Art. 43(1).

143 Viljoen, *International Human Rights Law in Africa,* 243.

144 The 1995 constitution, Art. 43(3).

article 43(1) which identifies the beneficiaries of the right to development as the 'peoples of Ethiopia as a whole' and 'nations, nationalities, and peoples', coinciding with the African Commission's understanding.

4.2.2 Duty-Bearers

Human rights in their nature have correlative duties which states assume under international treaties on human rights and national constitutions. Individuals are usually right-holders, not duty-bearers. Similarly, the right to development imposes obligations mainly on states. However, the DRD recognizes the responsibility of individuals for development, individually and collectively.[145] Human beings should "promote and protect an appropriate political, social and economic order for development."[146] In this regard, this provision of the Declaration is far-reaching when one compares it with the African Charter and the Ethiopian constitution. The African Charter does not incorporate any responsibility of individuals with regard to the right to development although recognition of individual duties is one of its distinguishing features. The Ethiopian constitution does not assign any responsibility to individuals either.

The DRD recognizes states as duty-bearers and requires them to formulate and implement development policies, and take legislative and other measures so as to create "national and international conditions favourable to the realization of the right to development."[147] Similarly, states have a duty to implement the right to development individually and collectively under the African Charter.[148] Although the Ethiopian constitution does not clearly specify corresponding duties of the state, it is obvious from the nature of human rights that the right to development is claimed against the state.

The African Charter does not apply beyond the territorial reach of the African states and it cannot impose duties on states outside Africa. The scope of the Ethiopian constitution is also limited to the Ethiopian territory. As a result, the Charter and the constitution lack a legal basis to impose duties on the international community. The DRD, however, tacitly identifies the international community as a duty-bearer.[149] It requires formulation of international development policies, and adoption of legislative and other measures.[150]

145 DRD, Art. 2(2).
146 Ibid.
147 Ibid., Arts. 2, 3, 8, and 10.
148 African Charter, Art. 22(2).
149 DRD, Arts. 4(1) and 10.
150 Ibid.

Although it is not formulated in a language of duties on developed countries, article 4(1) emphasizes the importance of providing developing countries with 'effective international co-operation'. Such co-operation which provides developing countries with appropriate means and facilities obviously comes from developed countries.[151] According to Sengupta, the Independent Expert on the Right to Development, the international community can facilitate the realization of the right to development by supplying foreign savings and investments, technology, and access to markets, and by providing institutional support.[152] Thus, the Declaration imposes, at least indirectly, an obligation to co-operate on developed countries.

4.3 *Obligations of States*

Constitutional recognition of the right to development entails corresponding duties on the state. The Ethiopian constitution expressly provides for the duty of the government to "protect and ensure Ethiopia's right to sustainable development."[153] Under the African Charter, states "have the duty, individually or collectively, to ensure the exercise of the right to development."[154] Like other rights, collective rights including the right to development generate four levels of duties: duty to respect, protect, promote, and fulfill.[155] For example, the duty to respect requires that a state should respect the resources belonging to a collective group "as it has to use the same resources to satisfy its needs."[156]

In *Gunme* v. *Cameroon*, the African Commission introduced the concept of progressive realization, which is not expressly provided in the Charter, into the right to development.[157] The Commission held that the:

> respondent state is under obligation to invest its resources in the best way possible to attain the progressive realisation of the right to development, and other economic, social and cultural rights.[158]

The obligations of states to progressively realize the right to development flow from the nature of the right itself. Obviously, the right to development requires

151 Ibid., Art. 4(2).

152 Sengupta, "The Human Right to Development," 194.

153 The 1995 constitution, Art. 43(3). See the Amharic version that can be understood as referring to "government" instead of "the state."

154 African Charter, Art. 22(2).

155 *SERAC* case, paras. 44–45.

156 Ibid., para. 45.

157 Gunme v. Cameroon, para. 206.

158 Ibid.

extensive resources for its realization. The Commission's holding in this regard is commendable although it has not gone further to identify some obligations of states that are capable of immediate implementation. Given the symbiotic relationship between the Charter and the constitution, one may argue that the right to development should be realized progressively even under the Ethiopian constitution.

Compared with the Ethiopian constitution and the Charter, the DRD provides more details on obligations of states. Nevertheless, the Declaration does not provide these obligations in a logical order. They are organized in a way that limits easy comprehension. The disarray of the obligations in particular and haphazard organization of the Declaration in general is attributable to an attempt to restate and enshrine competing and often contradictory visions of different groups instead of resolving them.[159] Yet, one may argue that the main obligation under the Declaration could be identified as the obligation of states to create "national and international conditions favourable to the realization of the right to development."[160]

To create favorable conditions for the realization of the right to development, states should take several measures that are aimed at removing obstacles to development and thereby create conditions favorable for development within their jurisdictions and beyond.[161] At national level, states should formulate policies, and take legislative and other measures. The goal of development policies is to achieve "constant improvement of the well-being of the entire population and of all individuals."[162] From the perspective of human development, improvement in well-being at least implies increase in life expectancy through the provision of better healthcare services, better attainment in education, and increases in income. The Declaration requires states to ensure for all "access to basic resources, education, health services, food, housing, [and] employment."[163] The Declaration denotes that development policies should make room for individual differences. Improvement in well-being is based on participation in development. Those who participate more in development are entitled to more improvement in their well-being than those who have less participation; those who contribute more deserve to obtain more benefits of development. Development policies should also address inequality. They

159 Alston, "Making Space for New Human Rights," 21.

160 DRD, Art. 3(1).

161 DRD, Art. 3(1&2).

162 Ibid., Art. 3(3).

163 Ibid., Art. 8(1).

should ensure equality of opportunities and fair distribution of income.[164] States should also take legislative measures.

At international level, states should adopt international development policies.[165] States, particularly developed states, should adopt international development policies individually. They can implement such policies through bilateral agreements made with developing countries. They should also make international development policies collectively through international organizations.

States have the obligation to co-operate to ensure realization of the right to development.[166] Developed states transfer resources necessary for development through international co-operation. The Declaration emphasizes that effective international co-operation is essential for comprehensive development of developing countries. In this regard, developed countries' pledge to provide 0.7 percent of their gross domestic product is worth mentioning. They should also co-operate to ensure respect for and observance of all human rights.

Being aware of its duty to formulate, adopt, and implement national development policies, Ethiopia has been adopting several comprehensive plans every five years. The latest of such plans is the Growth and Transformation Plan (GTP).[167] The GTP addresses issues of education, health, and income which are central to the human development reports. Its objective to maintain a real GDP growth rate of 11 percent is concerned with increasing income.[168] It also incorporates an objective of expanding and ensuring the qualities of education and healthcare services.[169] The GTP sets detailed targets in different sectors including education and healthcare sectors to be achieved by 2014/2015.[170] The plan is supported by policies and strategies in different sectors.

5 Conclusion

The right to development was first articulated in 1972. It was quickly accepted because it articulated the developing countries' demand for the New

164 Ibid.

165 Ibid., Art. 4(1).

166 Ibid., Art. 3(3).

167 Ministry of Finance and Economic Development, *Growth and Transformation Plan (2010/2011–2014/2015)* (Addis Ababa: November 2010).

168 GTP, 21.

169 Ibid.

170 Ibid., 34–37.

International Economic Order in the language of human rights. The developing countries' support for the right and their numerical superiority in the United Nations General Assembly culminated in the DRD in 1986. The Declaration represents an important step in the normative development of a legal right to development although it stagnated for almost three decades. Therefore, mechanisms for operationalizing the right have not been developed yet.

In Africa, the recognition of the right to development was very quick. As Africans were the first to articulate the right, its incorporation into the African Charter is not surprising. Communications that allege violations of the right to development occasionally come to the African Commission which has found violation of the right in a few cases. The jurisprudence of the Commission has been taken as evidence that the right to development is justiciable.

An analysis of the Commission's jurisprudence demonstrates that its finding of violations is limited to cases where states failed in their duty to respect or their duty to protect. The Commission has not gone far to canvass the duty of states to fulfill the right to development. It has not identified the duties of states with regard to the right to development in detail. It could have identified steps that states should take to carry out their duty to fulfill.

The jurisprudence of the Commission is still useful for understanding the right to development in the Ethiopian context. Understanding the right to development in light of the African Charter, and the jurisprudence of the African Commission and the DRD implies that Ethiopia has obligations to formulate and implement development policies, to take legislative and other measures, and to ensure the realization of all human rights. Ethiopia's efforts in the adoption of policies and other measures towards the realization of the right to development are commendable. With the highest percentage of people living in multidimensional poverty, Ethiopia obviously faces serious challenges that seem to be insurmountable.

Bibliography

Abdi Jibril Ali. "Distinguishing Limitation on Constitutional Rights from their Suspension: A Comment on the *CUD* Case." *Haramaya Law Review* 1 (2012): 1–27.

Alston, Philip. "Making Space for New Human Rights: The Case of the Right to Development." *Human Rights Year Book* 1 (1988): 3–40.

Baricako, Germain. "Introductory Preface: The African Charter and African Commission on Human and Peoples' Rights." In *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006*, edited by Malcolm Evans and Rachel Murray. Cambridge: Cambridge University Press, 2008.

Berg, Erik. "Post-Development Theory in Africa." *Peace Review: A Journal of Social Justice* 19 (2007): 541–554.

Donnelly, Jack. "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development." *California Western International Law Journal* 15 (1985): 473–509.

Gordon, Ruth E., and Jon H. Sylvester. "Deconstructing Development." *Wisconsin International Law Journal* 22 (2004): 1–98.

Ibhawoh, Bonny. "The Right to Development: The Politics and Polemics of Power and Resistance." *Human Rights Quarterly* 33 (2011): 76–104.

Jayawickrama, Nihal. *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*. Cambridge/New York: Cambridge University Press, 2002.

Kiely, Ray. "The Crisis of Development." In *Globalisation and the Third World*, edited by Ray Kiely and Phil Marflect. London/New York: Routledge, 1998.

Louka, Elli. *International Environmental Law: Fairness, Effectiveness, and World Order*. Cambridge: Cambridge University Press, 2006.

Malhotra, Kamal. "The Purpose of Development." *Michigan Journal of International Law* 26 (2004–2005): 13–18.

Matthews, Sally. "Post-Development Theory and the Question of Alternatives: A View from Africa." *Third World Quarterly* 25 (2004): 373–384.

Nagan, Winston P. "The Right to Development: Importance of Human and Social Capital as Human Rights Issues." *CADMUS* 1 (2013): 24–28.

Paul, James C.N. "The Human Rights to Development: Its Meaning and Importance." *The John Marshall Law Review* 25 (1991–1992): 235–265.

Salomon, Margot E. "From NIEO to Now and the Unfinishable Story of Economic Justice." *International and Comparative Law Quarterly* 62 (2013): 31–54.

Sen, Amartya. *Development as Freedom*. New York: Alfred A. Knopf, 2000.

Sengupta, Arjun. "The Human Right to Development." *Oxford Development Studies* 32 (2004): 181–203.

Sepúlveda, Magdalena, Theo van Banning, Gudrún D Gudmindsdóttir, Christine Chamoun, Willem J.M. van Genugten. *Human Rights: Reference Handbook*. Ciudad Colón: University for Peace, 2004, 3th rev. ed.

Sisay Alemahu Yeshanew. *The Justiciability of Economic, Social and Cultural Rights in the African Human Rights System: Theories, Laws, Practices and Prospects.* Åbo: Åbo Akademi University Press, 2011.

Todaro, Michael P. *Economic Development*. London/New York: Longman, 1997.

Udombana, Nsongurua J. "The Third World and the Right to Development: Agenda for the Next Millennium." *Human Rights Quarterly* 22 (2000): 753–787.

Viljoen, Frans. *International Human Rights Law in Africa*. Oxford: Oxford University Press, 2007.

PART 2

Development as a Threat to Human Rights

CHAPTER 4

Ethiopia

Development with or without Freedom?

Assefa Fiseha Yeibyio

Abstract

Comprising six sections, this chapter analyzes the institutional foundations of the developmental state based on the experience of some East Asian countries. The different sections build on one theme: the key features of the developmental state and its manifestations. The main features of the developmental state as evolved in some East Asian countries is then used as a theoretical framework for analyzing the evolving developmental state in Ethiopia. Two major observations are made from this comparative study. One is while the developmental state in Ethiopia is largely an emulation of the East Asian experience at least at a formal level, in reality its ability to deliver the much needed economic transformation and industrialization is hindered by a less institutionalized, weak, and neglected civil service. This institution suffers from lack of a competent and skilled civil service. Political loyalty and merit equally compete in the recruitment, retention, and promotion of civil servants. This is a serious departure when compared to the East Asian experience in which well-educated, competent, and merit-based civil servants play a key role both in articulating the development goal and realizing it. The second and more important observation is that there appears to be a differing commitment on the part of the government in its promises to deliver on the socio economic and cultural sector on the one hand and civil rights and political freedoms, on the other. Owing to ideological shift towards a developmental state, there is an evolving trend that focuses more on economic growth and less on civil rights and political freedoms despite the constitution placing equal weight on all generations of rights.

Keywords

developmental state – rule of law – Civil Service Reform

1 Introduction

The paper has six sections. The different sections analyze the institutional foundations of the developmental state, namely, its institutional architecture,

 | DOI 10.1163/9789004280250_006

the role, alignment, and capacity of the state in industrialization, the nature and function of the civil service, and lastly the contentious issue of whether a developmental state can at the same time ensure democracy and respect for human rights. The study uses the experience of some East Asian countries regarding developmental states as a framework for analyzing the nature and challenges of the evolving developmental state in Ethiopia.

The 1995 Ethiopian constitution provides for all three generation of rights.[1] This very constitution is declared to be the supreme law of the land (Article 9). Ethiopia has also adopted major international treaties on human rights such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural rights (ICESCR).[2] By virtue of article 9 of the constitution, such treaties are considered "an integral part of the law of the land."[3] Furthermore article 13(2) stipulates that the fundamental rights and freedoms specified in Chapter 3 of the constitution shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights (UDHR), International Covenants on Human Rights, and international instruments adopted by Ethiopia. Chapter 3 of the constitution provides for the guarantee of a host of individual and group rights and constitutes one-third of the constitution. Further along this line, human rights in the Ethiopian constitution are also entrenched and given constitutional protection through a rigid amendment procedure. Thus the constitution and international treaties provide an institutional recognition of human rights.

1 Of course it is possible to identify some hierarchies within the constitution, for example, between those rights that focus on nations, nationalities, and peoples on the one hand, and individual rights on the other. Balancing these competing rights is a difficult exercise as it needs interpretation and while interpreting constitutional clauses, hierarchy of values gives some clue to the interpreter. The amendment and emergency clauses also corroborate the same point.

2 See art. 9(4). The core international human rights instruments ratified by Ethiopia include the Convention on the Elimination of All forms of Racial Discrimination (December 21, 1965; Ethiopia adopted this treaty in 1976); the International Covenant on Civil and Political Rights (December 16, 1966; Ethiopia adopted this treaty in 1993); the International Covenant on Economic Social and Cultural Rights (December 16, 1966; Ethiopia adopted this treaty in 1993); the Convention on the Elimination of all Forms of Discrimination Against Women (December 18, 1979; Ethiopia adopted this treaty in 1981); the Convention on the Rights of the Child (November 20, 1989; Ethiopia adopted this treaty in 1991); the Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment (December 10, 1984; Ethiopia adopted this treaty in 1994).

3 What this means is far from clear. Does it mean that such treaties have equal status with the constitution or only with proclamations? See for details Sisay Alemahu, "The Justiciablity of Human Rights in FDRE Ethiopia," *African Human Rights Law Journal* 8/2 (2008).

Nevertheless, as this paper illustrates, there appears to be a differing commitment on the part of the government in its promises to deliver on the socio economic and cultural sector on the one hand and civil rights and political freedoms on the other. What explains this differing commitment and what implications does it bring to civil and political freedoms particularly when they are constitutionally entrenched? Based on the East Asian experience of developmental states and the way they are emulated by Ethiopian Peoples' Revolutionary Democratic Front (EPRDF),[4] the ruling party in power, the key argument made is that the ideological shift towards a developmental state explains the government's commitment more towards the socio economic sector than civil rights and political freedoms despite the constitution placing equal weight on all generations of rights. There is certainly an evolving tendency that focuses more on economic growth at the expense of civil rights and political freedoms. Aggravating this state of fact is the weak nature of the institutions that enforce human rights that at the same time also suffer from lack of clarity in their respective roles in the enforcement of human rights.

As Japan and of late South Korea's experience demonstrate, economic growth and respect for human rights can be achieved simultaneously without prioritizing one over the other, and indeed that is what the constitution stipulates. 'Development as Freedom'[5] as articulated by Amartya Sen also indicates that development is not merely about improvements in the socio economic sector, crucial in itself, but also includes the enjoyment of freedoms. The evolving trend of economic growth first and rights/democracy next is problematic when seen in the light of the spirit of the constitution, so to speak. Civil and political freedoms seem to be sacrificed in favor of a better performance in the socio economic and cultural sector at least in the short run. The long-term effect is far less predictable but it is not difficult to state that whatever gains made in the socio economic sector could risk political instability unless the government demonstrates equal commitment to civil rights and political freedoms. Improvement in the socio economic sector has the potential to create a middle class that will show less tolerance towards the authoritarian state in the long run. Whether the new generation of leaders of the EPRDF will continue adhering to the 'democratic developmental state' as articulated by the late PM

4 The EPRDF is a coalition of four major parties: the Tigray Peoples' Liberation Front, the Oromo Peoples' Democratic Organization, the Amhara National Democratic Movement, and the Southern Peoples' Democratic Movement. This coalition managed to remove the military junta (1974–1991) from power in 1991.

5 See his classic work Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

Meles Zenawi resulting in development and less freedom or will introduce political reform to make it genuinely democratic and developmental is something that is too early to tell.

2 Institutional Architectures of the Developmental State and Its Role in Socio Economic Development in Ethiopia

Ethiopia is a country that has suffered for long because of food self-insufficiency. The current government has made its intentions clear in its Growth and Transformation Plan (GTP), a core document that defines the government's developmental priorities as the eradication of poverty, achieving the Millennium Development Goals by 2015, and transforming Ethiopia into a middle income country by 2020–2023.[6] Accordingly it has designed relevant policies and targets a minimum of 11 percent[7] economic growth that should be equitably shared across regions and across society to achieve the stated objectives. The EPRDF has, since it took power in 1991 after overthrowing the military junta, committed itself to being a more 'activist state' as opposed to the liberal state. Based on the experience of some South and East Asian states such as South Korea, Singapore, Japan, and currently China, the late PM Meles Zenawi, who was also the chief ideologue articulated the 'democratic developmental state'[8] as its party policy to take center stage in Ethiopia.

6 See the Growth and Transformation plan (GTP) 2010/11-2014/15 v.1 Main Text, Ministry of Finance and Economic Development November 2010, Addis Ababa.

7 Figures are often contested. For example the Ethiopian government estimates for the 2012 fiscal year the figure was close to 10 percent but the IMF claims only 7 percent. See Aarom Maasho, "IMF raises Ethiopia 2012/2013 growth forecast," accessed November 13, 2013, http://www.reuters.com/article/2012/06/14/ethiopia-economy-imf-idAFL5E8HE7IL20120614.

The World Bank's estimate is, however, in line with the government's estimate. See press release by the World Bank, "Ethiopia Economic Update – Overcoming Inflation, Raising Competitiveness," accessed November 13, 2013, http://www.worldbank.org/en/news/press-release/2012/12/13/ethiopia-economic-update-overcoming-inflation-raising-competitiveness December 13, 2012.

8 There are some indicators that the EPRDF started to articulate this concept towards the early 2000s. In some documents it is even mentioned as one source of tension for the TPLF split in 2001. The then Prime Minister himself stated "…While I cannot say that we had an alternative to the neo-liberal reforms that the IMF and World Bank wanted us to introduce, we have never been comfortable with it from the very beginning. By the late 90s, our thinking as a ruling party was evolving in the direction of elaborating an alternative development paradigm that we have called democratic developmentalism. This was a rather slow and painful process. Painful because the full articulation of the paradigm with all its policy implications

The EPRDF's ideological roots 'Revolutionary Democracy' have largely been leftist. It has never been clearly set out in a manner where the rank and file cadres would understand and be able to explain it. Particularly since 1995, with more liberal elements included in the constitution,[9] its own high ranking officials have been in the dark as to whether the EPRDF has abandoned its ideology and moved more to the right.[10] The only leftist elements included in the constitution and other policies are the land policy, the state monopoly over telecom, electricity, opening up the financial sector only for the Ethiopian private sector, and the right to self-determination and the collective rights of 'nations, nationalities and peoples'. However, of late, the EPRDF seems to have

---

was one of the key causes of the most serious split in the history of the ruling party that took place in 2000–2001." Speech by H.E. Meles Zenawi, Prime Minister of the Federal Democratic Republic of Ethiopia for the Africa Task Force Brooks World Poverty Institute, Manchester University, UK, August 3 to 4, 2006, accessed September 12, 2013, http://www.ethioembassy.org.uk/Archive/Prime%20Minister%20Meles%20Africa%20Task%20Force%20speech.htm.

In 2000 E.C, (2007 G.C.) the EPRDF presented a special issue of *Addis Raey* (ruling party bulletin) entitled "the end of History and the Survival of Asian Development" v. 2 (October Issue) under the name Tadese Gebrewold, which pen name many attribute to the late Prime Minister Meles Zenawi. The document is a severe criticism of the works of Francis Fukuyama and other neo liberal authors' prediction of the end of history and the last man. There the developmental state in Japan and other East Asian countries and of late China and India are cited as alternatives to economic growth from which Africa has a lot to learn. On page 33 of the same document, it is argued that Africa in general and Ethiopia in particular should combine development with democracy to avoid the authoritarian developmental states of some East Asian countries. This concept is attributed to a classic work by Chalmers Johnson entitled *MITI and the Japanese Miracle* published in 1982. Yet the nature of the dominant party system that existed in some of the East Asian countries and the current situation in Ethiopia seem to be different. See The Reporter entitled "The dominant party in East Asia and Ethiopia different?" accessed April 10, 2013, http://www.ethiopianreporter.com/index.php/politics/item/1412-.

9 As argued in this paper, constitutional entrenchment of human rights implies a limited government more than anything else. Parliament that makes and breaks the government implies the former can pose serious limits on the latter, and constitutional supremacy is another component.

10 The ambiguity among high ranking EPRDF leaders was at the center of the debate between former Prime Minister Meles Zenawi and former President Dr. Negaso Gidada during the party crisis in 2001. The PM then insisted publicly that the EPRDF's agenda as reflected in the constitution is '*Nech* (*white*) Capitalism'. Apparently H.E Ato Bereket Simon's book entitled 'A Tale of Two Elections' (of 2005 and 2010), in Amharic and published in 2003 E.C., provides useful details on the same point and hence the question is when and how the 'developmental state' will phase out, if it ever will.

shifted from the more ambiguous ideology of Revolutionary Democracy to that of developmental state. A developmental state is an institutional, political cum ideological arrangement that evolved from Japan's post-war economic recovery and later adopted by some East Asian countries. Understanding some of its key features is vital in order to grasp and explain the current context of Ethiopia.

2.1 *State-Led Development*

The concept of developmental state evolved initially from Japan's post-war economic recovery. It evolved from a particular circumstance and adapts or even transforms itself in reaction to new developments.[11] It was not at all a theoretical construct but rather a 'catch up' mechanism for late industrialized states and based on particular contexts.[12] Given the global economic crisis in 2008/2009, there seems to be a growing interest in developmental states particularly in the developing world. The current dictum as Peter Evans alludes to seems to be "no developmental state, no development."[13] Thus despite variations across states and time, it is crucial to identify some of its key institutional foundations.

Many seem to agree that the developmental state delivers well when it manifests four vital features. One is the role of political leaders' ideological/political orientation and capability to design the development agenda of the country. In sharp contrast to the nature and role of the state advocated by the Bretton Woods Institutions in the early 1990s, a developmental state (also called planned rational) assumes a transformative role.[14] The developmental

11 In East Asia for example, many predicted its demise following the financial crisis in 1997–1998 but it soon rearranged itself and continued to serve as an alternative to the neo-liberal model. See Mark Beeson, "Developmental States in East Asia: A Comparative Study of the Japanese and Chinese Experience," *Asian Perspective* 33/2 (2009): 5–39.

12 Chalmers Johnson, *miti and the Japanese Miracle: The Growth of Industrial Policy, 1925–1975* (Stanford University Press, 1982), 275; see also Thandika Mkandawire, "From Maladjusted States to Democratic Developmental States in Africa," in *Constructing a Democratic Developmental State in South Africa*, ed. Omano Edgheji (Cape Town: HSRC Press, 2010), 59–61.

13 See also World Bank, *World Development Report: The State in the Changing World* (New York: Oxford University Press, 1997), iii.

14 The neo liberal state, also called the Washington consensus or market fundamentalism before it faced the recent economic crisis (that necessitated a rethink on the role of the state and regulation of the banking and financial sector), for a long time emphasized deregulation and the privatization of state-owned enterprises. It put its faith in the market and the importance of a minimal state in order to have access to badly needed foreign

objective is more of a political decision backed by the ideological rationale of nationalism and the urgency to 'catch up' than a mere economic policy. A developmentally oriented political elite is in the driver's seat of the economy that also has the mission of creating development oriented ideological hegemony. The legitimacy of the party and political institutions as such is not based on periodic and regular elections (though that is crucially relevant if the state claims to be democratic) but on continuous delivery of rapid economic growth and improved living standards of the population. It is not merely about the state's intervention in the economy for nearly all states intervene in the market for one reason or another.[15] It is about how the government intervenes and the purpose it claims to serve that distinguish it.[16] In short, it is a state-led economic development. The state selects strategic sectors and gives priority (cherry picking) to achieve its developmental objectives. In other words, the state had a developmental function[17] by giving precedence to industrial policy. Given that the private sector's capacity is limited or is merely profit driven, so the argument goes, it is incumbent upon the state to serve as an engine of development.[18]

If one looks at the GTP, that is exactly how the Ethiopian government articulated its development agenda. Certainly the issue of who is responsible for the design of the development agenda in Ethiopia is far from settled. To start with, the EPRDF's experience with policy design in general and developmental state in particular has been the task of the political leadership at the highest level and not of the elite bureaucracy (if there was one). The establishment of the Planning Commission in June 2013 and the appointment of the only non-EPRDF figure, H.E. Mekonnen Manyazewal, to head it seem to set a new trend. As was the case in some East Asian states this new development is probably about to herald the shift of the design and planning of transformational

currency from the World Bank and the IMF. See Mark Beeson, *supra* n. 11, 5–39. Neo liberals advocated a regulatory and reduced role of the state and market-led industrialization. The risks of unregulated markets and the failure of the market combined with greed led to the global economic crisis in the post-2008 era. See Omano Edgheji, "Constructing a Democratic Developmental State in South Africa," in *Constructing a Democratic Developmental State in South Africa*, ed. Omano Edgheji (Cape Town: HSRC Press, 2010), 1–35.

15 For strategic reasons such as security, to ensure industrial safety, to protect consumers, to prevent monopoly, etc. Johnson, *supra* n. 12, 270.

16 There is no guarantee that it will achieve its developmental goal as intended.

17 See Johnson, *supra* n. 12, 271.

18 David Hundt, *Korea's Developmental Alliance: State, Capital and the Politics of Rapid Development* (London: Routledge, 2009), 17.

development goals from the highest political leadership and line Ministry (such as the Ministry of Finance and Economic Cooperation) to a technocratic group within the planning commission.[19] Such institutions were the nerve center of development plans and policies in East Asia. They were the ones who designed the selective industrial policy and key players in the allocation of scarce resources such as hard currency for preferred sectors. It is too early to tell, but the tendency in Ethiopia seems to be to assign this key responsibility to the new institution perhaps with the condition that the political leadership will endorse (or not) the draft policy. Sorting out clearly the role of this new institution vis-à-vis the Ministry of Finance and Economic Development and the National Bank is not going to be an easy task, to be sure. There is certainly an overlap in their functions.

Very much related to this is whether the National Planning Commission will leave room for innovative policy making at the regional state level which is a key component of federalism. Since 1995, Ethiopia has adopted a federal system to accommodate diversity, ensure equitable development, and to end over concentration of power at the center. The key feature in a federal system is the constitutionally based division of power that allows regional states to design their own policies. Federal systems allow various policies to be experimented at regional state level in order to address local contexts subject to a general framework set by the federal government policy. Will regional states also be represented in this institution? These are worthy questions to which it is hardly possible to provide a sound answer at this stage.

2.2 *Capacity of the State*

Strongly related to the idea of state-led development is the importance of capacity and commitment of the state to design, implement, penetrate, and mobilize power and resources to its objective.[20] What the developmental state demands is a strong, stable, centralized state with a cohesive bureaucracy.[21] This is a key condition that gives it a huge potential for action in achieving its

19 For comparative insights, see Ha-Joon Chang, "How to Do a Developmental State: Political Organizational and Human Resource Requirements for the Developmental State," in *Constructing a Democratic Developmental State in South Africa*, ed. Omano Edgheji (Cape Town: HSRC Press, 2010), 82–94.

20 See Richard Doner, Bryan Ritche and Dan Slater, "Systemic Vulnerability and Origins of Developmental States: Northeast Asia and Southeast Asia in Comparative Perspective," *International Organizations* 59/2 (2005): 327–361.

21 Peter Evans, "Constructing the Twenty First Century Developmental State: Potentials and Pitfalls," in *Constructing a Democratic Developmental State in South Africa*, ed. Omano Edgheji (Cape Town: HSRC Press, 2010), 45.

developmental goals. It is no surprise that the EPRDF has more than any government in Ethiopian history penetrated deep into the family level. *Kebeles* were the lowest level state agents that the *Derg* (military junta 1974–1991) established when it was in power. The EPRDF has set 'a one to five' structure at the lowest level going down to the family level. The average family size in Ethiopia right now is not more than six. The EPRDF, one could state, is now able to reach every family in the country. This provides the ruling party a huge potential for mobilizing its resources and the people for its developmental objectives. For example the success stories in relation to reduction of child mortality and improved maternal health is partly because of this structure but as indicated later, it is not without serious drawbacks to the democratization process.

2.3 *Strong and Merit-Based Bureaucracy*

Thirdly, a key institutional feature that comes with state-led development is the importance of strong bureaucracy. As the capacity of the state and its commitment to the developmental objective is crucial, the bureaucracy is not only recruited and promoted on an impersonal, competitive, and meritocratic basis[22] but also has the additional burden of implementing the developmental goal. As such, those who design, implement, and monitor the development of the economy are the cream of the nation, i.e., the best trained and highly paid technocrats. The elite bureaucracy carries the burden of implementing the developmental goal.

Furthermore, the civil service in many developed countries is not only recruited and promoted based on merit but also continues to provide its services despite changes in political parties following elections. Only the political leadership is changed while retaining the civil service. Even in China and some East Asian countries, the system is competitive and able to attract capable civil servants by offering better services and opportunities from the market.[23] In China in particular, to join the higher ranks within the Communist party,

22 This is the typical Weberian type of civil service as opposed to the civil service in Africa that suffers from neo-patrimonial relationships and extreme politicization. See for details Peter Evans, *supra* n. 21, 45; see also Thandika Mkandawire, "From Maladjusted States to Democratic Developmental States in Africa," in *Constructing a Democratic Developmental State in South Africa*, ed. Omano Edgheji (Cape Town: HSRC Press, 2010), 63.

23 The authoritarian tendency in China is not the same as the one in Africa: leadership is not limited to one person but there is collective decision-making where there exists a *de facto* party-level term limit paving the way for leadership succession and impersonal and merit-based bureaucracy as opposed to the neo patrimonial type in Africa. See Francis Fukuyama, "The Patterns of History," *Journal of Democracy* 23/1 (2012): 14–16.

delivery of better economic growth at the provincial level remains a critical variable apart from party loyalty. It is thus possible to be competitive even under a one-party state.

The civil service[24] (here used to refer to experts that implement policies and whose tenure is not dependent on elections like political leaders, but on merit and efficient delivery of services) in Ethiopia is not immune to politics and the public sector has not been able to either retain or attract capable people.[25] Several studies conducted in this sector indicate that the civil service in Ethiopia has suffered from political clientelism where informal/personal links – belonging to the nobility either directly or through marriage and family and remaining loyal to the political executive such as the Monarch, or the Derg – mattered much more than technical competence. Indeed, for most of Ethiopia's long history, there was little demarcation between political leadership and the administration. Up until the early 1960s provincial governors and the emperor in particular retained all three functions – legislative, executive, and judicial powers. Even after the 1960s and the establishment of the Central Personnel Agency (CPA) that was tasked with the idea of formulating merit-based standard rules for recruitment, training, promotion, transfer, and retirement, political loyalty to the regime overshadowed impersonal recruitment – hence the proverbial saying of *'shum shir' 'dej tinat' and 'sishom yalbela sishar yalekasal'.*[26] Politicization of the civil service and the overall subjugation of this sector to party and political control continued during the Derg.[27]

---

24 Ministers, members of parliament, the armed forces, the police, and judges do not constitute the civil service. African civil service in general and that of Ethiopia in particular suffers from politicization of the sector. See for details, Dele Olowu, "African Governance and Civil Service Reform," in *Civil Service Reform: Building a Government that Works* (1996), 104, 109.

25 Even after the EPRDF assumed power and commenced the civil service reform program, the sector lacked stable leadership. Initially it started on a project basis and in a fragmented manner where various sectors were engaged in the reform, with no one center coordinating it. It later (in 2002) received central leadership from the Ministry of Capacity Building and was then again taken over by the Ministry of Civil Service when the former was liquidated in 2010.

26 These are well-known proverbs on the Ethiopian public sector meant to indicate that civil servants are at the mercy of the political leader and these uncertainties pave the way for corrupt practices. A civil servant who knows that he/she will be fired soon is expected to 'snatch as much as he/she can' or else the civil servant will regret it for the rest of time. For details, see Haile Kiros Asmerom, "Emergence, Expansion and Decline of Patrimonial Bureaucracy in Ethiopia 1907–1974" (PhD Thesis, Free University of Amsterdam, 1978).

27 Kassahun Birhanu, *The Changing Features of Public Administration in Ethiopia: the Challenges*, accessed July 30, 2013, http://www.dpmf.org/images/changing-public-admin-kassahun

The EPRDF has since it took power in 1991 tried to introduce reforms to this sector through the stipulations and public display of ethical principles, injecting customer oriented and decentralized service,[28] and improvements in designing their respective strategic plans to enable it to deliver much desired services, but the reforms do not seem to have brought the desired outcomes. On a positive note, one of the new developments in post-Meles EPRDF leadership is the emergence of a new position with the title of Deputy Prime Minister for the good governance cluster.[29] This institution seems to be the driving force for all reform efforts currently going on in the country. Yet as recent as *Tikimit* 28, 2006 E.C. (November 7, 2013 G.C.), Prime Minister Haile Mariam Desalegn in a televised speech expressed his anger over the 'unnecessary delay' in making decisions in many government institutions. A recently issued government document hints that the reform process among others lacked a committed political leadership at the middle and higher level. Sample studies from some federal line ministries do show that line ministries have shown improvement in the delivery of services[30] but a lot remains in terms of enhancing the

.html; Meheret Ayenew, "*Public Administration in Ethiopia 1974–1992: Administrative and Policy Response to Turbulence*" (PhD Thesis, State University of New York, 1997).

28 A key development in this respect is the creation of ten sub-cities in Addis Ababa and subsequently in nearly all bigger cities of Ethiopia that brought significant improvement compared to the previous era of services from one center.

29 This office is headed by H.E Muktar Kedir who is also the deputy chairman of the Oromo Peoples Democratic Organization, one of the four coalition partners of the EPRDF and Minister for Civil Service. The civil service reform that is being conducted throughout the country is now accountable to this office. The hope is that good governance is now given due attention by creating a high profile office close to the PM's office. As part of this development the office managed to organize a big event on *Tikimit* 28, 2006 E.C. (November 7, 2013) in the PM's office with a view to reviewing the plan of some sample ministerial offices with respect to good governance on issues related to participation of stakeholders in planning, customer satisfaction, service delivery, etc.

30 Even in these sample institutions of late there is unfortunately some regression. The provision of electricity, water, and telecommunication services, particularly in terms of quality and efficiency, seem to be getting worse, not better. The government's own sources indicate that there are some 83,000 citizens who have already paid the necessary fee to get electricity but the Ethiopian Electric Power Authority has not yet provided the much needed services. The Ethio Telecom, though it has shown improvements in terms of access (we are told there are no less than 22 million mobile users), is poor in terms of quality. Its own sources indicate that customers have rated it as low as 35 percent in terms of their satisfaction. The federal immigration authority initially showed an impressive performance but of late has gone from bad to worse. See The Reporter editorial calling for an explanation and apology from the government for the frequent failure to deliver these

participation of employees in the sector, engagement of stakeholders, improving transparency in the decision-making process, respecting the rights of employees, improving the overall working environment, clarifying the ambiguous variables used for the selection/appointment of the *sira hidet balebet* (process owner as they are often called), and the leader in the 'one to five'[31] task force at the grass root level.[32] Besides, as discussions with relevant heads of the civil service bureau demonstrate, it is not clear how the heads of the *sira hidet balebet* and 'one to five' *limatawi serawit* (developmental army) structure fit into the existing structure. There is a tendency of setting up a parallel structure: the old and the new 'one to five', and it is not clear whether the new structure is to be subject to, replace, or supersede the existing civil service structure.[33] More controversial, however, is whether the *sira hidet balebet* and team leader are political positions in which political loyalty plays a big role or whether the two positions are open for competition and hence the heads are selected because of merit and efficient performance. Right now the situation is far from clear and varies from one regional state to another. In some regional states the two positions are considered political appointments while in others they are regarded as civil service positions. In other regional states the two positions combine both political and merit considerations in which the heads are subject to two accountability instruments, both political and merit-based.

---

crucial services, accessed September 13, 2013, http://www.ethiopianreporter.com/index.php/editorial/item.

31 In one regional state, the regional state Council indeed issued a law proclaiming expressly that *ye sira hidet balbet* is a political appointment but later retracted it indicating the confusion even at the highest level. The 'one to five' task force organized in all sectors at federal and state level is meant to be led by one person selected based on his/her best performance in the sector like a role model. He/she then leads the group in discharging whatever is to be done. Yet in practice the process of selection and the criteria for selecting the team leader are far from clear. In some regional states after a brief confusion they seem to have got the point. In other regional states there is a tendency to pick the leader on an arbitrary or political loyalty basis. A few other states have not even started it. Interview held with two regional state bureau heads in August and September 2013. On the origins and rationale for the 'one to five' structure, see H.E Ato Bereket's new book entitled 'A Tale of Two Elections' (2005 and 2010) in Amharic 2003 E.C., 205–207.

32 See Sirgut Mitchel, "Achievements and Challenges in the Implementation of Result Oriented Performance System in the Ethiopian Federal Civil Service: Case Study of Three Selected Ministries" (AAU, MA Unpublished Thesis, 2006).

33 The Minister of Justice did in his speech on *Tikimit* 28, 2006 E.C (on good governance) indicate that there is a lack of clarity between the old and the new structure and as a result there is the risk of returning back to the old system.

TABLE 4.1 *Total number of civil servants in Ethiopia (Federal and regional states as of June 2011)*

Region	Region total
Tigray	63,736
Afar	18,197
Amhara	170,951
Oromia	298,035
Somali	36,732
Benishangul Gumuz	16,742
SNNPRS	187,251
Gambella	10,614
Harari	4,869
Addis Ababa	40,690
Dire Dawa	6,384
Federal government	72,515
Grand Total	926,716

SOURCE: FEDERAL MINISTRY OF CIVIL SERVICE HUMAN RESOURCE STATISTICS 2011.

Table 4.1. above lists the total number of civil servants in Ethiopia. The data of the Civil Service Ministry furthermore show that of the total regional state civil servants (854,201), only 28 percent have first degree and above qualifications. Of the total federal government's civil servants (72,515), only 13 percent have first degree and above qualifications.

Thus, the biggest challenge both during the past and the present is that the civil service in Africa in general and in Ethiopia in particular suffers from extreme politicization. As such, there is no clear distinction between the civil service and political leadership or at least the boundary is fluid. The assumption is that political parties and governments come and go but the civil service remains to serve governments as an institution. Yet the policy of the imperial and the military regime that politicized the civil service and the overshadowing of the reform process by political considerations and not merit in reforming this sector by the current government seem to have left this institution in disarray. In some institutions the reform agenda was a means to avoid 'unwanted technocrats' and replacement by political loyalists. Instead of insulating this sector from politics, the EPRDF indeed attempts to swell its size by

increasing its members in the civil service.[34] There are indicators that the recruitment, retention, and promotion to higher levels is very much influenced by membership of the political party and by political affiliation, even to assume non-political positions.[35] Even some higher institutions that used to have modest autonomy have lost it already as they are led by central committee members (of the party). If merit is relegated then how is the civil service going to deliver the minimum services let alone accomplish the mission of the developmental state? Building the capacity of the civil service and injecting merit into it will surely have a significant effect on improving the capacity of the state; otherwise the mission of the developmental state is at risk. The ideal civil service brings technical expertise to the government owing to the education, training, and tenure it enjoys. Some of the challenges thus still haunt the sector to date.[36] Indeed, it is the least paid section in the public sector that continues to suffer from loss of its senior experts to the private sector. The dilemma of whether the civil service and the technocrats should be mere agents of the developmental state *limatawi serawit* (development army) as the Ethiopian government currently claims or should enjoy some level of autonomy as technocrats remains an unresolved issue in Ethiopia even today. Injecting merit, depoliticizing the sector, and designing mechanisms to retain senior experts in the civil service are probably going to be the Achilles heel of the Ethiopian government. The above evidence shows that this sector is affected by neopatrimonial and informal political variables rather than formal laws that govern the civil service. Given this reality it is naive to expect the civil service to effectively implement the development policies set by the government.

34 See for details Girmay Zeru, *The Civil Service Reform Program and Democracy in Tigray* (ECSU, unpublished MA Thesis, 2012). The author states that more than 95 percent of the civil servants in four sample *weredas* are members of the TPLF; another source on the civil service in the SNNPRS puts the figure even higher. Interview held in Hawassa, August 22, 2013.

35 In one seminar held at the end of June 2013 in Adama, the author was asked what the problem is with this practice so long as civil servants join or not the party by their free will. There are two inherent risks in the Ethiopian context. One is the fact that membership of a political party if open to civil servants should not be limited to membership of the ruling party. The second and vital one however is the fact that recruitment, retention, and promotion even to non-political positions are affected because there is a growing tendency to favor those who are politically loyal to the ruling party.

36 It is interesting to note though that the very same document dictates that only merit and no other criteria should be the basis for assessing the performance of civil servants. It also emphasizes that this is the basis for institution building in the sector. See *Building Federal Civil Service Development Army*, Manual in Amharic, Issued by the Federal Civil Service Minister, January 2013.

Federalism also brings a new set of challenges. It is true that Ethiopia is a federation that opens up to accommodate its diversity and demands a fair representation of its different nationalities in the civil service.[37] But representation can be done in both an efficient or inefficient manner. Representation can be made by recruiting the best meritocratic elite from the different nationalities or it can be done by undermining meritocracy and merely focusing on political loyalty.[38] Inefficient bureaucracy recruited principally on the basis of political loyalty is sooner or later going to be an obstacle to the mission of the developmental state.

2.4 *State Society Coalition – Embedded but Autonomous State*

The fourth feature of the developmental state is what Peter Evans calls the 'state-society relations'.[39] In other words the developmental state should remain autonomous but strongly embedded in society. Unlike orthodox socialism or communism, that insists on state monopoly, the developmental state accepts partnership with business elites (domestic or foreign) and other sectors of society. The ultimate goal of the state – development – is not the exclusive domain of the political elite or the bureaucracy, but should be a shared

37 This is a goal that is not yet fully achieved. Recent statistical data indicates that of the total 65,238 civil servants at the federal level, there are only 65 Somali (0.1 percent), 83 Afar (0.13 percent), 15 Gumuz (0.02 percent), 42 Nuer (0.06 percent), and 42 Anywa (0.06 percent). *Human Resources Statistics* 2010, issued by the Ministry of Civil Service.

38 The former Prime Minister's remark in the appointment of a minister that faced opposition from parliament due to the alleged lack of competence remains the cornerstone in this regard. His remark emphasized the importance of political loyalty as opposed to merit, which stunned many observers. Even in a one-party system as in China, it is possible to have a competitive and merit-based political leadership as well as civil servants. Why would an incompetent but loyal political figure be preferred over a competent and loyal one for example? In the civil service the politicization of the institution refers to the substitution of or the prioritization of political criteria over merit in selection, retention, promotion, rewarding, and taking disciplinary action. See Guy Peters and Jon Pierre, *Politicization of the Civil Service in Comparative Perspective: The Quest for Control* (London: Routledge, 2004).

39 Peter Evans, *Embedded Autonomy: States and Industrial Transformation* (Princeton: Princeton University Press, 1995), 10. Embedded autonomy in a way is a paradox; if the state is close to or embedded in society how can it remain autonomous? The literature is far from clear on this point. In fact the issue of 'crony capitalism' or corruption, the major challenges to the developmental state model, seems a problem because of its exposure to business influence. Despite the developmental state's zero tolerance for corruption, it remains exposed to it. See Mark Beeson, *supra* n. 11, 10; see also Johnson, *supra* n. 12, 273–274.

agenda that is based on a *broad-based social and political coalition*.[40] The state maintains its internal organization but must be strongly tied to (*embedded in*) society, the business community, the youth, women, farmers, trade unions, and civil society in order to enhance their role in development. It is difficult to meet the developmental goal when there exist serious factions and disagreements, for example within the political elite and the bureaucracy. In a way the fact that the EPRDF is a strong rural and mass-based party[41] is a favorable circumstance though the same structure could also be a threat to the emergence of an autonomous and less politically affiliated civil society in Ethiopia. The implication of this feature for the developmental state for the 21st century is massive. This institutional feature implies that the process of designing the development agenda and its overall implementation requires not only a democratic decision-making process but also a deliberative one.[42] Yet as illustrated later, the democratic credentials of the developmental state in the last century were suspect as it has been associated with authoritarian developmental states.

The state, while embedded in society, must maintain its policy making *autonomy* from domestic and foreign pressures (partisan, economic/business, class, global forces) to enable it to design the developmental goal free from pressures. Two crucial challenges emerge in this regard. One is the issue of balancing technocratic autonomy versus the ideal of a broad-based societal coalition that may need more *deliberative procedures* and mass-based decision-making. The second is the possibility that when the state creates strong ties with the different sections of society, the political elite and the bureaucracy may fall into the trap of rent seeking behaviors, misuse of power, and corrupt practices.[43]

The fact that there are a few economically powerful groups in the Ethiopian economy was until recently considered a favorable circumstance to the ruling party's hegemony in the design of development plans. Yet the corruption

40 Peter Evans, *supra* n. 21, 45; Johnson, *supra* n. 12, 22.

41 Although the EPRDF has shown some flexibility in the last ten years by enlisting new members from urban youth and women, it is widely known that it represents the lower class, mainly rural farmers, who constitute 85 percent of the Ethiopian population.

42 Democracy is often understood as mere conducting of regular free and fair elections in which competitive parties campaign often during elections but deliberative democracy assumes continuous engagement of the public in public affairs without limiting its participation to the time of elections.

43 Peter Evans, *supra* n. 21, 52. Currently the EPRDF-led government alleges that rent seeking behavior and corruption are major challenges both to political leaders and the bureaucracy.

charges against some government officials and high-profile members of the business community in 2013 does indicate that unless supported by a strong institutional check and balance approach, the system is vulnerable to corruption and its autonomy can easily be hijacked.[44] Donor pressure is also a source of tension. The EPRDF has not been that easy to deal with when it comes to donor agencies. As some studies hint, it has set its own priority agenda where it struggled hard to maintain its policy making autonomy despite pressure from donors.[45]

Despite all the daunting challenges related to institutionalizing the developmental state in Ethiopia, the Ethiopian state seems to have delivered fairly well in the socio economic sector.[46] Until 2002 the total revenue collected both by federal and state governments did not exceed 7.8 billion birr annually. By 2012 the figure had reached 86 billion birr annually and the plan is to finance the government's entire plan from domestic revenue sources.[47] Ethiopia has used its own budget and donor aid effectively in securing a consecutive economic growth of 10 percent or more[48] and for the expansion of infrastructure. Although it is overshadowed by high rates of inflation[49] and corruption, the 10 percent economic growth has for a number of years been the fastest growing non-oil economy in Africa. As part of a means for creating jobs and reducing

44 The Director of the Revenue and Customs Authority, his deputy, and high profile businessmen were accused of corruption and brought before the court in 2013. What is interesting about this development is that some of the businessmen were close to the government so much so that they even created a group called *'limatawi balehabtoch'* (developmental investors) as opposed to 'rent seeker' investors and may have had a big share in financing the 2010 federal and regional state elections.

45 For details, see Dereje Feyissa, "Aid Negotiation: The Un Easy Partnership between EPRDF and the Donors," *Journal of Eastern African* Studies 5/4 (2011): 788–811.

46 The Ethiopian government's performance in the socio economic sector may still be low by Western standards but the reference is from Ethiopia's own context since 1995. Most of the figures are collected from the EPRDF's Report submitted to its members in the 9th Congress of the party held in Bahir Dar in March 2013.

47 Ethiopia's annual budget in 2012 was 130 Billion birr; the difference is currently covered by donor agencies and loans. The plan is to finance all government activities from collected revenue which is considered a key condition for ensuring the autonomy of the 'developmental state'. Ethiopia uses 60 percent of its budget for capital projects.

48 The average economic growth between 1974 and 1991 was 1.7 percent. The government's plan for the next three years based on the GTP is a minimum of 11 percent every year. The IMF however stated the 2013 economic growth as being much lower (7 percent) than what is stated by the government.

49 In 2011 the rate of inflation reached 45 percent and is currently estimated to be 12 percent.

urban-level unemployment the government has been encouraging small-scale enterprises by providing credit facilities, training, and land. The number of such small-scale enterprises was no more than 22,000 in 2006. The number is now approaching 136,000 and nearly 600,000 jobs have been created through this mechanism. As part of the effort to solve the critical problem of residential houses in cities, the government built between 2006 and 2012 some 200,000 houses in the form of condominiums (low-cost apartments), nearly half in the federal capital Addis Ababa. Currently this project has been expanded with various options provided to citizens and it is hoped that the housing problem in the major cities will be ameliorated significantly.

The share of Ethiopia's population living under poverty (less than a dollar a day) fell from 45 percent in 1991 to 29 percent in 2011. Exports have risen sharply and series of hydroelectric dams[50] have boosted its economy so much so that the country plans to be the energy giant of the Horn region exporting electricity to some neighboring countries like Djibouti, Kenya, and the Sudan.[51] Nearly every child in Ethiopia can now attend primary school for free. The change in this respect is remarkable from 19 percent in 1991 to 96 percent in 2011.[52] During the last decade, some 31 new universities have been built, which have significantly increased their enrolment from a few thousand to more than 110,000 every year and the plan is to increase enrolment to 467,000 by 2015. The new universities are fairly well distributed throughout the regional states.[53] Access to health centers has also improved, thereby reducing child mortality significantly. There has also been significant improvement in infrastructure such as roads (only 18,560 km in 1991 and now more than 80,000 km – still small but expanding fast) and telephone services.[54] These developments are

50 In 1991, Ethiopia produced 300 Mega Watts only. It is now approaching 8,000 Mega Watts. The biggest investment in this respect is the Grand Ethiopian Renaissance Dam (GERD 6,000 MW) which has the potential to transform Ethiopia from a mere consumer to an exporter of electricity to its neighbors and to make it earn much needed hard currency.

51 See Aaron M, "Ethiopia plans to sell power to Sudan, Yemen, Kenya and even Egypt," ADDIS ABABA – Reuters, accessed June 30, 2011, http://www.theglobeandmail.com/report-on-business/international-news/african-and-mideast/ethiopia-plans-power-exports-to-neighbours/article2080108/.

52 A major dividing issue in this respect is that the massification of education at all levels without necessary preparation in terms of qualified personnel, library, and other necessary inputs has compromised quality significantly.

53 See for details, *Ethiopia ye 2001 Ametawi Metshaf* (in Amharic) *Ethiopia 2001 e.c. Annual Book* (Addis Ababa: Master Printing House).

54 By 2001, there were some 27,000 mobile telephone users. There are now more than 22 million users. In 1991 there were only 175,653 direct telephone lines, 70 percent of which were

important preconditions to building one economic community. Indeed Ethiopia's investment in infrastructure is the highest in the African continent. Taking note of these encouraging developments, an observer noted that Ethiopia in 2011 is richer, more accommodative to cultural and linguistic diversity, and relatively more stable and peaceful, but far from democratic as indicated later.[55]

To be sure, delivery in the socio economic sector does not necessarily automatically translate into a guarantee of socio economic rights but it certainly is an important step forward towards realizing them. In the first place the realization of socio economic rights is based on the government's active engagement such as the design of pro poor policies and massive investment of resources. The massive expansion in infrastructure, such as roads, and construction of health centers and schools, has provided opportunities for the people to enroll in schools and for the fulfillment of their basic needs. The construction of the low-cost residential condominiums was in response to fundamental needs. Overall, the government's commitment and the allocation of huge resources for the sector respond to the age-old demand for an adequate standard of living. Surely there is a lot more demand but if the government continues with its current commitment and addresses issues related to quality, it will certainly lay the foundation for a better life. After all, the protection and enforcement of socio economic rights is very much related to resources and committed political leadership, and budgetary allocation can do a much better job than the courts. Enforcement of socio economic rights has strong budgetary and policy implications and requires the state to use resources to address basic needs and improve the standard of living such as access to housing, education, and employment opportunities. By doing so the government enforces this category of rights through political institutions though they may not be justiciable in the short run before courts of law.

2.5 *Economic Growth First, Democracy Next?*

The last and more important point in relation to our understanding of the institutional behavior of the developmental state is the fact that the developmental state in the last century operated under either a dominant, hegemonic, or one-party system and there is growing concern as to whether it can be a

located in Addis Ababa. There are now 910,353 customers. This sector still suffers from lack of efficiency. Customers continue to complain about the slow speed of the internet.

55 See the Economist: "Ethiopia's Prime Minister 'The man who tried to make dictatorship acceptable'," accessed August 25, 2012, http://www.economist.com/node/21560904; and Africa Confidential, "Ethiopia After Meles," August 24, 2012.

democratic and developmental one at the same time. This is an area that is not well articulated in the literature regarding the nature of the developmental state but remains crucial for those of us interested in the issue of whether a developmental state can be democratic or at least be transformed at some stage. We have noted already that in order to achieve its developmental objectives, the developmental state needs a strong center capable of mobilizing the people, resources, and various actors towards one goal and that can exist only if there is a strong, cohesive, and centralized party system.[56] A close observation of the East and South East Asian developmental states indicate that it is based on one of three possibilities. In China, Singapore,[57] and South Korea the developmental state operated under a one-party state and had strongly authoritarian tendencies. This was the case in Singapore under Lee Kuan Yew and South Korea under General Park Chung Hee (1961–1979) and Chun Doo-hwan (1980–1987)[58] so much so that one version of economic growth was coined after the former Prime Minister of Singapore as in the Lee thesis (see next section). None other than former Malaysia's Prime Minister Mahathir captured the dilemma that gave birth to whether development should be conceived narrowly focusing on mere economic growth or whether it should be understood broadly as articulated by Sen's 'development as freedom' and beyond to include democracy.

> In the former Soviet Union and the East European countries, democracy was introduced along with the free market. The result is chaos and increased misery. Not only have the countries broken up, mainly through bloody civil wars, but there is actual recession and more hardship for the people than when the Communists ruled. One may ask whether democracy is the means or the end. Democracy at all costs is not much different from Communist authoritarianism from the barrel of a gun. …In a number of East Asian countries, while *democracy is still eschewed*, the free

56 Atul Kohli states that, except India, many of the East Asian countries followed what he calls a 'cohesive capitalist route' whose main target is rapid industrialization. With respect to India, he states it is a 'fragmented multi-class' type where the developmental goal is broad-based with multiple centers of power that also combines goals of redistribution and achieving development alongside democratization. See Atul Kohli, *State Directed Development: Political Power and Industrialization* (Cambridge: Cambridge University Press, 2004), 382, 384, 386.

57 See Stephan Ortmann, "Singapore: Authoritarian but Newly Competitive," *Journal of Democracy* 22/4 (2011): 153–164.

58 See Songok Han Thornton and William Thornton, *Development without Freedom: The Politics of Asian Globalization* (Aldershot: Ashgate, 2008), 41 and 43.

> market has been accepted and has brought prosperity. Perhaps it is the *authoritarian stability* which enabled this to happen. Should we enforce democracy on people who may not be able to handle it and destroy stability?[59]

This developmental path advocates the denial of civil rights and political freedoms, and indeed postpones democratization as the condition for effective and rapid economic development.[60] Currently China seems to be going through similar circumstances under a single communist party system (officially a one-party state) where multiparty elections and human rights issues seem to be neglected in favor of rapid economic growth.[61]

Japan demonstrates an interesting case on the experience in the region as it is the pioneering state and because it managed to secure consecutive economic growth under a genuinely dominant party system[62] that was democratic under the Liberal Democratic Party (1954–1993 under LDP) for the most part of the 20th century. The LDP in Japan did not engage in election rigging and did not intend to stay in power by force of arms. When the relevance of the developmental state dwindled by the 1990s, voters were able to bring another party to power and the LDP did not stifle the process. Indeed credit goes to Japan's post-war economic reconstruction which evolved into 'Japan's miracle', later to be coined the developmental state.[63] India is another relevant case where democracy and development reinforced each other and where a

59 Quoted in Michael Davis, "The Price of Rights: Constitutionalism and East Asian Economic Development," *Human Rights Quarterly* 20/2 (1998): 309. As illustrated earlier, this is the core of the content for those who insist on preconditions for democratization. See Seymour Martin Lipset, "Some Social Requirements of Democracy," *American Political Science Review* 53 (1959): 69–105.

60 See Amartya Sen's summary of the Lee thesis in his well-known book *Development as Freedom* (Oxford: Oxford University Press, 1999), 15.

61 While some authors romanticize the Chinese Developmental State model, many are critical, pointing to its 'undemocratic nature', that is, its strongly authoritarian tendencies, human right violations and labor abuses, environmental pollution, and rising inequality, among other things. In brief it is put "The real specialty of the Chinese development model is in turning affluence against freedom." See Songok Han Thornton and William Thornton, *Development without Freedom: The Politics of Asian Globalization* (Aldershot: Ashgate, 2008), 111–150; see also Seung-Wook Baek, "Does China follow The East Asian Developmental Model?" *Journal of Contemporary Asia* 35/4 (2005); see also Minxin Pei, "Is CCP Rule Fragile or Resilient?" *Journal of Democracy* 23/1 (2012): 27–41.

62 See Songok Han Thornton and William Thornton, *Development without Freedom: The Politics of Asian Globalization* (Aldershot: Ashgate, 2008), 170.

63 See Frank McNeil, "Japan's New Politics," *Journal of Democracy* 5/4 (1994).

dominant party system under the Congress Party later gave birth to multiparty democracy. Given that India is also a multiethnic and multi-faith country with a working federal system, India should offer a more relevant experience to Ethiopia than China. In the latter, economic development has not led to democratic reforms and respect for human rights so far. The East Asian experience thus has mixed records. In the words of Songok Han Thornton and William Thornton there are two camps, 'camps of development with and without freedom',[64] that is, consecutive economic growth under an authoritarian developmental state as in South Korea, Singapore, and China on the one hand and economic growth in a democratic developmental state with a dominant party as in India, Japan, and of late, South Korea on the other.

Given that there are two camps of developmental state, one democratic and another authoritarian, the question is which path should Ethiopia take? A one-party state is certainly a paradox with democracy. It brings contradictions between the need for regular free and fair elections among competing parties and the need to maintain policy consistency in the context of the developmental state. The experience indicates that the developmental state tries to minimize policy fluctuation.[65] In other words as the elite assumes the responsibility of achieving developmental goals within a defined period of time it aims to maintain policy consistency.[66] Regular, free, and fair elections assume competitive political parties and alternative policy options. The outcome of regular, free, and fair elections is hardly predictable and it is logical to assume that different parties could come and go every term. A developmental state in a one or hegemonic-party state, on the other hand, assumes that the party that set the developmental goal needs to maintain policy consistency if it is to achieve the developmental goal it set out to achieve which often needs more than one term. What it needs therefore is either a hegemonic or a one-party system

64 Johnson, *supra* n. 12, 178.

65 David Hundt, *supra* n. 18, 21. Of course this argument is idealistic. The business elite that creates alliances with the state find mechanisms to influence the state in one way or another. Lobby and pressure groups have across the years gained substantial power and access to political institutions. The *chaebols* as they are called in South Korea continue to influence both politics and markets in many ways.

66 Michael Davis, *supra* n. 59, 321. This is one area where the developmental state and democracy come into tension, if not conflict. Democracy is based on competitive elections on a scheduled, regular, and pre-planned arrangement and there is no guarantee that the party in power will win the next election. A developmental state demands policy consistency to secure consecutive economic growth and that means a dominant party system, one could say, is a precondition for development. It seems it is difficult to reconcile the two and only Japan provides an exceptional example.

where the opposition has a fair chance of competition but is less likely to pose a threat to the dominant party.

The ruling party EPRDF claims, particularly following the 2010 national and regional state elections, that Ethiopia needs an *Awra*/vanguard/dominant party.[67] This claim is illustrated in various documents of the ruling party citing examples from other countries such as Japan (from 1954 to 1993).[68] Yet the analogy is problematic because there seems to be a thin line that differentiates between hegemonic and dominant party systems. Giovanni Sartori[69] makes a useful classification between the two. As the case of Japan's post-WWII development hints at a dominant party system, the political system is not against multipartyism as such but it happens that voters satisfied with the performance of the LDP continued to elect the same party in consecutive elections. In this system there is a regular and free election and opposition parties take part in the competitive election. There is little or no complaint about the electoral process on the basis of voting irregularities or fraud. The outcome of the election is also respected by both the winners and the losers. There is no fear that if the LDP loses an election it will engage in 'extra-legal measures' to stay in power and when it lost the elections in 1993, it did hand over power peacefully.

The hegemonic party system is a bit different. To a large extent this type of party system is not competitive and yet it is not the same as a one-party state.[70]

---

67 See *Addis Raey Hamle-Nehase* 2002 E.C v. 3 No. 3 Bulletin of EPRDF: 30–38. See also Tsehaye Debalkew, "Whither Ethiopia; Towards a Dominant Party System or a Single Party State?" where he concludes following the 2010 elections and its outcome: "This phenomenon, held under a multi-party contestation, wherein several political parties vie for power and culminating repeatedly by the victory of one party drawing the overwhelming support of the electors, and indeed the population at large is called a dominant party system," August 10, 2010. The EPRDF is emerging as a dominant political party, read both Parts I and II, accessed August 18, 2012, http://aigaforum.com/articles/dominant_or_single_party.htm.

68 See Giovanni Sartori, *Party and Party Systems: A Framework for Analysis*, vol. 1 (Cambridge: Cambridge University Press, 1976), 109; it is good to note that Japan's politics is very different from Ethiopia. The challenges that are related to managing ethno nationalist groups makes Ethiopian politics distinct in many respects.

69 Giovanni Sartori, *supra* n. 68; see also Jose Antonio Cheibub, *Presidentialism, Parliamentarism and Democracy* (Cambridge: Cambridge University Press, 2007), 29–30.

70 In this regime incumbents hold elections because they know they will not lose them. Yet in a democracy, uncertainty of electoral outcomes is considered an important indicator of democracy, that is, the outcome of the elections remains unknown before it takes place providing a hint that there is a level playing field and every competitive party has a chance

There are various restrictions placed on political parties that want to engage in elections. Complaints on the electoral process are very common as either of the parties might engage in various kinds of election rigging. Political pluralism is far from ascertained as well. As is well-known, competition and uncertainty of outcomes are vital elements of a democratic electoral process.[71] In a hegemonic party type, there are indicators that hint at the certainty of the outcome: the hegemonic party will retain power. More importantly there is no guarantee that if the hegemonic party loses the election it will transfer power peacefully. It is uncertain at least.

As indicated above, the EPRDF, following the 2010 election, declared itself a dominant party. Yet it is difficult to ignore the various election irregularities mentioned by several international observers and more importantly it does not address, as stated above, the problem of hegemonic parties that stand somewhere between a dominant party system and a one-party system. The observation is that the constitution and the electoral laws by and large ensure a multiparty system, yet the reality is more problematic. True or not, in nearly all four elections held between 1995 and 2010, various kinds of electoral irregularities have been reported.[72] Certainly there are now growing concerns over whether Ethiopia has a multiparty or hegemonic party system which to some extent affects the nature of the developmental state.[73] If we look at the 2010 national and regional state elections, Ethiopia's transition to genuine multiparty democracy is far from achieved. The ruling party's aggressive campaigns emanating from fears related to the 2005 election crisis, advantages of incumbency (use of government institutions and resources such as the media to its advantage), better organizational structure down to grass root level (party structure, mobilized mass, and ruling party affiliated organizations such as women, youth, and farmers), relatively improved service delivery at grass root

---

of winning the election. Another indicator is the requirement of alternation in power, and regular, fair, and competitive elections; see Jose Antonio Cheibub, *supra* n. 69, 29–30.

71 See Jose Antonio Cheibub, *supra* n. 69.

72 Even the moderate Jimmy Carter stated critical shortcomings. See Comments by Christopher Clapham on the Ethiopian crisis written in mid-November 2005 at http://www.ethiomedia.com/fastpress/Clapham_on_Ethiopia_crisis.html and Jon Abbink, "Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and is Aftermath," *African Affairs* 105/419 (2006): 187; also Terrence Lyons, "Ethiopia in 2005: The Beginning of a Transition?" *Center for Strategic and International Studies* No. 25 January 2006.

73 Kjetil Tronvoll has already concluded it is a one-party state. See Kjetil Tronvoll, "Briefing: The Ethiopian 2010 Federal and Regional Elections: Re-Establishing the One-Party State," *African Affairs* (2010): 1–16.

level coupled with controlled freedom for the fragmented opposition[74] (due to the lack of a clear and coherent alternative policy, owing to pressure from outside, lack of internal democratic practice, and power rivalry within itself) yielded in a one-party-dominated electoral outcome:[75] only one seat went to the opposition and another one to an independent candidate. As a result, some have gone to the extent of concluding that the era of the multiparty system in Ethiopia is gone giving way to a one-party state.[76] This conclusion is perhaps harsh and too early to take but it does certainly hint at where Ethiopia's democratization process is heading.

Following the death of Prime Minister Meles Zenawi in the summer of 2012, parliament did show its potential for checking the executive and administrative malpractices but it is too early to tell if this is a result of genuine institutional reform that focuses on the centrality of parliament as a representative and democratic institution indicating the emergence of multiple centers of power or the result of a temporary political shift of gravity created after the death of Meles Zenawi.

A final remark is that it is also far from clear as to whether the authoritarian developmental state is an interim possibility that later evolves into a democratic state (as in Japan and South Korea after the 1990s)[77] or remains an alternative governance system which seems to be the case currently in China.[78] As

74 There are more than 60 national political parties within the camp of the opposition. It is hardly possible to understand why so many parties exist. If parties were to be organized on an ideological basis one could only think of four or so parties such as liberal, social democracy, socialism/communism, etc. Rivalry among the leadership often plays a role in the ever flourishing party number in Ethiopia.

75 See European Union report on the 4th national and regional state council elections which concluded that seen from two angles – lack of a level playing field for all contesting parties and the narrowing of the political space – it has failed to meet international standards. European Union Election Observation Mission: Ethiopia Final Report on the House of Peoples' Representatives and State Council Elections May 2010, accessed August 22, 2011, http://www.eueom.eu/ethiopia2010/reports.

76 See Kjetil Tronvoll, "Briefing: The Ethiopian 2010 Federal and Regional Elections: Re-establishing the One Party State," *African Affairs* (2010): 1–16.

77 See Samuel Kim, *Korea's Democratization* (Cambridge: Cambridge University Press, 2003); Ann Sasa List-Jensen, *Economic Development and Authoritarianism – A Case Study on the Korean Developmental State* (2008), accessed April 18, 2013, http://www.diiper.ihis.dk/.

78 See Andrew Natahn, "China at the Tipping Point? Foreseeing the Unforeseeable," *Journal of Democracy* 24/1 (2013); also Benjamin Reilly, "South East Asia: In the Shadow of China," *Journal of Democracy* 24/1 (2013). There are those who think that development without freedom will eventually give way to democratic reforms. They argue that the "authoritarian developmental state is its own grave digger." Increase in economic wealth sooner or

Susan Shirk alleges, China is a fragile superpower with the world's fastest growing economy but with an "authoritarian regime that fears its own citizens."[79] This issue remains crucial because there is this allegation that the developmental state is sooner or later "its own grave digger."[80] The legitimacy of the party and political institutions as such is not based on periodic and regular elections but on continuous delivery of rapid economic growth and improved living standards of the population (capability expanding services). Consecutive economic growth, expansion of infrastructure, improved access to education and health, and pro poor policies are given the highest national priority. If it succeeds in achieving this, it produces an educated, informed, and demanding middle class, the very forces that apply pressure for change and political liberalization. Demand for political reform becomes acute. The developmental state must then be reformed to evolve as either a liberal or social democratic state as in the Scandinavian countries. If it fails to deliver consecutive economic growth, it would invite a sudden and probably lethal political crisis.[81] If this assertion is true then the developmental state appears to be an interim period of preparation that lays the foundation for either a liberal or social democratic state.[82] Yet China and Singapore (one of the most advanced economies) remain authoritarian but developed economies seem to challenge the above scenario and it is too early to state that the Chinese style of developmental state under one-party rule is on the wane. Indeed Singapore and China are anomalies to the age-old wisdom articulated by Lipset that economic development (as a social condition) paves the way for democracy.[83] So it seems, there

later demands political reform and hence the state has to either liberalize itself politically or will face crisis. See Michael Davis, "The Price of Rights: Constitutionalism and East Asian Economic Development," *Human Rights Quarterly* 20/2 (1998): 324.

79 Suzan Shirk, *China: Fragile Super Power* (Oxford: Oxford University Press, 2007), 5–6.

80 Peter Evans, *supra* n. 21, 229, where he argues that the developmental state does not last forever as it is less attractive to advanced economies.

81 Larry Diamond, "China and East Asian Democracy," *Journal of Democracy* 23/1 (2012): 12.

82 Parts of Western Europe and largely the Scandinavian countries (corporatist state) practiced for a long time the social democratic state run by a left oriented political elite that focused more on the welfare state and full employment than rapid economic growth in the 1950s.

83 India indeed is a major anomaly to this perspective, where democratization and economic development are evolving hand in hand. For Lipset's thesis see Seymour Martin Lipset, "Some Social Requirements of Democracy," *American Political Science Review* 53 (1959): 69–105. This is what is often referred to by Thomas Carothers as the 'sequencing fallacy'. Some still argue that democratization can only succeed if preceded by the rule of law, economic growth, the existence of the middle class, and a well-functioning state. They contend that unless these preconditions exist, illiberal and extremist ones will

are some preconditions for democracy and the argument is "the more well-to-do a nation, the greater the chance that it will sustain democracy"[84] because it transforms the middle class and the working class, the coalition of which serves as a driving force for political reform. Yet China and Singapore possibly disprove such scenario or at least are major deviations.

At this stage, it is difficult to make a conclusive statement as to whether Ethiopia's developmental path is an interim and transitory economic/political regime or is an alternative political economy. Sibhat Nega, a senior but retired political figure of the ruling party is quoted to have said the EPRDF's role is to serve as a midwife to capitalism. With the state playing as an engine of development, the system will give birth to the emergence of capitalism and once a middle class emerges, the ruling party will either wither away[85] or evolve into either social democracy or liberal state.

2.6 *Economic Growth First, Rights Next?*

This section, albeit briefly, builds on the point that there is a lack of political will to protect civil and political rights compared with the strong commitment on the part of the government in the socio economic sector. Added to this is the weak nature of the institutions that are responsible for enforcing civil rights and political freedoms. This trend does hint at an important dilemma. An active and strong developmentally oriented executive faces little or no restriction on its way. Given that the government is doing well in the socio economic sector and less on civil rights and freedoms, is the government prioritizing one category of rights over others? Is this scenario an endorsement of the practice in some East Asian countries of economic growth first and rights next? In order to appreciate the nature and content of the debate that is emerging in Ethiopia, it may be useful to refer to the issue as articulated by some authorities in the context of some Asian countries. There is this contentious argument often associated with former Singapore's long serving Prime Minister Lee Kuan Yew[86] (hence Lee's thesis) that advocated restrictions on civil and

prevail and these very forces derail, not facilitate democratization. For an effective defeat of the sequentialist argument, see Thomas Carothers, "How Democracies Emerge, The 'Sequencing' Fallacy," *Journal of Democracy* 18/1 (2007): 12–27.

84 Seymour Martin Lipset, *supra* n. 59, 75.

85 The Amharic term he used in an interview with the VOA Amharic program in 2011 is *meksem* (wither away by outliving its usefulness).

86 Lee Kuan Yew who was the Prime Minister of Singapore from 1959–1990 was successful in transforming Singapore's economy while maintaining tight political control. He argued strongly that civil and political freedoms are Western values unsuited to Asia and

political freedoms as a condition for rapid economic growth. The Lee thesis stresses the priority of economic goals, 'economic growth first'.[87]

The essence of the argument is that civil rights and political freedoms make little sense in societies hit by poverty. Where there is widespread poverty, priority should be given to addressing economic needs even if that may necessitate restriction of freedoms. Freedom from hunger is what people will opt for if given a choice between economic needs and political freedoms. Yet these arguments have their own problems. In the first place there is no guarantee that an authoritarian state will fulfill economic needs. There cannot be any better evidence than Ethiopia's own history for this. It has gone through two long serving authoritarian regimes for the most part of the 20th century but its economy went from bad to worse. Equally relevant is even if economic growth is to be made, it is difficult to sustain it unless civil rights and political freedoms are guaranteed.[88]

More importantly, as Amartya Sen argued, an adequate conception of development must go beyond improving the socio economic conditions of the citizen, as development is concerned with the enjoyment of socio economic and political freedoms. Growth of GDP per capita is not an end in itself but a proxy for improvement in human wellbeing. Respect for human rights and democracy are not necessarily incompatible with development. Indeed respect for human rights and democracy are integral parts of development. Participatory and representative political institutions are crucial in the design of the developmental agenda and in its implementation. Both processes are not merely products of technocratic work but the product of a broad-based societal coalition with the state that needs democratic deliberation[89] – hence the argument 'development as freedom'. The citizen must be engaged in the public decision-making process and that can only be meaningful if designed as per the citizen's wishes and aspirations and that can only be effective when the citizen enjoys civil and political freedoms. Improvement in the socio economic conditions and public facilities is important in itself in eradicating many obstacles of freedom but it is not enough. As the 'occupy Wall Street' and many other protest movements in Western capitals demonstrated, economic inequality may occur

---

emphasized 'Asian Values'. See Fareed Zakaria, "Culture Is Destiny: A Conversation with Lee Kuan Yew," *Foreign Affairs* 37/2 (1994): 109.

87 Songok Han Thornton and William Thornton, *Development without Freedom: The Politics of Asian Globalization* (Aldershot: Ashgate, 2008), 46; democracy only took root in South Korea in the early 1990s.

88 Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), 150.

89 Amartya Sen, *supra* n. 88, 3, 77, 153; see also Peter Evans, *supra* n. 21, 43.

despite economic growth. Economic inequality combined with fault lines related to language and religion could lead to a political storm in developing countries. So wealth needs to be fairly shared across sections of society and across geographic zones. The determination of the content and direction of development itself is based on the enjoyment of civil rights and political freedoms. It indeed constitutes the core of development. Achieving development, Sen argues, "requires the removal of poverty, tyranny, lack of economic opportunities, social deprivation, neglect of public services, and the machinery of repression."[90] In other words, "just and sustainable development is best achieved where economic and political priorities are balanced."[91] As such there is no need to sacrifice one for the other. Economic needs and political freedoms can be achieved concurrently without the need for prioritizing one over the other.

Given the fact that Ethiopia has suffered a lot owing to poverty and nearly 29 percent of its people are still living in poverty, it goes without saying that focusing on equitable socio economic development is a step in the right direction. What is worrisome is the tendency to undermine or focus less on civil and political freedoms. The Ethiopian constitution Chapter 2 (articles 8–12) provides for fundamental principles of the constitution. Article 10 in particular states, "Human rights and freedoms, *emanating from the nature of mankind,* are inviolable and inalienable." Chapter 3 of the constitution provides for the guarantee of a host of individual and group rights and constitutes one-third of the constitution. Reinforcing the fundamental nature of human rights as one of the principles of the constitution, article 105 stipulates that amendment to Chapter 3 of the constitution can only be made if *all* regional state councils approve doing so by majority vote and if the two federal houses endorse such amendment by a two-thirds majority vote. Human rights therefore are strongly entrenched implying that the powers of political institutions are limited.

What does constitutional entrenchment imply apart from the fact that the power of the majority in parliament and the executive is limited? Another important implication is the fact that if constitutionally entrenched rights and freedoms are to remain limitations on power, a certain institution must be established and empowered to check whether the acts and decisions of the political institutions comply with (either before they are enacted or after

90 See for details Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), 6–7.

91 This is articulated as the 'concurrent model of development' by Songok Han Thornton and William Thornton, *Development without Freedom: The Politics of Asian Globalization* (Aldershot: Ashgate, 2008), 7.

the fact) the constitutional norms.[92] Recognition of human rights in the constitution is an important step forward but is not enough. Strong institutional protection and enforcement is a crucial *requirement* in giving life to constitutionally entrenched human rights. In Ethiopia, the dominant thinking is that this mandate is *exclusively* given to the House of Federation (HoF) as assisted by the Council of Constitutional Inquiry (CCI).[93] Yet one could also strongly argue that constitutional interpretation is also the proper mandate of the federal and state-level courts at least as far as Chapter 3 is concerned.

The cornerstone provision in this regard is article 13 of the constitution which has so far attracted little attention both from practitioners and the academia. Sub article one stipulates "All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and *enforce* the provisions of this chapter." To be sure, the provision imposes obligations on all public institutions but owing to the nature of the judicial function, the article provides what one may call the *implicit* mandate of the courts at federal and state level to enforce and hence interpret Chapter 3 of the constitution. One cannot argue the same with respect to the mandate of the judiciary in relation to other chapters.[94] The argument is limited to the

92 Constitutional practice shows many variations in this regard. In the US the concept of judicial review has evolved due to judicial practice since 1803 in *Marbury v Madison* and as articulated by its Chief Justice John Marshall as the mandate of the regular courts and in particular that of the federal Supreme Court. In Germany and South Africa the Constitutional Court, not the Supreme Court plays the same role. In some parliamentary systems such as Australia and Canada the political institutions determine the scope and limit of rights and retain the last word in relation to resolution of constitutional disputes, though the Supreme Court participates particularly through common law protection of rights. The latter is also called judicial deference, that is, leave those issues to be settled by political institutions or through the democratic process. The central issue is who determines the scope and limits of such rights? Should it be the courts or the political institutions? Activism claims judges apply these norms to specific cases. Political skeptics argue citizens have no moral rights. The point is that judges should apply the law that other institutions have made. They should not make law.

93 See articles 61, 62, cum 83 and 84. The CCI is composed of six legal experts appointed by the President of the Republic, three members of the HoF designated for this purpose and the Chief Justice of the Federal Supreme Court and his Deputy that serve as chair and vice chair of the CCI ex officio. The CCI has an advisory role only and the HoF is at liberty to endorse, modify, or reject the opinion of the CCI.

94 There are 11 chapters in the constitution. Chapter 1 is on general provisions, Chapter 2 is on fundamental principles, Chapter 3 provides for fundamental rights and freedoms, Chapter 4 is on the structure of government, Chapter 5 provides on division of powers, Chapter 6 is about federal legislative bodies, Chapter 7 contains provisions in relation to

chapter on fundamental rights and freedoms. This approach does not necessarily contradict the mandate of the HoF/CCI. The argument is that final and authoritative interpretation of the constitution (including Chapter 3) is the mandate of the HoF/CCI. Yet as the weak form of review as evolved by the Supreme Court of Canada in its relations with the legislature illustrates well, courts can also interpret the chapter on fundamental rights and freedoms in the process of enforcing it, short of rendering a final verdict. Whatever interpretations the courts adopt are not necessarily the final ones. Whoever is not happy with the position of the court while interpreting Chapter 3 can apply to the HoF/CCI for final resolution.

However, the role of courts in the enforcement of human rights enshrined in the constitution is one of the contested issues in Ethiopia. It is encouraging to see that the federal Supreme Court Cassation Division has in the case of *Tsedale Demise v Kifle Demise*[95] courageously interpreted expansively the concept of 'best interests' of the child clause of the constitution. When it comes to the enforcement of rights as limits to power and public institutions, there seems to be widespread confusion among judges at all levels. Judges at federal and regional state level think that they have little or no role in interpreting the provisions of human rights enshrined in the constitution.[96] Apart from the empirical evidence regarding the opinion of judges, there are several cases decided both by the Cassation bench of the Supreme Court and the CCI/HoF that illustrate this assertion.

One category of cases decided by the Cassation bench of the Supreme Court relates to property rights, judicial review of administrative action, access to justice, and due process rights. While lower courts attempted to limit abuse of

---

the President, Chapter 8 is about the executive, Chapter 9 concerns the judiciary, Chapter 10 is on national policy principles and the last chapter contains miscellaneous provisions.

95 *Tsedale Demise v Kifle Demise,* Federal Supreme Court Cassation Division File No. 23632 (2006) v. 5 (Decisions of the Federal Supreme Court Cassation Division) v. 5, 188; see also Getachew Assefa, "Is Publication of a Ratified Treaty a Requirement for Its Enforcement in Ethiopia? A Comment Based on Federal Cassation File No. 23632," *Journal of Ethiopian Law* 23/2 (2009).

96 See the report on the needs assessment for in-service training of judges and prosecutors (in Amharic) June 30, 2009 by Assefa Fiseha and Solomon Negussie, submitted to the Federal Training Institute for Judges and Prosecutors, available with the author (unpublished). The study covered four regions, namely Oromia, the South, Somali, Benishangul Gumuz as well as Addis Ababa and 341 judges participated in the survey. The results of this study have never been contested.

power, this is not the case with the Federal Supreme Court that consistently declined to enforce such rights.[97]

What do the positions of the Court at the highest level and the CCI indicate? Do they imply that the constitution, contrary to what it stipulates itself under article 9, is simply a political document not subject to enforcement by courts? Not surprisingly, among the list of criticisms against the EPRDF-led government, human right violations reported every year by the U.S. State Department,[98] Human Rights Watch, and Amnesty International constitute the core. This echoes John Markakis' long-time worry indicated in his classic book *the Anatomy of Traditional Polity* that human rights in Ethiopia are a luxury which the government does not take seriously and their inclusion in constitutions is simply a matter of formalism.[99] Given the widespread confusion in the courts, there is a risk that the human right provisions will remain

97 See for example *Yeka Land Development and Administration Office v Asmelash Tafese and others*, Federal Supreme Court Civil Cassation File No. 27604 (March 2007); also the *Heirs of Wasihun v Agency for Government Houses* where the Cassation Court decided on *Miazia* 21/2001 E.C (April 2009) that the Board is an administrative body and hence the Court has no mandate to review whether its decision contains fundamental errors of law or not (unpublished, available with the author). There are many cases that illustrate this but the most outrageous decision is the *Mahberawi Watsina Belesiltan v Ato Birhanu Hiry and Ato Kebede G. Mariam*, Federal Supreme Court Cassation Division File No. 18342 *Tahsas* 17, 1998 in which the Court stated that the tribunal's decision within the federal agency by virtue of Proclamation No. 38/88 is final and the Court has no mandate to review it. See V. 3 104 ff; *Asehanfi Amare and et al. v Ethiopian Revenue and Customs Authority* in which the Authority was empowered by virtue of secondary legislation (Regulation No. 155/2008, art 37) to dismiss employees suspected of corruption without following due process of law. The regulation also stated that the decisions of the Authority are not subject to review by regular courts; the Cassation bench of the Supreme Court declined to review the Board's decision and the CCI in its opinions written on *Yekatit* 1, 2002 E.C. (January 2012) hinted that the executive may in a parliamentary system declare some matters non-justiciable and prevent such cases from being brought before a court. See the opinion of the CCI on *Asehanfi Amare and et al.* Even more outrageous is the opinion of the CCI that tried to justify the position of the executive in ousting the mandate of the court. Addressing the issue of reinstatement of the employees, it stated, "dismissed employees have the right to find a job elsewhere and are not prohibited from doing so."

98 For the 2012 Country Reports on Human Rights Practices for Ethiopia, see http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed April 22, 2013).

99 John Markakis, *Ethiopia: Anatomy of a Traditional Polity* (2006), 333. The book was first published in 1974 and has now been reprinted again; see also Marina Ottaway, "The Ethiopian Transition: Democratization or New Authoritarianism?" *Northeast African Studies* 2/3 (1995): 67–84; Jon Abbink, "The Ethiopian Second Republic and the Fragile 'Social Contract'," *Africa Spectrum* 44/2 (2009): 3–28.

dead letters until such time as the judiciary breathes life into them. The conclusion is inescapable: owing to the weak nature of the institutions that enforce human rights and the political dilemma on the part of the government, economic growth is prioritized at the expense of human rights and democratization.

3 Conclusion and Recommendations

Ethiopia currently seems to be in a state of transition where it started with a more or less accommodative constitution that guaranteed all generation of rights into a more active developmental state. There seems to be a shift from a partly liberal constitution to a developmental state along the East Asian experience that focuses more on socio economic development than on civil and political freedoms. The signs of an ideological shift or reorientation are many and are not without problems as it brings its own new set of paradoxes. The constitution promises respect for all generation of rights – rights as foundations of the political system and a multiparty system. What it states is that a party or a coalition of parties that wins a majority in parliament has the mandate to establish the government. By any standard this is the core of liberalism that guarantees the political process will remain democratic. At its core is the presence of choices in the form of political parties, candidates, and policies, and for that to be realized, there need to be many parties in the game. How many such political parties is a problematic issue but in the long run some three or four[100] bigger and more or less ideologically cohesive[101] and with comparable political weight need to exist, if there is going to be a multiparty election with alternative choices for the voter. Here we see a more liberal element in the Ethiopian constitution when compared with the Chinese one. The Chinese constitution leaves no doubt: it is a one-party state.

100 If we were to talk about real politics the number could even be less. If politics is merely about ideology (it surely is not, it is more importantly about grabbing power) then we can only think of liberals, social democrats, and of the EPRDF's Revolutionary Democracy/ Developmental state. One could not understand for example the differences between the EPRDF and that of Dr. Merera or Prof Beyene's party! The latter two merely accuse the EPRDF of failing to deliver as promised in the constitution and in this respect they both are ideologically closer to the EPRDF than Lidetu's Liberal party. So what are the current 33 'opposition parties' doing? Does it mean that they have 33 different ideologies?

101 The EPRDF's toughest criticism against opposition political parties so far has been that the opposition is united by their hate for the EPRDF and not by their cohesive ideological/ political program.

The democratic credentials of the developmental state have mixed records. In Japan and of late in South Korea this has led to development with freedom. In Singapore and China it is a case of development without freedom or one could state it is a case of development first, and rights and democracy next. The developmental state is operated in Japan under a dominant party system, whereas in Singapore and China there are hegemonic one-party systems. Whether the political system we have right now in Ethiopia is a dominant party that stays in power because the voter is happy as claimed by the EPRDF or a 'hegemonic party system'[102] that needs the opposition so long as they do not pose a major threat remains contested. But there surely is something in the making. The EPRDF's political vision for the next decades envisages a vanguard/*awra* party so that the policy of the developmental state remains consistent and achieves the developmental goals. Obviously this will put the possibility for multiparty elections in the shadow and could lead to a scenario of 'economic growth first and rights next'.

Further sources of stress can be identified. The developmental state, one could say, brings challenges to the idea of institution building in the civil service and the idea of constitutional supremacy where the powers of the government are limited. What the developmental state needs is a coherent, unitary, strong center/executive that is capable of mobilizing resources and the people towards one end. A major challenge associated with this is the failure to distinguish between political leadership and the civil service. At this stage the border between the two is very fluid and there is no clarity on the part of the leadership in making sure that the civil service is recruited, maintained, and promoted or demoted based on merit and not on political loyalty. Right now merit and political loyalty are competing with one another and unless this trend is rectified soon, it will surely affect the efficiency of the sector negatively. Political pluralism is also in a shaky position. In a genuine democratic federation there exist multiple centers of power where local units can design their own development agenda subject to national standards. It requires competing interests to be compromised and the legislature is required to be fairly representative of the divergent views in society. What we have right now

102 A hegemonic party as articulated by the well-known political scientist Giovanni Sartori is not democratic like the dominant party. There is an opposition but the likelihood of winning an election is almost impossible. Voters and political parties often complain about election irregularities and about the lack of a level playing field. The impartiality of those who administer the election is often contested as well or there is a perception of that sort in the public. In a nutshell, a hegemonic party is distinct from a dominant party system and is found somewhere between a dominant party system and a one-party state. See Giovanni Sartori, *supra* n. 68, 109; see also Jose Antonio Cheibub, *supra* n. 69, 29–30.

(except for the period between 2005 and 2010) is a one-party-controlled parliament except for the two non-EPRDF members. Besides, many of the East Asian countries are smaller states with a more or less homogenous society. Ethiopia is not only heterogeneous but has also suffered a lot from its failure to accommodate these various groups, which led to a protracted civil war. The post-1991 development in accommodating diversity is a step in the right direction yet has implications for regional state autonomy. The developmental state with its urgency to ensure rapid economic growth and strong mobilizing potential from the center down to the grass root level (the one to five structure) has a centralizing tendency which may sideline the idea of federalism and separation of powers and trigger new repercussions in the long run.

Over all there is a general trend to shift from the partly liberal constitution to the developmental state that prioritizes more the socio economic sector and less civil rights and political freedoms. This has the risk of reducing the rule of law to a mere instrument of power, a risk that Ethiopia must learn from its own recent political history (the Imperial and the *Derg* eras). This can only be explained in relation to the ideological shift that came within the EPRDF leadership. Nevertheless, as clearly stipulated in the constitution and as can be gathered from Japan and of late South Korea, it is possible to respect civil rights and political freedoms and ensure economic growth at the same time. 'Development as freedom' as articulated by Amartya Sen and as stipulated in the constitution demands that development is understood in its broad sense that guarantees both economic growth and the respect of freedoms.

For this objective to materialize, institutions responsible for human right enforcement need to be strengthened and the political leadership needs to demonstrate equal commitment. The existing confusion among judges and members of the CCI and the HoF needs to be clarified through amendment based on the Canadian experience where the courts will be clearly mandated to interpret Chapter 3, though a final and authoritative decision is reserved to the HoF. This will provide courts with ample opportunity to enforce constitutionally entrenched rights and freedoms. This may then pave the way for the rule of law to shape the behavior of public institutions and serve as limit on power by protecting human rights. Such conception of the rule of law could prevent the political system and the role of law from degenerating into a mere instrument of power and oppression, key challenges in the recent political history of Ethiopia where the executive prevailed over the rule of law.

The rule of law along with impartial courts gives legal backing to development and ensures some level of political stability. In the absence of the rule of law and impartial courts, one cannot think of long-term investments, domestic or foreign. When an investor thinks of investing his/her capital the first thing

he/she checks is the legal and policy framework for establishing it and the next is whether there is an impartial court so that if a dispute arises there will be a fair hearing within a relatively short period of time.[103]

Crucial in this regard is whether Ethiopia's case of economic growth first and rights next is going to be a challenge only for an interim period, paving the way for political reform, or is going to remain an alternative form of governance as in China. Whatever the case may be, in the short run civil rights and political freedoms seem to be sacrificed in favor of economic development. In the long run it may be difficult to sustain a political system such as in Ethiopia as economic power may imply more autonomy in decision-making which necessitates political reform. The claim in Ethiopia is that the state will not only be developmental but will also be '*democratic*'. Political practice seems to hint otherwise and it is hard to tell whether this is an interim challenge or something more.

Bibliography

Abbink, Jon. "Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and Its Aftermath." *African Affairs* 105/419 (2006): 173–199.

Abbink, Jon. "The Ethiopian Second Republic and the Fragile 'Social Contract'." *Africa Spectrum* 44/2 (2009): 3–28.

Baek, Seung-Wook. "Does China follow The East Asian Developmental Model?" *Journal of Contemporary Asia* 35/4 (2005): 485–498.

Beeson, Mark. "Developmental States in East Asia: A Comparative Study of the Japanese and Chinese Experience." *Asian Perspective* 33/2 (2009): 5–39.

Carothers, Thomas. "How Democracies Emerge, the 'Sequencing' Fallacy." *Journal of Democracy* 18/1 (2007): 12–27.

Chang, Ha-Joon. "How to Do a Developmental State: Political Organizational and Human Resource Requirements for the Developmental State." in *Constructing a Democratic Developmental State in South Africa*, ed. Omano Edgheji. Cape Town: HSRC Press, 2010.

Cheibub, Jose Antonio. *Presidentialism, Parliamentarism and Democracy* Cambridge: Cambridge University Press, 2007.

Davis, Michael. "The Price of Rights: Constitutionalism and East Asian Economic Development." *Human Rights Quarterly* 20/2 (1998): 303–337.

103 As the saying goes 'justice delayed is justice denied' and the opposite is 'justice rushed is justice crushed' – both are dangers that need to be avoided.

Dereje Feyissa. "Aid Negotiation: The Un Easy Partnership between EPRDF and the Donors." *Journal of Eastern African Studies* 5/4 (2011): 788–811.

Diamond, Larry. "China and East Asian Democracy." *Journal of Democracy* 23/1 (2012): 5–13.

Doner, Richard, Bryan Ritche and Dan Slater. "Systemic Vulnerability and Origins of Developmental States: Northeast Asia and Southeast Asia in Comparative Perspective." *International Organizations* 59/2 (2005): 327–361.

Edgheji, Omano. "Constructing a Democratic Developmental State in South Africa." In *Constructing a Democratic Developmental State in South Africa*, ed. Omano Edgheji. Cape Town: HSRC Press, 2010.

Evans, Peter. *Embedded Autonomy: States and Industrial Transformation.* Princeton: Princeton University Press, 1995.

Evans, Peter. "Constructing the Twenty First Century Developmental State: Potentials and Pitfalls." in *Constructing a Democratic Developmental State in South Africa*, ed. Omano Edgheji Cape Town: HSRC Press, 2010.

Fukuyama, Francis. "The Patterns of History." *Journal of Democracy* 23/1 (2012): 14–26.

Getachew Assefa. "Is Publication of a Ratified Treaty a Requirement for Its Enforcement in Ethiopia? A Comment Based on Federal Cassation File No. 23632." *Journal of Ethiopian Law* 23/2 (2009).

Girmay Zeru. "The Civil Service Reform Program and Democracy in Tigray." Unpublished MA Thesis, ECSU, 2012.

Haile Kiros Asmerom. "Emergence, Expansion and Decline of Patrimonial Bureaucracy in Ethiopia 1907–1974." PhD thesis, Free University of Amsterdam, 1978.

Hundt, David. *Korea's Developmental Alliance: State, Capital and the Politics of Rapid Development.* London: Routledge, 2009.

Johnson, Chalmers. *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925–1975.* Stanford University Press, 1982.

Kassahun Birhanu. *The Changing Features of Public Administration in Ethiopia: The Challenges*, accessed July 30, 2013, http://www.dpmf.org/images/changing-public-admin-kassahun.html.

Kim, Samuel. *Korea's Democratization* Cambridge: Cambridge University Press, 2003.

Kohli, Atul. *State Directed Development: Political Power and Industrialization.* Cambridge: Cambridge University Press, 2004.

Lipset, Seymour. "Some Social Requirements of Democracy." *American Political Science Review* 53 (1959): 69–105.

Lyons, Terrence. "Ethiopia in 2005: The Beginning of a Transition?" *Center for Strategic and International Studies* No. 25, January 2006.

Markakis, John. *Ethiopia: Anatomy of a Traditional Polity.* Addis Ababa: Shama Books, 2006.

McNeil, Frank. "Japan's New Politics." *Journal of Democracy* 5/4 (1994).

Meheret Ayenew. "Public Administration in Ethiopia 1974–1992: Administrative and Policy Response to Turbulence." PhD Thesis, State University of New York, 1997.

Mkandawire, Thandika. "From Maladjusted States to Democratic Developmental States in Africa." in *Constructing a Democratic Developmental State in South Africa*, ed. Omano Edgheji Cape Town: HSRC Press, 2010.

Natahn, Andrew. "China at the Tipping Point? Foreseeing the Unforeseeable." *Journal of Democracy* 24/1 (2013): 20–25.

Olowu, Dele. "African Governance and Civil Service Reform." in *Civil Service Reform: Building a Government that Works* (1996).

Ortmann, Stephan. "Singapore: Authoritarian but Newly Competitive." *Journal of Democracy* 22/4 (2011): 153–164.

Ottaway, Marina. "The Ethiopian Transition: Democratization or New Authoritarianism?" *Northeast African Studies* 2/3 (1995): 67–84.

Pei, Minxin. "Is CCP Rule Fragile or Resilient?" *Journal of Democracy* 23/1 (2012): 27–41.

Peters, Guy and Jon Pierre. *Politicization of the Civil Service in Comparative Perspective: The Quest for Control* London: Routledge, 2004.

Reilly, Benjamin. "South East Asia: In the Shadow of China." *Journal of Democracy* 24/1 (2013): 156–164.

Sartori, Giovanni. *Party and Party Systems: A Framework for Analysis*, vol. 1 Cambridge: Cambridge University Press, 1976.

Sen, Amartya. *Development as Freedom*. Oxford: Oxford University Press, 1999.

Shirk, Suzan. *China: Fragile Super Power*. Oxford: Oxford University Press, 2007.

Sirgut, Mitchel. "Achievements and Challenges in the Implementation of Result Oriented Performance System in the Ethiopian Federal Civil Service: Case Study of Three Selected Ministries." unpublished MA Thesis, Addis Ababa University, 2006.

Sisay Alemahu. "The Justiciablity of Human Rights in FDRE Ethiopia." *African Human Rights Law Journal* 8/2 (2008).

Thornton, Songok Han, and William Thornton. *Development without Freedom: The Politics of Asian Globalization* Aldershot: Ashgate, 2008.

Tronvoll, Kjetil. "Briefing: The Ethiopian 2010 Federal and Regional Elections: Re-Establishing the One-Party State." *African Affairs* (2010): 1–16.

World Bank. *World Development Report: The State in the Changing World.* New York: Oxford University Press, 1997.

Zakaria, Fareed. "Culture Is Destiny: A Conversation with Lee Kuan Yew." *Foreign Affairs* 37/2 (1994).

CHAPTER 5

Addressing the Rights of Indigenous Peoples in the Development of Ethiopia

A Difficult Compromise or a Compelling Necessity?

Dorothée Cambou

Abstract

The development of the rights of indigenous peoples has grown considerably over two decades at the international level. Yet this development has been resisted by African governments. Ethiopia is among the states that manifested its reluctance to the adoption of the UN Declaration on the Rights of Indigenous Peoples and abstained from voting for the adoption of this historical instrument on September 13, 2007. Given the increasing support for the rights of indigenous peoples at the international level and in the African human rights system, this article assesses the relevance of the rights of indigenous peoples for Ethiopia and clarifies the meaning and the scope of their rights in light of the relevant provisions of the Ethiopian constitution. Overall, this article justifies the necessity to interpret Ethiopian law with due regard to the rights of indigenous peoples on the basis of Ethiopia's obligations towards international and African human rights law and provides a contemporary understanding of the constitution of Ethiopia subject to the respect and protection of the rights of indigenous peoples in the development process of the country.

Keywords

indigenous peoples – Ethiopia – African human rights – pastoralists

1 Introduction

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized.[1] However, in

1 Article 1(1) of the UN Declaration on the Right to Development, UNGA Resolution 41/128 (1986).

 | DOI 10.1163/9789004280250_007

Africa, indigenous peoples have not been enjoying this right.[2] While governments may argue that indigenous peoples benefit from national development, they remain among the poorest in their states.[3] The strategies established to promote and strengthen their positions are often misconceived and do not account for their specific situations. In general, there is a fallacious assumption that modernization and economic growth through the development of large-scale projects will benefit indigenous peoples. According to UN rapporteur Stavenhagen, however, wherever they occur, large-scale development projects will inevitably affect the living conditions of indigenous peoples. Although the impact might sometimes be beneficial, very often such projects are devastating, but never negligible.[4]

The human right to development entails the full realization of the right of peoples to self-determination, which includes the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.[5] It comprises the duty of states to formulate appropriate national development policies that aim at the constant improvement of the wellbeing of the entire population and of all individuals, on the basis of their active, free, and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.[6] Although these rights are at the heart of indigenous claims, many states still fail to recognize and accommodate them at the local level. In fact, the development programs promoted by African states have, on the contrary, frequently resulted in negative or even disastrous implications for indigenous peoples. Among the countries that have been criticized for implementing development strategies that negatively affect the livelihoods of indigenous peoples figures the state of Ethiopia.[7]

2 Kanyinke Sena, "Africa Indigenous Peoples: Development with Culture and Identity: Article 2 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples," *United Nations International expert group meeting*, PFII/2010/EGM (New York, January 12–14, 2010): 1–6.

3 Rodolfo Stavenhagen, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, submitted pursuant to Commission resolution 2001/57, UN Doc E/CN.4/2002/97 (2002) para. 80; Helen Quane, "The Rights of Indigenous Peoples and the Development Process," *Human Rights Quarterly* 27/2 (2005): 654.

4 Rodolfo Stavenhagen, *Indigenous Peoples in Comparative Perspective – Problems and Policies*, UNDP 2004/14 (2004): 5.

5 Article 1(2) of the UN Declaration on the Right to Development.

6 Article 2(3) of the UN Declaration on the Right to Development.

7 Report of the African Commission's working group of experts on indigenous populations/communities (Copenhagen: IWGIA, 2005) (hereinafter referred to as the Report of the African Commission); see also Resolution on the adoption of the "Report of the African

Known as one of the cradles of mankind, Ethiopia is the homeland of various indigenous communities. Like other indigenous peoples around the world, Ethiopian pastoralists and hunter gatherers have a specific relationship to their lands, territories, and resources which distinguish them from other segments of society.[8] The spiritual, economic, social, and cultural foundations of their livelihoods are sustained by the unique ties to their traditional lands on which the wellbeing of present and future generations is based. Thus, the continued survival of indigenous peoples depends on the respect and protection of their relationship to their lands and territories. However, this relationship is increasingly being challenged by development plans promoted on their territories and generally operated by the government. Ethiopia, which is today considered one of the fastest growing African economies, champions a development process that is largely triggered by land reforms based on the modernization and intensification of agricultural activities.[9] To conduct these reforms, the government sees the mobilization of under-utilized and unproductive labor as well as the proper utilization of agricultural lands and the adoption of technology as key drivers of growth and productivity.[10] Through agricultural development, the objective set out by the government is to reduce poverty and ensure food security for the population.[11] Yet, there is a growing concern that this development process does not benefit pastoral and hunter-gather communities living in the country.[12] Pastoralists suffer in particular from land eviction and also endure the negative effect of micro development policies that are based on the resettlement and sedentarization of their communities.[13] Eviction of pastoralists from their ancestral land is a huge problem that has besieged

---

Commission's Working Group on Indigenous Populations/Communities" (17th Activity Report of the Commission, annex IV. 28th ordinary session, 2003), 26–33.

8 Mohammud Abdulahi, "The Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities," *International Journal on Minority and Group Rights* 14 (2007): 91.

9 The World Bank, "Ethiopia Economic Update – Laying the Foundation for Achieving Middle Income Status," Press Release June 18, 2013, accessed September 15, 2013, http://www.worldbank.org/en/news/press-release/2013/06/18/ethiopia-economic-update-laying-the-foundation-for-achieving-middle-income-status.

10 Federal Democratic Republic of Ethiopia Ministry of agriculture and rural development, "Ethiopia's agricultural sector policy and investment framework 2010–2020," (2010): 5.

11 Ibid., para. 3.

12 Report of the African Commission, *supra* n. 7, 33; Human Rights Watch, *What Will happen if Hunger Comes? Abuses against the Indigenous Peoples of Ethiopia's Lower Omo Valley* (2012): 1–76.

13 Report of the African Commission, *supra* n. 7, 33.

pastoral communities in Ethiopia for a long time.[14] The passing of indigenous lands to 'commercial developers' has caused conflicts between communities and the government. As a result of these policies, the poverty of local communities has been greatly increased while depriving them of their means of development.[15]

In Ethiopia, the rights of indigenous peoples are protected under the constitutional provisions which recognize fundamental rights and freedoms for Ethiopian citizens.[16] The constitution lists a number of human and democratic rights that must be protected in the country and which according to its Article 13 "shall be interpreted in a manner consistent with the Universal Declaration of Human Rights, international human rights covenants and conventions ratified by Ethiopia."[17] Given the development of indigenous peoples' rights as an issue of international law and African human rights law, this article argues that the government of Ethiopia has the responsibility to respect and protect the rights of indigenous communities located on its territories by virtue of its commitment to human rights law. In particular, the right to self-determination, the right to property, and the right to development must be interpreted as conferring rights to indigenous peoples in the development process that affect them. On the basis of international law and the African understanding of the rights of indigenous peoples, this article seeks to clarify the scope and meaning of these rights as well as the correlative duties imposed on the government. The underlying purpose of this analysis is therefore to demonstrate the increasing relevance of the rights of indigenous peoples in the African context and the necessity to ensure its implementation at the local level.

2 The Development of Indigenous Peoples' Rights as an African Human Rights Issue

Despite legal controversies over the applicability of indigenous peoples' rights in Africa, the African Commission on Human and Peoples' Rights has endorsed the protection of indigenous rights as an integral component of the African human rights system.[18] The Commission has not solely acknowledged the

14 Ibid.

15 Ibid.

16 Articles 13–44 of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, *Federal Negarit Gazeta*, Year 1, No 1 Addis Ababa, August 21, 1995 (hereinafter referred to as the 1995 constitution).

17 Article 13(2) of the 1995 constitution.

18 See in particular The African Commission Report.

existence of indigenous peoples in Africa; it has also raised attention to their dramatic sufferings in African countries and convincingly argued the need to adopt specific instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to protect indigenous peoples against human rights violations perpetrated by their own states.[19] As a consequence, it is now clearly acknowledged that the concept of indigeneity finds relevance in the African context. The next section describes this development.

2.1 *The Relevance of Indigenous Peoples' Rights in Africa*

The emergence of indigenous peoples' rights in Africa is relatively recent. It can be traced back to 1999 through a conference organized by the International Working Group for Indigenous Affairs (IWGIA) in Tanzania. The conference objective was to lobby the African Commission to address the human rights situation of indigenous peoples in Africa as it had never done so before.[20] As a follow up to this event, the issue of indigenous peoples' rights was for the first time introduced as a separate item on the agenda of the African Commission in 2001.[21] This was a major step forward for the African human rights regime which led to the creation of the Working Group on Indigenous Populations/Communities in Africa (AWGIP).[22] As a first task, the Working Group was mandated to produce a report to look into the concept of indigenous peoples in Africa and to study the implication of indigenous peoples' rights for the African human rights system.[23] The report which came out in 2003 was subsequently endorsed by the African Commission.[24] This was a breakthrough in African human rights as it was the first time that an African official body had mentioned the marginalization and human rights abuses suffered by indigenous peoples in the continent. In its report, the Working Group described the situation of indigenous communities in different parts of Africa and the human

19 UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/Res/61/295 (2007).

20 UN Commission on Human Rights, *Seminar on Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations involving Minorities and Indigenous Peoples* (paper presented in Arusha, Tanzania May 13–15, 2000. UN doc. E/CN.4/Sub2/AC.5/2000/WP.3, 2000).

21 IWGIA, *The Indigenous World 2001–2002* (2002), 352.

22 Resolution on the Rights of Indigenous Populations/Communities in Africa, establishing a Working Group of Experts on Indigenous Populations/Communities (adopted during the 28th Session of the African Commission on Human and Peoples' Rights, October 23–November 2000).

23 Report of the African Commission, *supra* n. 7, 14.

24 Resolution on the adoption of the "Report of the African Commission's Working Group on Indigenous Populations/Communities," *supra* n. 7.

right issues and struggles in their respective countries.[25] In the report, land and resources dispossession, discrimination, denial of justice, violation of cultural rights, and denial of the right to existence and to their own development are listed among the most severe violations experienced by indigenous communities across Africa.[26] The Working Group also highlighted the failure of the dominant development paradigms to accommodate African indigenous peoples as a cause of their human rights sufferings.[27] While the report is merely descriptive and does not account for the situation of all African indigenous communities, it provides compelling reasons for the necessity to address the causes of human rights abuses of indigenous peoples on the continent.

Even with the acknowledgment of the pressing need to address the situation of indigenous peoples by the African Commission, most African states have remained reluctant to recognize their rights. This reluctance reached a critical point during the final discussion leading to the adoption of the UNDRIP in 2006[28] when a coalition of African states led by Namibia decided to defer the adoption of the text because of the controversial nature of several provisions.[29] Particular concerns were raised about the definition of indigenous peoples, and the impact of the recognition of their rights to land and natural resources and to self-determination.[30] The group feared in particular that the Declaration would threaten the political unity and territorial integrity of their states.[31] These worries were reiterated during the General Assembly of the African Union held

25 Report of the African Commission, *supra* n. 7, 14.

26 Ibid., Chapter 2, 14–59.

27 Ibid., 14.

28 Albert Barume, "Responding to the Concerns of the African States," in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, ed. Claire Charters and Rodolfo Stavenhagen (Copenhagen: IWGIA, 2009), 171–172.

29 Report of the Human Rights Council, Namibia: amendments to draft resolution A/C.3/61/L.18/Rev.1 Working group of the Commission on Human Rights to elaborate a draft Declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994.

30 African Group, *Draft Aide Memoire on the United Nations Declaration on the Rights of Indigenous Peoples* (New York, 9 November 2007) (hereinafter referred to as Aide-Memoire of the African Group). See also Albert Barume, "Responding to the Concerns of the African States," in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, ed. Claire Charters and Rodolfo Stavenhagen (Copenhagen: IWGIA, 2009), 171.

31 Ibid., para. 3.0.
African Union, Decision on the United Nations Declaration on the Rights of Indigenous Peoples (DOC. ASSEMBLY/AU/9 (VIII) ADD.6) (2007); Barume, *supra* n. 30, 173.

in 2007 in Addis Ababa.[32] In its resolution, the African Union reaffirmed the importance of the principle of territorial integrity in Africa and declared that "the vast majority of the peoples of Africa are indigenous to the African Continent" thereby disclaiming the relevance of their rights for African states.[33]

The acute opposition between the African Commission and the African Union was not only a hurdle for the development of the rights of indigenous peoples in Africa but also a major obstacle to the adoption of the UNDRIP at the international level. This opposition was explained both by the lack of dialog between the two organizations and by the absence of many African representatives during the two-decade-long negotiation process leading to the Declaration.[34] Prior to its intervention, little consideration was given by the AU to the African Commissions' and UN Working Groups' work on indigenous peoples. For example, when considering the draft UN Declaration at the UN and later within the AU, African states and the AU main bodies made no reference to the work of the African Commission and its Working Group on indigenous populations. To remedy the situation, the African Commission adopted in 2007 an advisory opinion to the attention of the African group, addressing point by point each of its concerns.[35] In summary, this advisory opinion recalled the conclusion reached a few years earlier by the Working Group on Indigenous populations. It emphasized that the African human rights system had developed its own understanding of the concept of indigenous peoples' rights.[36] It also underlined that the UNDRIP does not create new rights and is not incompatible with the territorial integrity of African states.[37] On the contrary, the Declaration, according to the opinion "reaffirms rights that are already recognized by virtually all African Constitutions and the African Charter."[38] Nevertheless, because these rights are not enjoyed by indigenous communities on an equal footing with the rest of the peoples, the Commission urged African countries to recognize the rights of indigenous peoples as expressed in the Declaration. This advisory opinion has largely contributed to

32 Ibid., Decision on the United Nations Declaration on the Rights of Indigenous Peoples.

33 Ibid., para. 7.

34 Rachel Murray, "The UN Declaration on the Rights of Indigenous Peoples in Africa: the Approach of the Regional Organisations to Indigenous Peoples," in *Reflections on the UN Declaration on the Rights of Indigenous Peoples,* ed. Stephen Allen and Alexandra Xanthaki (2011), 490.

35 African Commission on Human and Peoples' Rights, "Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples," (Banjul – Gambia, 2007) (hereinafter referred to as Advisory Opinion of the African Commission).

36 Ibid., para. 1.1.

37 Ibid., paras. 1.1 and 3.2.

38 Ibid., para. 1.2.

unlocking the voting process of the UNDRIP. In effect, the Declaration was adopted a few months later on September 13, 2007, with no African state voting against it.[39]

The position of Ethiopia on the rights of indigenous peoples is arguably similar to that of the other African states. The country was part of the coalition that voted for the deferment of the adoption of the UNDRIP and did not participate in the final session when the Declaration was adopted.[40] Nevertheless, the lack of consideration of the government for the recognition of indigenous peoples' rights does not diminish the normative value of the UNDRIP nor does it affect the relevance of the rights of indigenous peoples in Ethiopia. Although the Declaration is not legally binding, its legal effect has been confirmed both at the international and African levels. The discourse of human rights has steadily evolved towards the integration of indigenous peoples' rights and the African Commission has started to give shape to its own understanding of the rights of indigenous peoples.

Pursuant to its obligations under general human rights law and the African Charter, the government of Ethiopia is consequently obligated to recognize the existence of indigenous peoples on its territory as well as to respect and protect their rights. In this regard, there is no doubt as to the relevance of indigenous peoples' rights in Ethiopia.

2.2 *The Definition of Indigenous Peoples in the African Context*

Although, the relevance of indigenous peoples' rights in Africa should no longer be questioned, the issue of indigenousness continues to be disputed. In the absence of references to indigenous peoples' rights in the African Charter, the first question that evidently arises is who indigenous people are in Africa. At the international level, there is a general consensus that a formal legal definition is not necessary. Lacking an explicit reference in the African Charter, reference is generally made to the working definition elaborated by Martinez Cobo which focuses on the element of "historical continuity with pre-invasion or pre-colonial societies" as a basic element to identify indigenousness.[41] However, this definition has raised some issues in Africa. It has caused most governments to declare that the concept of indigenousness is irrelevant in Africa because under colonial rule all Africans were considered native to the

39 Three countries abstained, namely Burundi, Kenya, and Nigeria, and 15 other African countries were absent, including Ethiopia.

40 Ibid. See also African Decision on the adoption of the UNDRIP, *supra* n. 32.

41 Jose R. Martinez Cobo, "Study on the Problem of Discrimination against Indigenous Populations," Vol. 5, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986), 379–380.

continent and have suffered from the colonization process of their territories by non-African occupants.[42] In this sense, African states regard all Africans as indigenous to their continent. Besides, the focus of the Martinez Cobo definition on the original inhabitants is problematic for African states because it emphasizes the fact that certain communities would be more aboriginal or native to the continent than others.[43] Given migration, population composition changes, and the division of communities by the imposition of state boundaries, it makes little sense to utilize the criterion of being original inhabitants of the land to identify who indigenous peoples are in the African countries.

In order to settle the issue of the definition of indigenous peoples in the African context, the Commission put forward its own understanding of the concept.[44] In particular, it underlined that:

> in Africa, the term 'indigenous people' is not aimed at protecting the rights of the 'first inhabitants' that were invaded by foreigners. Nor does it aim to create a hierarchy among national communities or to set aside special rights for certain people.[45]

In Africa, the term indigenous is designed for communities that have a way of life that differs from the dominant society and is under threat. The concept includes communities that have been long forgotten or overlooked for the sake of post-colonial development.[46] In its advisory opinion, the Commission also defended the view that rather than establish a strict definition, it was more appropriate to only define the main characteristics used to identify indigenous populations and communities in Africa.[47]

As a criterion to identify indigenous peoples in Africa, the Commission suggested the following elements:

a) Self-identification;
b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;

---

42 *Supra* n. 35, para. 7.

43 Jérémie Gilbert, "Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights," *International and Comparative Law Quarterly* 60 (2011): 250.

44 Avisory Opinion of the African Commission, *supra* n. 38, para. 1.1.

45 Ibid., para. 2.8.

46 Ibid., para. 2.3.

47 Report of the African Commission, *supra* n. 7, 87.

c) A state of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life, or mode of production from the national hegemonic and dominant model.[48]

In the case *Centre for Minority Rights Development* (CEMIRIDE) (*on behalf of the Endorois Community*) *v. Kenya* the Commission had the opportunity to apply this view for the first time to a concrete case. The Commission decided that the Endorois community, a pastoralist group living in Kenya's Rift Valley close to Lake Bogoria, was an indigenous people by virtue of their distinctive way of life and their specific connection with land and natural resources.[49] In its decision, the Commission also upheld the postcolonial reading of the AWGIP by confirming that the Endorois are, as a people, a beneficiary of the collective rights protected under the African Charter,[50] including the right to property, the right to freely dispose of their wealth and natural resources as well as the right to development.[51] Interestingly, the Commission also confirmed the views in its ruling that African pastoralists are among the peoples considered indigenous in Africa.[52]

The decision of the Commission has extensive ramifications for African states whose population is composed of indigenous peoples. In the case of Ethiopia, it is estimated that the pastoralist communities account for 12 percent of the country's total population and is made up of 29 groups.[53] Those groups are heterogeneous in their composition and social structure and belong to various ethnic groups such as the Afar, Oromo, Somali, and Nuer as well as to other smaller Omotic groups in the south of which they form a substantive part.[54] They live in all regions of the country, inhabiting almost the entire lowlands. For centuries, these communities have adapted their livelihood to the difficult climatic conditions of the region where they live and developed their way of life based on a communal land tenure system.[55] These systems endow each group with autonomy in the use and management of the land and natural resources necessary to sustain their livelihoods. Even though many differences

48 Advisory Opinion, *supra* n. 35, paras. 9–12.

49 African Commission on Human and Peoples' rights, Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois Community) v. Kenya, Communication 276/2003 (hereinafter referred to as *Endorois v. Kenya*), para. 114.

50 Ibid., para. 162.

51 Ibid., 80; Report of the African Commission, *supra* n. 7, 13.

52 Advisory opinion, *supra* n. 35, para. 2.2. In addition to pastoralists, hunter gatherers are also among the indigenous communities in Ethiopia and more generally in Africa.

53 Report of the African Commission, *supra* n. 7 at.18.

54 Ibid. and IWGIA, "Indigenous peoples in Ethiopia," accessed November 15, 2013, http://www.iwgia.org/regions/africa/ethiopia/.

55 Mohammud Abdulahi, *supra* n. 8, 85.

exist from one community to the other in their beliefs and way of life,[56] pastoralists have a specific connection with their traditional land and resources that differentiates them from other groups in society. Those groups are often marginalized and discriminated against because of their particular way of life. In its first report on the situation of indigenous peoples in Africa, the AWGIP noted that Ethiopian pastoralists have suffered from negative stereotyping for a long time and this has given rise to two separate forms of inequality: land dispossession and marginalization from the development projects launched by the various governments of the country.[57]

The difficult situation of indigenous peoples in Ethiopia is further burdened by the absence of legal protection targeting their specific conditions. In Ethiopia, there is no legislation that protects the rights of indigenous peoples and the government has never demonstrated its keenness to support their human rights at the national level. Notably, Ethiopia was absent from the UN General Assembly the day the UNDRIP was adopted.

Yet, the constitution of Ethiopia recognizes the existence of pastoralist groups and their specific rights to land.[58] Quite progressively, the constitution also acknowledges that the country is composed of different peoples entitled to collective rights, including the right to self-determination. In addition, international human rights law, including the African Charter and the ICCPR, are incorporated in Ethiopian constitutional law. As a consequence, it is argued that the right of indigenous peoples transpires through the provisions of the constitution whose interpretation must be read in accordance with international human rights law and the African Charter which are binding on Ethiopia. In this respect, the following section examines the meaning of the rights of indigenous peoples in relation to Ethiopia's obligations pertaining to human rights law and seeks to challenge arguments that have been advanced by most African states to undermine their commitments towards the specific protection of indigenous peoples' rights.

3 The Definition of Indigenous Peoples' Rights in the Development Context

The reluctance of African countries to recognize the rights of indigenous peoples stems from the acceptance of their status as a people which entitles them to benefit from collective rights. In particular, objections have been

56 Ibid., 88.

57 Report of the African Commission, *supra* n. 7, 33.

58 Article 40(5) of the 1995 constitution.

raised against the recognition of the rights of indigenous peoples to self-determination because it would bestow the right for sub-groups to self-determination which could be misinterpreted as conferring the right to secession.[59] Additionally, African governments are worried that the rights of indigenous peoples to land and natural resources would contradict the principle that control over land and natural resources is the responsibility of states.[60] They also deferred the adoption of the draft Declaration because it would apparently confer the power for subnational groups to veto 'democratic' laws of African states.[61] In its advisory opinion, the African Commission, however, dismissed most arguments. It upheld the view that collective rights, formulated as rights of 'peoples', should be available to sections of populations within nation states, including indigenous peoples.[62] By way of compromise the Commission stipulated that those rights must be exercised in accordance with state boundaries and with due regard for state sovereignty but this precision also serves to disqualify any argument that could oppose indigenous rights on the grounds that they would threaten the unity and integrity of the state.[63] Ultimately, this opinion was also made clear in the UNDRIP.[64]

As mentioned earlier, the African Commission confirmed and specified its approach to indigenous peoples' rights for the first time in the Case *Endorois v. Kenya*.[65] The claim of the Endorois people, a pastoralist community living in the vicinity of Lake Bogoria in Kenya, related to the establishment of a game reserve on their traditional lands. Subsequently, the community was evicted during the 1970s and 1980s and a private concession was granted to a ruby mine on their traditional lands. In its decision of 2009, the Commission confirmed the violations by Kenya of the rights of the community to property, to land and natural resources, and to development of the Endorois peoples as protected under articles 14, 21, and 22 of the African Charter.[66] This landmark decision is

59 African Aide-Memoire, *supra* n. 30, para. 3.0.

60 Ibid., para. 7.0.

61 Ibid., para. 6.0.

62 Advisory opinion of the African Commission, *supra* n. 35, para. 3.2.

63 Ibid.

64 Article 46 of the UNDRIP indicates that "nothing in the Declaration should be construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States."

65 *Endorois v. Kenya, supra* n. 49; See also Gilbert, *supra* n. 43; Gaetano Pentassuglia, "Indigenous groups and the developing jurisprudence of the African Commission on Human and Peoples' Rights: some reflections," *UCL Human Rights Review* 3 (2010): 157–159.

66 *Endorois v. Kenya*, see *supra* n. 49, 80.

in line with international human rights law which suggests that indigenous peoples are entitled to the protection of their collective rights, including their right to self-determination, to land and natural resources, and meaningful consultation in the development process of their land and territories[67] The next section examines the content and extent of all three rights which, it has been acknowledged, "go to the heart of indigenous rights" and are correspondingly protected by international human rights law as well as by the African human rights regime and the constitution of Ethiopia.[68]

3.1 *The Right to Self-Determination*

In Ethiopia, the constitution proclaims the unrestricted right of every nation, nationality, or people to self-determination including a right to secession.[69] Although there is no clear definition of the identity of the right holder of self-determination, the constitution indicates that the term 'nation', 'nationality', or 'people' is a group of people who have or share a large measure of common culture, or similar customs, mutual intelligibility of language, belief in a common or related identities, and who predominantly inhabit an identifiable, contiguous territory.[70] In other words, the term 'right holder of self-determination' in Ethiopia designates a section of the population, not its majority. In practice, the constitution envisages an ethnic federal system and establishes regional states along ethnic lines. This system therefore guarantees the rights of ethnic communities such as the Afar, Somali, and Oromo – among which there are a significant number of pastoralists – to self-governance including secession. However, it has been noticed by the Ethiopian Human Rights Council that:

> by making ethnicity the sole organizing criteria without providing constitutional guarantees to minority groups, the Constitution has – perhaps unintentionally – led to discrimination, disenfranchisement and marginalization of minority ethnic groups in 'majority' regions.[71]

By not ensuring the rights of minority or indigenous groups, the constitution tends to support the monopoly of dominant ethnic groups and fails to account

67 In particular the UNDRIP.

68 Articles 1.2 and 2.3 of the Declaration on the Right to Development; *Endorois v. Kenya*, *supra* n. 49, para. 157; article 1(2) of the ICCPR; article 3 of the UNDRIP; articles 21 and 22 of the African Charter; and articles 39 and 40–43 of the 1995 constitution.

69 Article 39(1) of the 1995 constitution.

70 Article 39(5) of the 1995 constitution.

71 Ethiopian Human Rights Council, *Parallel Report Submitted to the Committee on Racial Discrimination*, (August 2009), 3.

for the existence of minority and indigenous communities at the local level. In the absence of legislation protecting their distinctive livelihoods, indigenous pastoralists whose way of life differs significantly from that of the dominant ethnic group from the region they inhabit may suffer the consequences of policy choices that do not accommodate their separate interests. In this regard, the question that can be raised is how to interpret the constitution in a manner that accounts for the right of indigenous peoples to self-determination. Given that neither human rights law nor the African Charter are static regimes, it is important to provide an answer to this question in light of contemporary developments regarding the rights of indigenous peoples and more generally in light of the evolution pertaining to the understanding of the right to self-determination in human rights.

During the adoption process of the UNDRIP, the African group firmly opposed the idea of a right to self-determination for indigenous peoples fearing that its acceptance would lead to secession and the dismembering of sovereign African states.[72] This opposition was based on the traditional interpretation of self-determination which confers on colonial peoples the right to independence. More recently, however, self-determination has taken on a new meaning. The right chiefly operates inside the boundaries of existing states as a means for the entire population of the state to choose a representative government.[73] In other words, the right to internal self-determination is now accepted in international law as an alternative to exercising self-determination externally. In addition, self-determination has equally been interpreted as:

> a right of a defined part of the population, which has distinctive characteristics on the basis of race or ethnicity, to participate in the political life of the State, to be represented in its government and not to be discriminated against.[74]

This view is also embraced by the UNDRIP. More particularly, the UNDRIP proclaims the right of autonomy and self-governance for indigenous peoples as a means of exercising their right to self-determination and provide for their right to live a distinctive way of life and if *they so choose* to participate in the governance of their states.[75] From a general viewpoint, this development has

72 Aide Memoire of the African Group, *supra* n. 30, para. 3.0.

73 International Court of Justice, Separate opinion of Judge Yusuf in Advisory opinion on Kosovo's Declaration of independence (July 22, 2010), 9.

74 Ibid.

75 Articles 4 and 5 of the UNDRIP.

confirmed the application of the right to self-determination beyond the mere context of decolonization.

In its jurisprudence, the African Commission has also started to endorse the postcolonial understanding of the right to self-determination. In the case *Katangese Peoples' Congress v. Zaire*, it implicitly recognized the possibility for a subnational group to achieve self-determination.[76] In particular, it held the view that the Katangese people could exercise their right to self-determination but in a variant that is compatible with the sovereignty and integrity of their state.[77] This communication opened an opportunity for the African Commission to elaborate on the postcolonial understanding of the right to self-determination, in a manner that includes indigenous peoples.[78] In fact, this idea was expressly upheld by an African group of experts in charge of appreciating the meaning of self-determination in the UNDRIP. In their response note to support the adoption of the Declaration, which was in substance upheld by the advisory opinion of the African Commission,[79] they indicated that:

> Collective rights, formulated as rights of 'peoples', should be available to sections of populations within nation states, including indigenous peoples, but that…the right to self-determination as entrenched within the provisions of the OAU Charter as well as the African Charter, cannot be understood to sanction secessionist sentiments. Self-determination of peoples must therefore be exercised within the inviolable national boundaries of the State with due regard for the sovereignty of the nation state.[80]

This opinion is in line with international law which confers the right of self-determination to indigenous people insofar as its exercise does not encourage any action which would dismember or impair the territorial integrity or political unity of sovereign and independent states.[81] Thus, the right to self-determination does not grant indigenous peoples the ultimate right to

76 *Katangese Peoples' Congress v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995) para. 6.

77 Ibid.

78 Report of the African Commission, *supra* n. 7, 111.

79 Advisory Opinion of the African Commission, *supra* n. 35, paras 17–18.

80 Response note to 'the draft aide memoire of the African group on the UN Declaration on the Rights of Indigenous Peoples' presented by an African group of experts (March 21, 2007), 6.7.

81 Article 46 of the UNDRIP.

secession. Instead, indigenous self-determination must be interpreted as conferring on indigenous peoples:

> the right to full participation in national life, the right to local self-government, the right to be consulted and to participate in the making of certain laws and programs, the right of recognition and appreciation of their traditional structures along with the freedom to enjoy and promote their cultures.[82]

In essence, this means that indigenous groups must have all possibilities to participate in the decision-making process of the larger society in which they live but more importantly a right also to an autonomous exercise of competences deemed necessary to protect their economic, social, and cultural distinctiveness inside state borders.[83] In the development context, this must be understood as giving indigenous peoples the right to participate in the development process of their own country but also as the right to develop according to their own beliefs and aspirations.

Conventionally, the discourse on self-determination focuses on its political aspect. However, self-determination also entails the right to freely pursue economic, social, and cultural development, and equally confers on all peoples the right, for their own ends, to dispose freely of their natural wealth and resources.[84] This is the resource dimension of the right to self-determination. Although this aspect of the right has been neglected in international law and is not clearly formulated in the constitution of Ethiopia, it constitutes the counterpart of political self-determination and is a precondition for the full enjoyment of the other economic, social, and cultural rights.[85] Both in international law and African human rights law, self-determination has evolved towards an understanding that includes the right of indigenous peoples to dispose freely of natural resources and imposes certain obligations on states.[86] In connection

82 Ibid., para. 3.4; see articles 4 and 5 of the UNDRIP.

83 Stefaan Smis, Dorothée Cambou and Genny Ngende, "The Question of Land Grab in Africa and the Indigenous Peoples' Right to Traditional Lands, Territories and Resources," *Loyola of Los Angeles International and Comparative Law Review* 35 (2014): 18.

84 Article 1.2 of the ICCPR and article 1.2 of ICESCR.

85 Alice Farmer, "Toward a meaningful rebirth of economic self-determination: human rights realization in resources-rich countries," *New York Journal of International Law and Politics* 39 (2006): 418–473.

86 Dorothée Cambou and Stefaan Smis, "Permanent sovereignty over natural resources from a human rights perspective: natural resources exploitation and indigenous peoples' rights in the Arctic," *Michigan State International Law Review* (2014): 347–376.

with the rights of indigenous peoples, the Human Rights Committee has several times emphasized that the right to self-determination requires that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.[87] Even though the Committee does not formulate in a clear manner the obligations arising from this right, it nevertheless recommends that decisive and urgent action be taken towards the full implementation of the right. In the development context, the Committee also highlighted the right of indigenous peoples to influence the decision-making process affecting their land and natural resources and means of subsistence.[88] Thus, the right to indigenous self-determination implies that they have the right to dispose of their natural resources, located on their traditional land. This should be interpreted as giving them both the right to control their traditional resources and the right to be involved in the management of all other resources used by the state.[89] Furthermore, development projects such as oil drilling or mining exploration should not affect the right of indigenous peoples to access their own means of subsistence as they might constitute a violation of indigenous self-determination.

In African human rights law, the right of peoples to freely dispose of their wealth and natural resources is expressly recognized under article 21 of the African Charter. This provision mirrors that of article 1.2 of the ICCPR and ICESC. In this respect, it is therefore argued that the resource dimension of the right to self-determination is protected under the scope of article 21 of the Charter.[90] In practice, the application of the resource dimension of the right to self-determination to the situation of indigenous peoples has been expressly confirmed by the African Commission in the case of *Endorois v. Kenya*.[91] Quite remarkably, the Commission indicated in its communication that the right to all resources located in indigenous traditional lands is vested in the indigenous

87 Human Rights Committee, Concluding Observations on Canada, paragraph 8. UN doc. CCPR/C/79/Add.105 (1999); Concluding Observations on Mexico, UN doc. CCPR/C/79/Add.109 (1999); Concluding Observations on Norway, UN doc. CCPR/C/79/Add.112 (1999); Concluding Observations on Australia, UN doc. CCPR/CO/69/AUS (2000); Concluding Observations on Denmark, UN doc. CCPR/CO/70/DNK (2000); see Martin Scheinin, *Indigenous Peoples' Land Rights under the International Covenant on Civil and Political Rights* (paper prepared for TorkelOppsahlsminneseminar, Norwegian Centre for Human Rights, University of Oslo, Norway, 2004).

88 Human Rights Committee, Concluding Observations on Sweden, UN doc. CCPR/CO/74/SWE (2002), para. 15.

89 Articles 26 and 32 of the UNDRIP.

90 Article 1 ICCPR, article 1 ICESCR.

91 *Endorois v Kenya*, *supra* n. 49, para. 268.

peoples, not the state.[92] In the area of development, the Commission also emphasized the state's duty to protect the survival of indigenous peoples as a group and its obligation to restrict the right to private property in cases when it is required for the survival of the indigenous group.[93] The confirmation by the African Commission that the right of indigenous peoples to natural resources is protected within the African Human rights systems complies with the progressive understanding that endows indigenous peoples with the right to self-determination, including the right to participate in the governance of their state, to dispose of their natural resources, and to maintain their distinctive livelihood.

Read in accordance with the above interpretation, the right to self-determination, as proclaimed within the constitution of Ethiopia implies therefore the rights for indigenous peoples to freely determine their economic, social, and cultural development, and also to dispose of their own natural resources. In this respect, article 39.2 of the constitution which asserts the right of every nation, nationality, and people to promote its culture must be interpreted as conferring the right of pastoralists to dispose of their land and resources. This understanding is supported by the HRC which has repeatedly interpreted the right to culture in light of article 1 of the ICCPR as including the right of indigenous peoples to land and resources.[94] More generally, given the recognition of the right of ethnic minorities to self-determination in Ethiopian law, what must additionally be ensured is the faculty for indigenous communities who form a part of those ethnic groups but whose members identify themselves as an indigenous people to exercise their right to self-determination in accordance with their distinctive livelihood and beliefs. In this regard, both regional and federal governments must ensure that indigenous views are always taken into account in the development of their land or any other project that may affect them. What must also be guaranteed is that indigenous communities are free to determine their economic, social, and cultural development independently of any form of domination. In this sense, self-determination for indigenous peoples means the capacity for them to influence meaningfully the development policy affecting their land. Thus, self-determination is from a conceptual viewpoint relational. In the situation where different peoples cohabit in the same state, it entails the cooperation of those different groups, as equals, in the development process of the land and territo-

92 Ibid., para. 267.

93 Ibid., para. 267.

94 See in particular Human Rights Committee, *General Comment No. 23*, U.N. Doc. HRI/GEN/1/Rev.1 (1994), para 7.

ries they share, occupy, and use. In practical terms, the authorities in charge of development policies must consequently integrate indigenous perspectives so as to ensure that their livelihoods are not endangered by mainstream policies. In some areas, this might be a difficult compromise to achieve given the discrepancy between the national or regional development strategy of Ethiopia and indigenous distinctive interests. However, the need for such compromise cannot be overstated since it is the only way to allow the realization of indigenous peoples' self-determination and also the only manner in which to comply with international human rights as developed in recent years.

3.2 *The Rights to Property over Land and Natural Resources*

With self-determination, the rights to property over land and natural resources represent one of the most controversial issues concerning the rights of indigenous peoples. In Ethiopia, article 40 of the constitution confers common property of land on the nations, nationalities, and peoples of Ethiopia, and vests ownership of land and natural resources in the state and the peoples of Ethiopia.[95] It also guarantees the right of Ethiopian pastoralists to free land for grazing and cultivation as well as a right not to be displaced from their own land.[96] Despite its ambiguous character, article 40 recognizes pastoralists as legitimate beneficiaries of the right to property over land and resources. However, it is not clearly formulated to what extent the constitution protects the property rights of indigenous peoples. While the constitution protects the right to private property, it neither defines the substance of pastoralists' property rights nor acknowledges their communal rights to land and resources.

Whereas the right to property is lacking of a definition in the constitution of Ethiopia, in international human rights law it has been interpreted as including both the individual and communal right to property.[97] More specifically, international law acknowledges the collective aspect of the indigenous relationship with their land and resources.[98] In Africa, the Working Group on Indigenous communities pointed out in its 2005 report that the lack of recognition of the pastoralists' customary land rights and the absence of protection for their collective tittles to land was a serious human rights concern for those communities.[99] As the result of any legal recognition of their rights,

95 Article 40(3) of the 1995 constitution.

96 Article 40(5) of the 1995 constitution.

97 Article 17 of the Universal Declaration of Human Rights (1948).

98 Article 26 and preamble of the UNDRIP, articles 13–14 of the ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989).

99 Report of the African Commission, *supra* n. 7, 21–22.

indigenous peoples have been losing their land over the years.[100] Considering the importance of land and natural resources for the survival of indigenous peoples, there is a pressing need for them to be recognized as the rights holders of their communal land and to be protected against the intrusive effects of development projects on their land.

The issue of the right of indigenous peoples to property was raised in the case of *Endorois v. Kenya.* In its decision, the African Commission determined that the rights, interests, and benefits of indigenous communities in regard to their traditional land constitute property under the African Charter.[101] It also indicated that the right to property implies the obligations for African states to respect as well as protect the property rights of indigenous peoples.[102] In particular, states have the duty to recognize the right of communal property of indigenous peoples and also the obligation to establish the mechanisms necessary to give domestic legal effect to such rights as recognized in the Charter and international law.[103]

Although the right to property is not an absolute one – an encroachment of the right to property is not a violation if conducted in the interest of public need or in the general interest of the community and in accordance with appropriate laws – the Commission noted that any limitations on the right to property must be proportionate to a legitimate need, and should be the least restrictive measures possible.[104] The assessment of the encroachment of the right to property must be conducted on the basis of a case-by-case analysis. In addition, the Commission indicated that a limitation can neither be considered proportionate when the right becomes illusory nor can it be in accordance with the laws, when this law does not give rise to the right of consultation and compensation of the indigenous community deprived of its land.[105] The threshold to justify a restriction of the right to property is therefore seemingly high in African human rights law. More generally, the conclusions of the Commission which are largely drawn upon the jurisprudence of the IACHR and the UNDRIP, demonstrate that indigenous rights to land and resources have now matured as a specific human right obligating the state not only to recognize their right to communal property but also to protect them against the adverse effects of development plans. In the Endorois case, the Commission

100 Ibid.

101 *Endorois v. Kenya*, *supra* n. 49, para. 187.

102 Ibid., para. 191.

103 Ibid., para. 196.

104 Ibid., para. 214.

105 Ibid., para. 215; 224–225.

additionally stipulated that the right to ownership, rather than mere access is the only way to "ensure that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries."[106]

Read against the backdrop of this interpretation, article 40 of the constitution of Ethiopia must therefore be interpreted not only as conferring a right of property usage to pastoralist communities but also as conferring on them a right to ownership. The fact that the constitution of Ethiopia vests the ownership of land in the state and the peoples is not incompatible with the rights of indigenous peoples to customary land rights. On the contrary, this recognition will uphold the constitutional principle of equality before the law given that identical rights are recognized for other communities, such as the right of farmers to private property.[107] In order to ensure and uphold equality, the rights of indigenous peoples to property must be recognized on the basis of their customs. In other words, pastoralist communities are entitled to property rights even though their occupation of the land is non-sedentary and the use of the resource is non-exclusive. Upholding the principle of equality does not solely mean treating equal cases similarly but also treating different cases differently.

In sum, notwithstanding the absence of title over their land, Ethiopian Authorities have the duty to recognize and protect the property rights of pastoralist communities including the right to use and ownership in the same way as for other peoples inhabiting the country. In addition, any limitation that would restrict the use, ownership, or access to the land and resources of pastoralist communities can only be justified by the government to the extent that they have been meaningfully consulted and have received appropriate compensation. The rights of consultation and to benefit from the development process are additionally protected under the framework of the right to development which is guaranteed under Ethiopian constitutional law, the African Charter, and international law.

3.3 *The Right to Development*

In Ethiopia, the right to development is expressly recognized under article 43 of the constitution. The constitution guarantees in particular that "the peoples of Ethiopia as a whole, and each nation, nationality, and people have the right to improved living standards and to sustainable development."[108] In addition, article 43.2 of the constitution stipulates that "all persons have the right to

106 Ibid., para. 215.

107 Advisory Opinion of the African Commission, *supra* n. 35, para. 7.2.

108 Article 43(1) of the 1995 constitution.

participate in national development and, in particular, to be consulted in respect to projects affecting their community."[109] The recognition of the right of pastoralists to development in this provision is however not explicitly defined. In practice, it has also been noted that pastoralism, as a viable traditional way of life, is not recognized in the same way as farming in Ethiopian law.[110] More generally, most states in Africa have failed to recognize the specific needs and aspirations of indigenous communities as a component of their national development process. The assumption is that mainstream development paradigms accommodate indigenous peoples whereas in fact they have largely contributed to the destruction of their livelihoods.[111] Large-scale development projects that take place in the name of economic development have impoverished indigenous peoples rather than improved their situations to give way to the economic interests of the dominant societies.[112] In its report, the AWGIP indicates that development initiatives such as the establishment of national parks, mining, dam, oil drilling, and construction, because of their very negative impact on the livelihood of pastoral communities are in serious violation of African human rights law.[113] Thus, there is a pressing need to interpret the right of indigenous peoples to development as recognized universally for other peoples.[114]

While the right to development remains contested in international law, it must be at least interpreted as proffering the freedom of choice. In particular, article 2(3) of the UN Declaration on the Right to Development indicates that the right to development includes "active, free and meaningful participation in development."[115] In similar terms, article 32 of the UNDRIP stipulates that:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources,

109 Article 43(2) of the 1995 constitution.

110 Report of the African Commission, *supra* n. 7, 50.

111 Ibid., 12.

112 Ibid., 20.

113 Ibid., 20.

114 Ibid., 50.

115 Article 2.3 of the Declaration on the Right to Development; see *supra* n. 1.

> particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[116]

The recognition of the right of indigenous peoples to participate in the decision-making process has triggered numerous debates during the drafting process of the UNDRIP. In particular, African states raised their concerns over the recognition of free, prior, and informed consent and the fact that the right to consultation as expressed in the UNDRIP might confer upon a subnational group a power of veto over the democratic legislature.[117] In reaction to this statement, the African Commission emphasized that consultation with indigenous peoples does not necessarily provide them with a right to veto. However, considering the inequality of powers between the state and indigenous communities, the inclusion of the right of indigenous peoples to free, prior, and informed consent is justified and necessary for protecting the interests of indigenous peoples.[118] This principle has been introduced for resolving past and present discriminations from which indigenous peoples greatly suffer. In this regard, the Commission has provided its own understanding as to what free, prior, and informed consent implies in the development context:

> The term 'consent' means that indigenous peoples must be involved in all aspects of planning, from beginning to end, and that there must be consultation at all stages. Indigenous peoples must be consulted and their participation must be continuous. Consent must be informed in terms of the nature, size, scope, duration, location, impact, reasons, purpose and specific procedures for the intended development project. Indigenous communities need to have an exact view of the project before it is adopted.[119]

Although doubts remain as to the extent of the right to consent, both the Human Rights Committee and the Inter-American Court of Human Rights (IACtHR) emphasize that consultation is however not sufficient in cases of

116 Article 32 of the UNDRIP.

117 Aide Memoire of the African group, *supra* n. 30, para. 6.

118 Ibid., para. 6.6.

119 Ibid., para. 6.7.

large development projects; instead free, prior, and informed consent is required.[120] Guided by the UNDRIP and the conclusions of the IACtHR, the African Commission similarly recognized the obligation of the state in the case of large-scale development projects not only to consult but also to obtain the free, prior, and informed consent of the affected community according to their customs and traditions in the *Endorois* case.[121] Thus, together with the Human rights Committee and the Inter-American Court, the African Commission has taken the lead to strengthen the position of indigenous peoples whose survival is challenged by development policies and to secure their right to meaningful consultation in the development process that affects their way of life.

The right to development does not solely include the right to be meaningfully consulted in the development process; it also entails the right to benefit from it. The African Commission indicates in this respect that a development project must both empower the community and improve their capabilities and choices in order for the right to development to be realized.[122] The Commission places great emphasis on the aspect of benefit sharing of the right to development which, it underlines, is key to the development process.[123] Thus, when the development in question decreases the wellbeing of the community or restricts their right to land and natural resources without providing just compensation, the state fails to meet its human rights obligation under article 22 of the African Charter.[124] Ultimately, the conclusions of the African Commission stress that it is the responsibility of the state both to ensure the right to development of indigenous peoples located in its territories and that indigenous communities are not left out of the process of benefits.[125] In other words, the state is also responsible for taking positive measures to include indigenous peoples in the development process and cannot exempt itself from its responsibility when third parties fail to respect these objectives.

Given the applicability of the right of indigenous peoples to development but the absence of specific legislation targeting its implementation in Ethiopia, the government must give way to the adoption of legislation and policies that foster indigenous rights in the development process that affect them. Although there are high probabilities that the recognition of the rights of indigenous

120 Human Rights Committee, *ÁngelaPomaPoma v. Peru*, Communication No. 1457/2006, UN Doc CCPR/C/95/D/1457/2006, 24 April 2009 and Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgment of November 28, 2007, IACtHR Series C, No. 172.

121 *Endorois v. Kenya*, *supra* n. 49, para. 291.

122 Ibid., para. 283.

123 Ibid., para. 295.

124 Ibid., para. 295.

125 Ibid., para. 298.

peoples hinder the implementation of current legislation and policies, it is a matter of utmost importance, and a human right priority, to ensure the realization of their rights, before their existence as indigenous peoples is sacrificed on the altar of development.

4 Conclusion

A few years ago, states and academics alike remarked that a certain degree of confusion emerged with the recognition of the rights of indigenous peoples in international law. During the adoption process of the UNDRIP, there was notably a degree of uncertainty regarding the implication of the rights of indigenous peoples.[126] African governments in particular were quite puzzled by the recognition of the existence of indigenous peoples in their territories and the implication of their rights for the integrity of states and the pursuance of their respective development strategy.

Now that the UNDRIP has been adopted and that the rights of indigenous peoples have been integrated into the international and regional human rights discourses, there should no longer be dissension over the applicability of indigenous peoples' rights in African countries. Every African state, by virtue of its obligations under international law and African human rights law, is obligated to ensure the rights of indigenous peoples on its territories. In Ethiopia, this view is even more prominently defendable given the importance of human rights in the constitution of the country. In addition, the rights of indigenous peoples should no longer be contested. On the basis of the UNDRIP and African Human rights law, it is now possible to further specify the meaning and scope of their rights in the development context. First and foremost, indigenous peoples are the rights holders of collective rights, including self-determination, the ownership and use of lands and natural resources located on their territories as well as the right to participate and to benefit from the development process that affects them. In relation to the issue of self-determination, in its modern formulation, the right gives rise to the obligation of the state to accommodate the view of indigenous peoples in the development process by securing their right to autonomy and self-government. As such, indigenous peoples should be allowed to benefit from the national development process and freely determine their own development paths. The right to self-determination also implies the recognition of their right to natural resources and the right not to be deprived of their own means of subsistence. These rights should be equally

126 Quane, *supra* n. 3, 680.

protected as an aspect of the right of indigenous peoples to communal property. Ultimately, the rights of indigenous peoples encompass the possibility for them not only to participate in the development process but also to substantially benefit from it. In this respect, governments shall no longer prioritize national development over the livelihoods of indigenous peoples. Indigenous peoples have for too long been discriminated against and overlooked in the development process of their own countries. From now on, they shall be meaningfully consulted by the state and considered an equal partner and beneficiary from the development projects held on their territories. Considering the dire situation of most indigenous peoples in Africa, respect for and protection of their rights must be given preeminence in the development policy of each African country.

'Before they pass away',[127] the government of Ethiopia must consequently ensure that the national development of the country does not threaten the survival of indigenous communities living in its territories. It must guarantee that the development process meets the needs of its population and contributes equally to the wellbeing of indigenous peoples as well as their future generations. Although the implementation of indigenous peoples' rights in Ethiopia might give rise or require certain policy and legislative reforms, those changes should not be considered as a matter of choice for the government, but purely as an imperative of human rights responsibility.

Bibliography

African Commission on Human and Peoples' Rights, Katangese Peoples' Congress v. Zaire, African Commission on Human and Peoples' Rights, Communication No. 75/92 (1995).

African Commission on Human and Peoples' Rights, Resolution on the Rights of Indigenous populations/Communities in Africa, establishing a Working Group of Experts on Indigenous Populations/Communities (October 23–November 2000).

African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v. Kenya, Communication 276/2003.

African Commission on Human and Peoples' Rights, Resolution on the adoption of the Report of the African Commission's Working Group on Indigenous Populations/Communities, Res 65 (XXXIV) 2003.

127 Jimmy Nelson, *Before they pass away* (TeNeuse, 2013), accessed December 2, 2013, http://www.beforethey.com/journey/ethiopia.

African Commission on Human and Peoples' Rights, Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples (Banjul, 2007).

African Commission's Working Group of Experts on Indigenous Populations/Communities, Report of the African commission's working group of experts on indigenous populations/communities (Copenhagen: IWGIA, 2005).

African group, Draft Aide Memoire on the United Nations Declaration on the Rights of Indigenous Peoples (New York, 2007).

African group of experts, Response note to "the Draft Aide Memoir of the African Group on the UN Declaration on the Rights of Indigenous Peoples" (2007).

Allen, Stephen, and Alexandra Xanthaki, eds. *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. United Kingdom: Hart Publishing, 2011.

Cambou, Dorothée, and Stefaan Smis. "Permanent sovereignty over natural resources from a human rights perspective: natural resources exploitation and indigenous peoples' rights in the Arctic." *Michigan State International Law Review* (2014): 347–376.

Charters, Claire, and Rodolfo Stavenhagen. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009.

Ethiopian Human Rights Council, Parallel Report Submitted to the Committee on Racial Discrimination, (August 2009).

Farmer, Alice. "Toward a meaningful rebirth of economic self-determination: human rights realization in resources-rich countries." *New York Journal of International Law and Politics* 39 (2006): 417–473.

FDRE Ministry of Agriculture and Rural Development, *Ethiopia's agricultural sector policy and investment framework 2010–2020* (2010).

Gilbert, Jérémie. "Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights." *International and Comparative Law Quarterly* 60 (2011): 245–270.

Human Rights Committee, ÁngelaPomaPoma v. Peru, Communication No. 1457/2006, UN Doc CCPR/C/95/D/1457/2006; Concluding Observations on Canada, paragraph 8.UN doc. CCPR/C/79/Add.105 (1999); Concluding Observations on Mexico, UN doc. CCPR/C/79/Add.109 (1999); Concluding Observations on Norway, UN doc. CCPR/C/79/Add.112 (1999); Concluding Observations on Australia, UN doc. CCPR/CO/69/AUS (2000); Concluding Observations on Denmark, UN doc. CCPR/CO/70/DNK (2000); Concluding Observations on Sweden, UN doc. CCPR/CO/74/SWE (2002).

Human Rights Committee, General Comment No. 23, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

Human Rights Watch, *What Will Happen if Hunger Comes? Abuses against the Indigenous Peoples of Ethiopia's Lower Omo Valley.* USA: Human Rights Watch, 2012.

Inter-American Court of Human Rights, Saramaka People v. Suriname, Judgment of November 28, 2007, IACtHR Series C, No. 172.

International Court of Justice, Separate opinion of Judge Yusuf in his advisory opinion on Kosovo's declaration of independence (July 22, 2010).

IWGIA, *The Indigenous World 2001–2002.* Copenhagen: IWGIA, 2002.

Kanyinke, Sena. "Africa Indigenous Peoples: Development with Culture and Identity: Article 2 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples." United Nations International expert group meeting, PFII/2010/EGM (New York, 2010): 1–12.

Martinez Cobo, Jose. "Study on the Problem of Discrimination against Indigenous Populations." Vol. 5, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986).

Mohammud Abdulahi. "The Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities." *International Journal on Minority and Group Rights* 14 (2007): 85–123.

Pentassuglia, Gaetano. "Indigenous groups and the developing jurisprudence of the African Commission on Human and Peoples' Rights: some reflections." *UCL Human Rights Review* 3 (2010): 150–163.

Scheinin, Martin. *Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights* (paper prepared for TorkelOppsahlsminneseminar, Norwegian Centre for Human Rights, University of Oslo, Norway, 2004): 1–17.

Smis, Stefaan, Dorothée Cambou, and Genny Ngende. "The Question of Land Grab in Africa and the Indigenous Peoples' Right to Traditional Lands, Territories and Resources." *Loyola of Los Angeles International and Comparative Law Review* 35 (2014): 493–535.

Stavenhagen, Rodolfo. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, submitted pursuant to Commission resolution 2001/57, UN Doc E/CN.4/2002/97 (2002).

Stavenhagen, Rodolfo. *Indigenous Peoples in Comparative Perspective – Problems and Policies*. UNDP, 2004.

Quane, Helen. "The Rights of Indigenous Peoples and the Development Process." *Human Rights Quarterly* 27/2 (2005): 652–682.

The World Bank, *Ethiopia Economic Update – Laying the Foundation for Achieving Middle Income Status* (press release of June 18, 2013).

UN Declaration on the Right to Development, UNGA Resolution 41/128 (1986).

UN Declaration on the Rights of Indigenous Peoples, UN Doc.A/Res/61/295 (2007).

CHAPTER 6

Foreign Direct Investment in Ethiopian Land

The Good, The Bad, and The Lessons to be Learned

Genny Ngende

Abstract

The Structural Adjustment Program (SAP) is modeled after a neo-liberal approach to development, under which the conditions set forth favor more economic development rather than a holistic approach. This holistic approach caters for not only economic advancement but also provides room for the fulfillment of socio-political, cultural, and economic rights. By examining the new right and liberal schools of thought, it is posited that the conditions in relation to foreign aid are constructed in line with the former school of thought. The consequence of this is one-dimensional economic reform. In considering that development is a multidimensional process, it is argued that subsequent policies adopted are likely to be flawed.

Keywords

Ethiopia – Structural Adjustment Program – human rights – investment – foreign aid

1 Introduction

Consensus exists among social scientists that development is multidimensional, consisting of economic, political, and social aspects. These economic, political, and social aspects are articulated in an array of international human rights instruments. Indeed, this nexus implies that policymakers when dealing with national development ought to integrate economic, political, and social approaches – in other words, socio-economic and political rights. Development can be achieved in numerous ways; however for the purposes of this paper, foreign aid and foreign direct investment are considered and discussed in detail.

Since the Structural Adjustment Program (SAP) attempts to divorce itself from human rights, can one argue that this can have an adverse impact on the development process? In examining this, I will premise my argument on both the liberal and new rights school of thought, by stating that the trappings of

 | DOI 10.1163/9789004280250_008

the SAP that have been identified by both schools of thought inevitably tarnish any subsequent program funded by the World Bank and International Monetary Fund (hereinafter referred to as the financial institutions). I will be examining development in the agricultural sector. It will be argued that the adoption of the Poverty Reduction Strategy Paper (PRSP) merely masks the underlying problem by focusing on the symptoms as opposed to the cause. Since foreign aid sets the economic scene for foreign direct investment, investments will operate based on policies funded by foreign donors. It would seem that the failure of any government policy or program lies with government officials. However, this paper argues that failure was destined from the onset because of the lack of human rights provisions in the SAP, thus undermining the development process.

Ethiopia will be used as a case study. Ethiopia is a particular case because, in spite of its high rates of economic growth, the nation suffers from widespread hunger and poverty. Interestingly enough, it is also heavily reliant on foreign aid, which accounts for 50 to 60 percent of its national budget. Further, there has been an exponential increase of foreign direct investment on the continent and Ethiopia has not been exempt from this phenomenon. Therefore, the following will be examined: foreign aid pattern in Ethiopia, the policies that have been adopted as result of foreign capital, the ramifications of those policies on foreign direct investment, and the individuals affected by such investment. In conclusion it will be argued that indeed a human rights-based approach to development is needed, in conjunction with a re-examination of the SAP.

2 The General Evolution of the Foreign Aid Narrative

Modern foreign aid can be traced back to colonialism, attached to which is the sense of responsibility to provide capital assistance. This sense of responsibility is not void of self-serving interests, nor can one completely deny an altruistic intent. A prime example of this can be found in the UK 1929 Colonial Development Act that made reference to Britain's responsibilities to its colonies on the one hand, and on the other hand emphasized the need for trade.[1] The connotation of foreign aid (and to a certain extent, what it denotes) had further been expanded by the Marshall Plan and Point IV of the Truman doctrine, which crystallized using foreign aid as a political tool.[2] Offering an

1 Bethany Barratt, *Human Rights and Foreign Aid: For love or money?* (New York: Routledge 2008), 17.

2 Ibid., 18.

exorbitant amount of capital to developing nations, in particular African states, as provisos to supporting the political agenda of the day was a strategy promoted by the U.S. and the Soviet Union during the Cold War. It is asserted that during the period between 1950 and 1970, Ethiopia received a combined amount of $600 million in aid from the U.S., the Soviet Union, and the World Bank.[3]

It is postulated by Barratt that the period between the 1960s and 1980s marked a paradigm shift in the manner in which foreign aid was examined, focusing on the recipient, and notably hinging on the prospects of development and poverty reduction.[4] This period is characterized by a comprehensive array of events, one in particular being widespread decolonization on the African continent. These newly sovereign African states now had political and economic aspirations that could come to fruition through trade. This newly found economic aspiration further exposed the resultant effect of decades of economic dependency: financial difficulties that had the effect of stifling development. Ethiopia (together with other African states) was marred by famine.[5] The events in Africa (and similar issues in other developing states) illustrate the lagging developmental progress of the South that was also plagued by poverty. The widening inequality of the north and south, even at the peak of foreign aid grants, failed to close the gap. This was, however, the catalyst to finding ways that foreign aid could in fact provide aid; hence it has been renamed 'development assistance' and/or 'development cooperation'.[6]

In lieu of the historical narratives, the contemporary view of foreign aid is that it is premised on assisting (economical, cultural, and/or geo-political) allies that lead to trade benefits for the donor, and the belief that development and economic growth will in turn translate into stability (in the developing state).[7] It must be highlighted that although there is now a more holistic approach to foreign aid, the political component has not been abandoned. The cold war agenda has merely been replaced by the war on terror. However, the addition of human rights aspects is an improvement from the past approach and indicative of a global economic and political edifice that views development as not only an embodiment of economic advancement. Consequently

3 Edmond J. Keller, *Revolutionary Ethiopia: From Empire to People's Republic* (Bloomington: Indiana University Press 1991), 79.

4 Barratt, *Human Rights and Foreign Aid*, 20.

5 Edmond J. Keller, "Drought, War and the Politics of Famine in Ethiopia and Eritrea," *The Journal of Modern African Studies* 30 (1992): 609.

6 Barratt, *Human Rights and Foreign Aid*, 20.

7 Ibid., 18.

foreign aid, as defined by the Development Assistance Committee of the Organization for Economic Cooperation and Development (OECD), is financial flows and technical assistance that serve to promote economic development and welfare. They are provided as either grants or subsidized loans, and attach conditions known as structural adjustment programs.[8]

3 The Structural Adjustment Program

As mentioned above, the 1980s ushered in a new outlook on developmental aid that was multidimensional and attempted to address the needs of the recipient. In addition to this metamorphosis came with it a change in gear from a state-centric power base to one in which the market was the focal point.[9] The international financial institutions were at the helm and, perhaps, the architects of this market-led approach. The Structural Adjustment Program (SAP) was the condition set for developing states to obtain loans. The conditions for structural adjustment can include: decreasing expenditure, devaluation of currencies, trade liberalization, privatization of state-owned enterprises, protecting the rights of foreign investors, and so forth.[10] They serve as a guarantee that the market would dictate trade, thus fostering an economic climate receptive of an ever increasing presence of multinational corporations (MNCS). It is stipulated in the New Partnership for African Development (NEPAD) Declaration that in order for the African continent to achieve the goal of reducing poverty by 5 percent by 2015, as set forth in the Millennium Development Goal, reliance is to be made on the investments of corporations.[11] The inference drawn here is that developing nations are in fact reliant on multinational corporations. As a result of this, multinational corporations have replaced official aid as the main source of development finance for Third World countries.[12]

8 Steven Radelet, "A Primer for Foreign Aid," Working Paper 92 (Center for Global Development, 2006), accessed July 2006, http://www.cgdev.org/files/8846_file_WP92.pdf.

9 M. Rodwan Abouharb, *Human Rights and Structural Adjustment* (New York: Cambridge University Press 2007), 3.

10 Ibid.

11 Elizabeth Asiedu and Kwabena Gyimah-Brempong, "The Effect of the Liberalization of Investment Policies on Employment and Investment of Multinational Corporations in Africa," *African Development Review* 20/1 (2008): 49, accessed April 10, 2013, DOI: 10.1111/j.1467-8268.2008.00176.x.

12 Susanne Soderberg, "Taming Corporations or Buttressing Market-led Development? A Critical Assessment of the Global Compact," *Globalizations* 4 (2007): 500.

Conversely, African states are engaged in a competition to attract foreign direct investment derived from MNCs. Consequently, they willingly incorporate the SAP into domestic policies.

Pundits have criticized the SAP on the grounds of political and human rights considerations. By the same token the merits of it have also been made based on those very same grounds. Human rights are seen to be compromised because the casualties of budget cuts, as a result of SAP, are often the health and education sectors, which are at the core of the rights to health and education. Abouharb in discussing the negative effects of the SAP refers to the austerity myth, which refers to the cutting of public service budgets which is viewed as inevitable collateral damage of structural adjustment.[13] In defence of the SAP, Rogoff claims that (African) states seek loans because they are in financial need, and due to such need had already cut funding to the public sector, independent of any condition set by foreign donors.[14] As a rebuttal, Abouharb makes claim to the fact that the pool of developing states seeking loans is not merely exclusive to those that are in financial dire straits and consequentially have reduced public spending, but also extends to those who do not fall under the abovementioned category.[15] The austerity myth correlates with the new right school of thought that views the role of the SAP as unleashing the free market by curtailing public spending, and the elimination of state subsidies to goods and services.[16] The new right further encourages abolishing the minimum wage legislation.[17] This speaks to the core of the right to fair labor practices. These arguments foil the more liberal camp that views the SAP as causing social disorder, and the general response to the social disorder would be to establish equity. The liberal camp is concerned with poverty and inequality.[18] Bar-On quotes Gilmore, whose argument is hinged on rectifying social disorder by forming a community. It is made clear that such a community or the creation of 'one nation' is a futile process unless the citizens of the community are protected and have benefits under the system.[19] The type of equality that the liberal camp is concerned with is social integration, social security, and equal opportunity.[20] The former is articulated by drawing on a

13 Abouharb, *Human Rights and Structural Adjustment*, 74.

14 Ibid.

15 Ibid., 75.

16 Arnon Bar-On, "Assessing Sub-Saharan Africa's Structural Adjustment Programmes: the need for more qualitative measures," *Journal of Social Development in Africa* 12 (1997): 15.

17 Ibid., 17.

18 Ibid., 18.

19 Ibid.

20 Ibid., 19.

shared commitment to community and its governance, which will instil a sense of equal worth and/or integration within this common culture. Economic development is instrumental in effectuating this. Social security is tied to social services that are to be accessible to all, irrespective of social-economic grouping or any other factors differentiating individuals. An important component of social services is preventing its derogation and inculcating a sense of security in that such services will be rendered. Equal opportunity is a complementary component of this, in that social services are effective when everyone has a fair claim. An example of this would be having a minimum core standard of health, housing, education, and so forth.[21] It should be noted that the point of convergence of both schools of thought is a belief in the market.

In 2002 the World Bank and IMF introduced the Poverty Reduction Strategy Paper (PRSP) that encourages a national outline of how states intend to reduce poverty.[22] In order for states to qualify for concessional and additional loans, they must outline how they intend to combat poverty in their respective states.[23] One can argue that this move was merely to appease the critics who, since the 1980s, have called for a radical introduction of human rights in the development discourse. On the other hand, others may argue that a consorted effort has been made as the PRSP coincides with the Millennium Development Goals (MDGs) of poverty reduction. In addition, the PRSP in encouraging states to draw up national poverty reduction plans reflective of the domestic needs gives them a sense of owning and deciding on their terms. This also attempts to lay to rest the argument that the national sovereignty of a state may be deemed to be compromised by an external entity (World Bank and IMF) dictating the terms of its domestic policy, as well as how and what such policy should resemble. One needs to ask the question whether the PRSP merely tackles the symptom (poverty) and disregards the cause (the SAP). The understanding is that the original conditions still stand, and there is merely an additional one. Would financial institutions reject a loan application if the poverty reduction plan stipulated that reducing poverty is hinged on re-examining and/or disregarding certain provisions of the SAP?

21 Ibid., 20.

22 International Development Association and International Monetary Fund, *The Federal Democratic Republic of Ethiopia: Joint Staff Advisory Note on Growth and Transformation* (Washington: International Monetary Fund, 2011), 1.

23 Ibid.

4 The Use of Foreign Aid for Development in Ethiopia

The total foreign aid to Ethiopia in the year 2008 amounted to $811.4 million.[24] It is noteworthy to emphasize the disparity in figures between 2008 and the previous year. In 2007, Ethiopia received $371.7 million, a considerably lower amount.[25] There has been a steady increase since 2008. In 2011, the World Bank Group gave $630 million towards the Promotion of Basic Services (PBS). The PBS gets further funding from the African Development Bank, the UK's Department for International Development (DFID), the European Union (EU), Austria, Italy, Germany, Irish Aid, and so forth.[26] In 2011, the UK DFID allocated $97.5 million to the PBS program and also made a contribution to the Productive Safety Net Program (PSNP), which tackles the issue of famine in the country.[27] With assistance from the World Bank, Ethiopia created the National Food Security Program (NFSP) whose function is to address food insecurity through a series of food and money transfers. The NFSP comprises three major components, namely the Productive Safety Net Program (PSNP), Other Food Security Program (OFSP) and the Voluntary Resettlement Program that relocates individuals from food insecure areas.[28] The aggregate budget of the PSNP, since its inception, has been $2.3 billion. The following donors have provided monetary assistance: DFID, USAID, World Bank Group, Irish Aid, the Canadian International Development Agency, Swedish International Development Agency, World Food Program, and the Netherlands.[29]

Over the years a great deal of capital has been injected into Ethiopia, which begs to question the reason for enormous capital contributions that seem to exponentially increase with the passing of time. Unlike its African counterparts, Ethiopia was never colonized and any attempt by affluent states to offer economic assistance cannot be attributed to an indirect attempt at maintaining some form of (political) control after decolonization.[30] Global

24 Peace Nganwa, "Ethiopia Resources for Poverty Eradication: A Background Paper," Report for Ethiopia on Poverty, Development Initiatives, accessed April 10, 2014, http://devinit.org/wp-content/uploads/2013/08/Ethiopia-Resources-for-poverty-eradication.pdf.

25 Ibid.

26 Luis Flores "Development Aid to Ethiopia Overlooking Violence, Marginalization and Political Repression," Oakland Institute Report, Oakland Institute, accessed November 5, 2013, http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Brief_Development_Aid_Ethiopia.pdf, p. 13.

27 Ibid.

28 Ibid.

29 Ibid., 19.

30 Ibid., 14.

price volatility, environmental degradation, issues regarding food security, and the need for alternative energy sources have all culminated in an exponential increase in demand for farmland. With regard to the economic crisis, the advent collapse of the U.S. housing and derivative markets ushered in a paradigm shift in investment choices; subsequently investors sought other avenues to "channel their funds."[31] This argument is further qualified by Stebek who provides an account of the surge of farmland transactions as being motivated by hikes in food prices (stemming from the global financial decline) that led foreign investors to opt to lease and/or purchase land abroad to ensure food security.[32] Since variations in temperature and rainfall are determinant factors In agricultural production, climatic changes have also adversely affected food security, thus intensifying the search for arable land. Alternative energy sources in the form of bio-fuel have further contributed to the rise in commercial farmland transactions.[33] Saturnino also references the abovementioned factors in triggering a "re-evaluation for farmland ownership."[34] The proliferation in land acquisitions and leases is best illustrated in the demand for 4 million hectares of land in 2008 that rose to a demand for 56 million hectares before the end of 2009.[35] The World Bank has reported that more than 70 percent of demand has been for African land; states like Ethiopia, Sudan, and Mozambique have concluded lease and/or sale agreements amounting to millions of hectares.[36] Indeed, the International Monetary Fund (IMF), the World Bank, and bilateral and multilateral donors have continuously supported economic policy reform in Ethiopia. Economic assistance from all the donors is directly or indirectly geared towards agricultural modernization.

The search for what is considered to be empty land has led multinational corporations (and states alike) to regions where so-called 'empty' land is in abundance. The term 'empty' denotes land that is un-used, under-used, or fallow.[37]

---

31 Phoebe Stevens, "The global land grab: an analysis of extant governance institutions," *International Affairs Review* 20 (2011): 1.

32 Elias N. Stebek, "Investment: Land Contracts with Foreign Investors and Ethiopia's Normative Setting Focus," *Mizan Law Review* 5 (2011): 175.

33 Stevens, "The global land grab," 3.

34 Saturnino M. Borras Jr. et al., "Towards a better understanding of global land grabbing: an editorial introduction," *Journal of Peasant Studies* 38/2 (2011): 209.

35 Klaus Deininger, *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits* (Washington: World Bank Report, 2011).

36 Ibid.

37 "AFRICA: Great Land Grab," *Africa Research Bulletin*: *Economic, Financial and Technical Series* 47 Issue 5 (2010): 18694A, accessed April 10, 2013, DOI: 10.1111/j.1467-6346.2010.03289.x.

The purchased or leased land becomes a source for fuel and for the production of food in the event of future price increases.[38] Since the economic interests of donors lie in the area of agriculture, they are compelled to fund any project that furthers that interest.

The projects and schemes being funded are reminiscent and underscore the structural adjustment critiques of the liberal school of thought. In one form or another, foreign capital is concentrated on reversing the effect of the SAP, more specifically the aspect concerned with poverty and famine. It is a fact that an interest in agricultural land has attracted funding and it is also a fact that over the last 20 years the adverse effects of the SAP have been at the forefront of discussion. Has funding to the Productive Safety Net Program (which falls under the National Food Security Fund) and Voluntary Resettlement Program resulted in success?

More than 80 percent of Ethiopia's population live in rural areas and are reliant on agriculture for their livelihood, making the issue of poverty and famine come very much under the auspice of agricultural development. The Productive Safety Net Program was created in 2005 to curb the adverse effect of famine caused by drought. The program targets extremely poor households in two ways, namely through public works and direct support. In respect to the former, beneficiaries were paid 8 Ethiopian birr (in December 2013 this amounted to $0.42) in exchange for labor.[39] Direct support, in the form of money or food, is given to beneficiaries whose primary income earners are elderly or disabled.[40] This program can also be accompanied by the Other Food Security Program through which beneficiaries receive at least one of the following: access to credit, agricultural extension services, technology transfer, and irrigation and water harvesting schemes.[41] According to the government more than 7 million people have received PSNP transfers and from 2005 to 2007, 3.5 million households received credit.[42] The World Bank has reported progress based on the first two years of the program where beneficiaries had

38 Saturnino M. Borras Jr. et al., "Towards a better understanding of global land grabbing," 209.

39 Daniel. O. Gilligan, "The Impact of Ethiopia's Productive Safety Net Programme and Its Linkages," *Journal of Development* 45 (2009): 1684.

40 Ibid., 1685.

41 Berhane et al., "The Impact of Ethiopia's Productive Safety Nets Household Asset Building Programme, 2006–2010," Report of the International Institute Food Policy Research Institute (International Food Policy Research Institute, 2011), 1.

42 Ibid.

risen from 4.83 million to 7.2 million.[43] These very same sentiments were reiterated by the Ethiopian government which claimed that the PSNP (in conjunction with the Other Food Security Program) has had a positive impact.[44] Nonetheless, food insecurity was still a matter of great concern, so much so that in 2009 the government re-launched the Food Security Program by increasing efforts in the Productive Safety Nets Program by replacing the Other Food Security Program with the Household Asset Building Program.[45] During the past two decades, Ethiopia has been the largest recipient of food aid in Africa. During the droughts of 1999/2000 and 2002/2003, the U.S. gave $500 million worth of aid. It is reported that in some regions, 75 percent of the population were beneficiaries.[46] This leads to the belief that a vast number of Ethiopians are reliant on food aid. This argument is supported by Peter D. Little in his article dealing with food dependency in north-eastern Ethiopia.[47] This assertion is further corroborated by Getachew et al.[48]

The Voluntary Resettlement Program is implemented under four pillars, namely voluntariness, underutilized land, consultation with the host communities, and proper preparation.[49] At the time of its inception the Voluntary Resettlement Program was premised on relocating 2.2 million (this was the figure in 2003) destitute individuals from food insecure regions of central and eastern highlands to the western lowlands of the country.[50] The logic behind this program is that individuals will move to regions that are more secure because of food accessibility. It is argued by Hammond that this program is heavily flawed since individuals are located to remote areas with little access to roads and the conditions where they have settled prevents them from realizing

43 Productive safety Net Project (PSNP), accessed November 5, 2013, http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,contentMDK:21072837~menuPK:1804110~pagePK:146736~piPK:146830~theSitePK:258644,00.html.

44 Berhane et al., "The Impact of Ethiopia's Productive Safety Nets," 1.

45 Ibid.

46 Peter D. Little, "Food Aid Dependency in North Eastern Ethiopia: Myth or Reality?" *World Development* 36 (2008): 874.

47 Ibid.

48 Getachew Shambel Endris and Alemu Sokora Nenko, "The Food Aid Scenario in Ethiopia: pro-poor or pro-politics?" *Developing Country Studies* 3/5 (2013): 167.

49 Megerssa Tolessa Walo, "Contradictions between rhetoric and practice: the case of intra-regional resettlement programme in northern Ethiopia," *Journal of Sustainable Development* 14 (2012): 41.

50 Laura Hammond, "Strategies of invisibilization: how Ethiopia's Resettlement Programme hides the poorest of the poor," *Journal of Refugee Studies* 21 (2008): 517.

the benefits promised.[51] These unfavorable conditions include: an absence of basic services and the land provided is heavily forested. Another point of concern is the presence of the trypanosomiasis-carrying tsetse fly.[52] This parasitic disease of both humans and animals can be fatal, especially so in the absence of basic services. However, Hammond does acknowledge that some areas have fertile land, and it would seem justifiable for the government to relocate individuals to those areas.[53] In referring to fertile land, the operative word is 'some'; therefore, there was/is a limited number of arable lands. The result of this has been that individuals have plunged back into poverty, and dependency on food aid has continued.[54]

5 Foreign Direct Investment in Ethiopian Land

The liberalization of the market in 1992 ushered in a new era that released entrepreneurs and potential entrepreneurs from bureaucratic rule, and subsequently encouraged foreign investment.[55] Prior to that year, the country was embroiled in an armed conflict with Eritrea, which undoubtedly discouraged investment. Although the country had been a socialist nation, evidence shows that foreign investment (even if it took the form of a joint venture with the government) had always been on the agenda. On January 22, 1983, the Provisional Military Administrative Council (PMAC) passed a new law (Joint Venture Establishment Proclamation no. 235/1983) on joint ventures between the government and foreign private or state capital.[56] Even though this law was passed, the political and economic climate at the time was not attractive to foreign investors because the socialist period (1975 to 1991) was marred by the nationalization of private and foreign-owned enterprises. Moreover, a few years after this (1991 until 1999), the country was still not at a point where it could attract foreign investment. It is worth noting that during the 1960s the markets were open for trade, especially in agricultural products, but this changed drastically after the radical restructuring of the economic system. After decades of losing foreign investors, internal structuring was needed.

51 Ibid., 518.

52 Ibid.

53 Ibid., 522.

54 Ibid., 523.

55 *Investment and Innovation Policy Review on Ethiopia* (Geneva: UNCTAD, 2002), 75.

56 Mengistu Fisseha Tsion, "Highlights of Ethiopia's New Joint Venture Law," *Review of Socialist Law* 11 (1985): 161.

Indeed, domestic investment had rapidly increased during the early 1990s, but the gap between domestic investment and savings was, at the time, too wide.[57] The only solution was to attract foreign aid and subsequently, foreign direct investment.

A bevy of macro policy reforms have been implemented, namely: the liberalization of trade policy, privatization of public sector enterprises, financial sector reforms, and deregulation of prices and exchange rate controls.[58] Private sector institutions, such as banks, have been permitted to operate. This is a positive change because the money is no longer in the hands of the state and therefore free from bureaucratic rule, subsequently boosting investor confidence. Investment is encouraged in almost all economic sectors. There is a 100 percent exemption from customs duties and import taxes on all capital equipment, export taxes (except for coffee), as well as income holidays varying from one to five years, and so forth. There is also a guarantee against expropriation (except if it is in the public's interest).[59] Indeed, these reforms have occurred to attract foreign direct investment, and have been implemented according to the Structural Adjustment Program.

Agriculture is a large and important sector, and land is an expensive commodity in developed countries; multinational corporations (as well as states and other institutions) are in the search for inexpensive land, which is in abundance in Ethiopia. Initially, government policy was in favor of small farmers when it came to land. However, this has changed. Evidence of a shift can be traced as far back as 2001 when a state document unequivocally spoke of a 'role change' from peasant cultivation to capitalist farming – in other words, government supporting large-scale foreign investment.[60] This coincides with the new five-year Growth and Transformation Plan (GTP) that commenced in 2011 and is premised on meeting the Millennium Development Goal plans by 2015, as well as transforming the country into what it terms 'middle income'. The success of the GTP is posited on the commercialization of farming land.[61] Overall, the economic reform reflects the political shift that has taken place, from socialism to capitalism, thus extending an invitation to foreign investors.

In light of these developments, investors have positively responded to the economic metamorphosis in the country, as British, American, Chinese, and

57 UNCTAD, Investment and Innovation Policy Review, 10.

58 Ibid., 19.

59 Ibid., 19.

60 Dessalegn Rahmato, "Land to Investors: Large Scale Land Transfers in Ethiopia," Forum for Social Studies Report (Addis Ababa: Forum for Social Studies, 2011), 11.

61 Ibid.

Saudi Arabian firms (just to name a few) have invested or are currently investing in the country. It has been asserted by GRAIN that in 2011, over 3.6 million hectares of land was leased to foreign firms, namely: Indian, Saudi Arabian, European, and Israeli firms.[62] Karuturi (an Indian MNC) has a lease agreement providing it access to 300,000 hectares in Gambela and 11,000 hectares in Oromia.[63]

The large-scale transactions call for an analysis of the negotiation process involved. The Ministry of Agricultural and Rural Development (MOARD) has formulated rules and guidelines for land transfers, rent assessment, and land use practices, which have not been adopted by the Regions and the Federal government.[64] Currently, the procedure merely consists of prospective investors filling out a form that attaches no stringent commitments or obligations, nor are there mechanisms in place to verify the accuracy of information furnished.[65] The resultant effect of this is a hyperbolized version of how much investors are willing to invest and the benefits their project will yield. Once it is determined which land will be transferred, the investor is required to submit an environmental impact assessment report that is reviewed by the MOARD, and in most cases the application is approved.[66] This foils the process in Oromia, which follows a stricter process by obliging its Regional Land and Environmental Protection Bureau to identify the land, assess the environmental report, and provide periodic follow up.[67] The woreda (district) authorities are tasked with handling the grievances of the local community.[68] The effect of the contrasting procedures is a lack of clarity and more importantly the grievances of local stakeholders are more numerous in other regions and less so in Oromia where stringent regulations are put in place. The adverse impact exposes weaknesses in the GTP program, the government structure in place to implement the program, as well as the legal infrastructure for remedial redress in the event of legal infringement, therefore raising the question of who bears responsibility and/or accountability and to whom. If such answer is not attainable it sets the stage for a climate of impunity.

62 GRAIN, *Land Grabbing and the Global Food Crisis* (Report of GRAIN: December 2011), 23.

63 Ibid.

64 Dessalegn Rahmato, "Large Scale Land Transfers in Ethiopia," 14.

65 Ibid., 14.

66 Ibid.

67 Ibid., 15.

68 Ibid.

6 The Legal Ramification of Foreign Aid and FDI Policies on Local Stakeholders

Article 40 of the 1995 constitution of the Federal Democratic Republic of Ethiopia states: "the right to ownership of rural land and urban land, as well as of all natural resources is exclusively vested in the state and the peoples of Ethiopia."[69] There are three main issues that need to be discussed here. First, what are the implications of ownership of land by the state? Second, can ownership also be vested in the 'peoples of Ethiopia', as stated in article 40? Third, if ownership by individuals is established, what factors can lead to government derogating from this right?

All land transactions by multinational corporations, as discussed above, were lease contracts. A lease contract does not entail that ownership has been transferred. Land is merely occupied by these corporations. The legal status of the respective parties determines whose right is superior. Indeed, an ownership right enables the owner to alienate the property, whereas the right of use (which is generally enjoyed in a lease agreement) is limited to precisely that, i.e., use. The terms of the contract govern what can or cannot be done. As a general rule the leaseholder (MNC) cannot sell the property. Therefore, upon termination of the said agreement, the property is to be transferred back to the original owner, the state. However, the matter becomes more complex when presented with multiple right holders occupying the same space with different ways of exercising their right of use, as is often the case in land transactions in Africa, and particularly Ethiopia. The stakeholders include: the state, the foreign investor, and the land occupants (Ethiopian citizens occupying land). Although the constitution recognizes communal land rights, state practice does not. As a result of a long debate on whether ownership lies with the state or the peoples of Ethiopia, the state has unilaterally declared itself owner.[70] There are both positive and negative aspects of state ownership of land. Once again, unlike most African states in which ownership is transferred, Ethiopia presents a particular case because retaining ownership allows a re-negotiation of the terms of the lease agreement. A prime example of this would be the government's renegotiation with Karuturi (the Indian multinational

69 See Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, *Federal Negarit Gazeta*, Year 1, No 1 Addis Ababa, August 21, 1995 (hereinafter referred to as the 1995 constitution).

70 Mohammud Abdulahi, "The legal status of the communal land holding system in Ethiopia: the case of Pastoral communities," *International Journal on Minority and Group Rights* 14 (2007): 85.

corporation). Five years after leasing land, the company had failed to make progress, which resulted in Ethiopia reducing the number of hectares leased from 300,000 to 100,000 and also prompted the government to re-evaluate other lease agreements.[71] However, the negative aspect of state ownership is that even if the right of use of landholders is recognized, it may give the government carte blanche to terminate such rights. Holders (Ethiopians) of land who have used the land in a manner deemed to be improper may lose their land rights.[72] Unfortunately, the practices of the inhabitants may be viewed as improper usage, for instance swiddening (practiced by the Majangir) at times entails the burning of land. Likewise, under the practice of transhumance cultivation (practiced by Nuers) land may be perceived to be unused.[73] Consequently, the leasing of 'unused', 'under-used', and 'fallow' land is considered justifiable under the abovementioned provision. Another factor to consider is expropriation for the public interest. Can one say that foreign direct investment in agricultural land is in the best interest of the public?

Article 40(1) allows private ownership by citizens, and article 40(3) unequivocally vests ownership of land in the 'peoples of Ethiopia'. The preamble of the constitution makes reference to 'nations', 'nationalities', and 'peoples of Ethiopia'.[74] Further, article 9(4) of the constitution stipulates that all international agreements ratified by the state are deemed to be part of domestic law.[75] The International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic and Social Rights (ICESCR) provide for the recognition of individual and collective/group rights.[76] Article 1 of the ICCPR stipulates "all peoples have the right to self-determination…freely pursue their economic, social and cultural development."[77] Article 27 further

71 Amen Sethi, "Karuturi debacle prompts Ethiopia to review land policy," The Hindu, June 1, 2013, accessed November 5, 2013, http://www.thehindu.com/news/international/world/karuturi-debacle-prompts-ethiopia-to-review-land-policy/article4772306.ece.

72 Dessalegn Rahmato, "Large Scale Land Transfers in Ethiopia," 6.

73 Human Rights Watch, "Waiting here for death forced displacement and villagization in Ethiopia's Gambela region," HRW Report (Human Rights Watch, 2012), 12.

74 See the 1995 constitution.

75 Adem Kassie Abebe, "Human Rights under the Ethiopian Constitution: a Descriptive Overview," *Mizan Law Review* 5 (2011): 41.

76 Mohammud Abdulahi, "The legal status of the communal land holding system in Ethiopia," 92.

77 Martin Scheinin, "Indigenous People's Land Rights under the International Covenant on Civil and Political Rights," Report of Norwegian Centre for Human Rights (April 28, 2004), accessed November 5, 2013, http://www.galdu.org/govat/doc/ind_peoples_land_rights.pdf, 1.

posits that states should not stifle the right of ethnic, religious, or linguistic minorities to enjoy their culture, to profess their own religion, or to use their own language,[78] even though both articles do not mention the word 'indigenous' (article 1 refers to 'peoples' and article 27 mentions 'minorities'). Indigenous people fall under the category of peoples and minorities, that is, as far as the Human Rights Committee is concerned.[79] Moreover article 17 asserts that no one is to be subjected to arbitrary or unlawful interference with their privacy, family, and home.[80] The ICESCR provision is further qualified by the Committee on Economic, Social and Cultural Rights (CESCR) in its 1991 General Comments that states that all persons should have legal protection against forced eviction, harassment, and other threats.[81] Further, forced evictions are "prima facie incompatible with the requirements of the Covenant (ICESCR)."[82] The word 'peoples' in the African Charter on Human and Peoples' rights is a clear indication that communal/collective rights is one of the features. Under article 17, states have a duty to promote and protect the morals and traditional values recognized by the community.[83] A close inspection of the domestic law reveals that Ethiopia is signatory to international laws recognizing the right and protection of indigenous and minority groups. Article 13(2) of the constitution requires that the bill of rights be interpreted in line with the Universal Declaration of Human Rights, the two international covenants, and other international instruments it adopts.[84] With regard to the abovementioned legal instruments (to which Ethiopia is a party) the 'peoples of Ethiopia' have a right of ownership over the land which they inhabit.

Regarding ownership rights of the indigenous and minority groups, state practice and the constitution are in opposition. Article 9(1) of the constitution affirms the supremacy of the constitution.[85] Therefore, parliamentary acts have to conform to it. What would justify the state derogating from this? If the rights of indigenous and minority groups were recognized, would the leasing of land be hindered in any way? One may argue that the neo-liberal approach calls for privatization and since land is owned publicly, Ethiopia does not

78 Ibid.

79 Ibid., 3.

80 United Nations International Covenant on Civil and Political Rights of December 16, 1966.

81 General comment 7 on the right to housing and forced evictions, accessed November 5, 2013, http://www.escr-net.org/docs/i/425237.

82 Ibid.

83 African Charter on Human and Peoples' Rights of June 27, 1981.

84 Adem Kassie Abebe, "Human Rights under the Ethiopian Constitution," 47.

85 See the 1995 constitution.

conform to this. However, privatization is not the only condition of the Structural Adjustment Program; it is only a microcosm of neo-liberalism. One may view the classical neo-liberal approach as placing a larger emphasis on economic development, and it is perhaps for this purpose that financial institutions sought to rectify such viewpoint by creating the Poverty Reduction Strategy Paper. As stated above, 80 percent of the population relies on land for their livelihood. Landholders, who have lost their right of use for whatever reason, also lose their land. A loss of land rights translates into poverty.

What happens to the individuals once the land believed to be un-used, underused, or fallow is leased? The large-scale land transactions are valued at millions of dollars, and the size of land leased reflects this. On account of this, the number of individuals who live on the land can be in the millions, thus making relocation an astronomical task. The government has proceeded to do so through its Villagization Plan or Voluntary Villagization Scheme.[86] Under the Voluntary Villagization Scheme rural communities are relocated to regions where they would have access to social and economic infrastructures, and where there is food security.[87] The four pillars of the Voluntary Villagization Scheme are: voluntariness, availability, under-utilized land, and consultation with host communities.[88] There are numerous challenges to the Voluntary Villagization Scheme, namely under-implementation, lack of voluntarism, discrepancies between promises made by government and practical implementation, and the continued state of poverty and food insecurity.[89] Moreover, negative consequences of villagization have been noted to be environmental, socio-cultural, and economic.[90] As previously discussed, one of the factors fueling the global interest in farmland is environmental degradation, which has adversely impacted on food security. Although one of the aims of the villagization scheme is to provide food security, one of the many challenges noted has been food insecurity and poverty in some of the relocated lands. In spite of introducing features of human rights (improving access to social and economic infrastructures), it appears that much still needs to be improved.

86 Guyu Ferede Daie, "Voluntary Villagization Scheme (VVS) for transforming semi-pastoral communities in Benishangul-Gumuz region, north-western Ethiopia: challenges and local development indicators," *Journal of Sustainable Development in Africa* 14 (2012): 186; Human Rights Watch, Waiting here for death, 162.

87 Ibid.

88 Ibid., 163.

89 Guyu Ferede Daie, Voluntary Villagization Scheme, 186.

90 Ibid., 187.

7 Human Rights-Based Approach to Development

One cannot divorce the Structural Adjustment Program from human rights. To buttress this assertion, let us consider some of the general conditions set by the financial institutions. States are encouraged to cut public service budget, which could translate into decreasing funding in the health sector, or cutting down on government subsidies on food staples, education, or housing sectors.[91] These sectors are directly related to the rights to health, education, and shelter/housing. The financial institutions have incorporated the Poverty Reduction Strategy Paper that tackles the issue of food insecurity. Poverty is characterized by insufficient command over publicly provided goods and services, as well as a lack of accessibility to communally owned and managed resources; lastly it is an inadequate command over resources that are made public through formal and informal networks of mutual support.[92] This relates to a minimum core standard of public delivery. Indeed, policies are shaped by norms and standards. International human rights can effectively shape the normative framework of international and national policies, especially poverty reduction strategies.[93] Further, anti-poverty policies are effective, equitable, and sustainable if they are premised on international human rights.[94] This can extend to the right to property and/or the right to equality when attempting to access state programs or when applying for employment. This is the case because the goal of the anti-poverty discourse is to ensure that everyone has just enough to survive. Equity considerations and elements that need to be in place for this to be a possibility come into play.

In 1986 the UN General Assembly accepted the Declaration on the Human Right to Development (hereinafter referred to as the Declaration).[95] It stipulates that it is:

> a comprehensive economic, social, cultural and political process in which free and meaningful participation is necessary for the constant improvement of the well-being of the entire population and all individuals.[96]

---

91 Cypher, James, M. and James L. Dietz. *The Process of Economic Development* (New York: Routledge, 2004), 506.

92 Office of the High Commission for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework* (Geneva: Office of the High Commission for Human Rights, 2004), 2.

93 Ibid., 8.

94 Ibid., 3.

95 Brigitte I. Hamm, "Human Rights Based Approach to Development," *Human Rights Quarterly* 23 (2001): 1005.

96 Declaration on the Right to Development of December 4, 1986.

Although the Declaration acknowledges the pivotal role of the human rights instruments that exist, it singles out the ICCPR and ICESCR.[97] In so doing, the Declaration attempts to bring together first and second-generational rights, which have traditionally been perceived as being distinct and separate. Human rights and development have also been viewed as distinct and separate, and the Declaration reconciles this. In 1998 the World Bank stated "creating the conditions for the attainment of human rights is a central and irreducible goal of development."[98] Therefore, the case for a human rights approach to development has been made by the World Bank. In other words, the pendulum of conditionality of loans is leaning towards the liberal school of thought. It, however, remains to be seen whether this holds true in practice.

8 Conclusion

The demand for farmland has risen because the global financial crisis has led to hikes in food prices, which has invariably resulted in an insatiable quest for arable land in order to prepare for the possibility of future hikes. Foreign donors and investors are, therefore, concerned with food security. Similarly, the Ethiopian government is concerned with food security. Both parties enter into lease agreements with the belief that their respective objectives will be met. In an attempt to achieve the objectives, the government created the Productive Safety Net Program (PSNP) and other similar projects to combat food insecurity. This program has since crumbled under the weight of the enormity of food scarcity. In addressing the exponential increase of food insecure communities, the Voluntary Resettlement Plan (VRP) was introduced in an attempt to relocate the communities to food secure regions, which experienced dismal results. Communities once again experienced poverty and potentially needed to rely on the PSNP. Since the PSNP is heavily funded by foreign donors, communities become dependent on aid. Moreover, the addition of food insecure communities to a program that is already overwhelmed will lead to the need to relocate to more favorable regions, once again making use of the services of the VRP. Thus, communities are in a perpetual cycle.

The issue of food security also emerges when dealing with lease agreements between MNCs and the state. The fact that the constitution recognizes

97 Ibid.

98 Ana Palacio, "The Way Forward: Human Rights and the World Bank," October 2006, accessed April 15, 2014, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:21106614~menuPK:445673~pagePK:64020865~piPK:149114~theSitePK:445634,00.html.

communal rights has not prevented the state from assuming primary ownership over all lands; jeopardizing the livelihoods of those dependent on land. The Voluntary Villagization Scheme is similar to the Voluntary Resettlement Plan since the end result is that communities are once again uprooted from their homes, and the potential of exposure to food insecurity is high.

The good or positive element of this scenario is that a demand for land slightly puts the government in a bargaining position. In addition, state ownership allows for renegotiation if there is a need. The bad or negative aspect is that even if parties renegotiate terms of the contract, Ethiopian landholders are still left vulnerable to the perils of landlessness. They are exposed to poverty because of the so-called public interest to expropriate land, which will most likely always trump communal land rights. Where the goal of acquiring farmland by foreign donors and investors has been met, the goal of the government in eradicating poverty has yet to be fulfilled. Interestingly enough, both the government and foreign actors are of the belief that investment in Ethiopian land will yield their respective required result. The lesson to be learned from this is that the suspensive conditions of loan agreements promote economic advancement at the benefit of international investors and to the detriment of the country. Encouraging states to outline an anti-poverty plan is a futile exercise because the problem lies with the Structural Adjustment Program itself.

Bibliography

Abouharb, M. Rodwan. *Human Rights and Structural Adjustment*. New York: Cambridge University Press, 2007.

Adem Kassie Abebe. "Human Rights under the Ethiopian Constitution: a Descriptive Overview." *Mizan Law Review* 5 (2011): 41–71.

"AFRICA: Great Land Grab." *Africa Research Bulletin: Economic, Financial and Technical Series* 47/5 (2010): 18694A–18694C. Accessed April 10, 2013. DOI: 10.1111/j.1467-6346.2010.03289.x.

Asiedu, Elizabeth, and Kwabena Gyimah-Brempong. "The Effect of the Liberalization of Investment Policies on Employment and Investment of Multinational Corporations in Africa." *African Development Review* 20/1 (2008): 49–66. Accessed April 10, 2013. DOI: 10.1111/j.1467-8268.2008.00176.x.

Bar-On, Arnon. "Assessing Sub-Saharan Africa's Structural Adjustment Programmes: the need for more qualitative measures." *Journal of Social Development in Africa* 12 (1997): 15–27.

Barratt, Bethany. *Human Rights and Foreign Aid For love or money?* New York: Routledge, 2008.

Berhane, Hoddinott, Kumar, and Taffesse. "The Impact of Ethiopia's Productive Safety Nets Household Asset Building Programme." Report of the International Food Policy Research Institute, December 30. Washington: International Food Policy Research Institute, 2011.

Cypher, James, M. and James L. Dietz. *The Process of Economic Development*. New York: Routledge, 2004.

Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, *Federal Negarit Gazeta*, Year 1, No 1 Addis Ababa, August 21, 1995.

Declaration on the Right to Development of December 4, 1986.

Deininger, Klaus. *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits*. Washington: World Bank Report, 2011.

Dessalegn Rahmato. "Land to Investors: Large Scale Land Transfers in Ethiopia." Forum for Social Studies Report. Addis Ababa: Forum for Social Studies, 2011.

Flores, Luis. "Development Aid to Ethiopia Overlooking Violence, Marginalization and Political Repression." Oakland Institute Report, Oakland Institute. Accessed November 5, 2013. http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Brief_Development_Aid_Ethiopia.pdf.

Getachew Shambel Endris and Alemu Sokora Nenko. "The Food Aid Scenario in Ethiopia: pro-poor or pro-politics?" *Developing Country Studies* 3/5 (2013): 167–173.

Gilligan, Daniel. O. "The Impact of Ethiopia's Productive Safety Net Programme and Its Linkages." *Journal of Development* 45 (2009): 1–19.

GRAIN. *Land Grabbing and the Global Food Crisis*. Report of GRAIN: December 2011.

Guyu Ferede Daie. "Voluntary Villagization Scheme (VVS) for transforming semi-pastoral communities in Benishangul-Gumuz region, north-western Ethiopia: challenges and local development indicators." *Journal of Sustainable Development in Africa* 14 (2012): 241–274.

Hamm, Brigitte I. "Human Rights Based Approach to Development." *Human Rights Quarterly* 23 (2001): 1005–1031.

Hammond, Laura. "Strategies of invisibilization: how Ethiopia's Resettlement Programme hides the poorest of the poor." *Journal of Refugee Studies* 21 (2008): 517–536.

Human Rights Watch. "Waiting here for death forced displacement and villagization in Ethiopia's Gambela region." HRW Report. Human Rights Watch, 2012.

International Development Association and International Monetary Fund. *The Federal Democratic Republic of Ethiopia: Joint Staff Advisory Note on Growth and Transformation*. Washington: International Monetary Fund, 2011.

Keller, Edmond J. "Drought, War and the Politics of Famine in Ethiopia and Eritrea." *The Journal of Modern African Studies* 30 (1992): 609–624.

Keller, Edmond J. *Revolutionary Ethiopia: From Empire to People's Republic*. Bloomington: Indiana University Press, 1991.

Little, Peter D. "Food Aid Dependency in North Eastern Ethiopia: Myth or reality?" *World Development* 36 (2008): 860–874.

Megerssa Tolessa Walo. "Contradictions between rhetoric and practice: the case of intra-regional resettlement programme in northern Ethiopia." *Journal of Sustainable Development* 14 (2012): 41–62.

Mengistu Fisseha Tsion. "Highlights of Ethiopia's New Joint Venture Law." *Review of Socialist Law* 11 (1985): 161–171.

Mohammud Abdulahi. "The legal status of the communal land holding system in Ethiopia: the case of Pastoral communities." *International Journal on Minority and Group Rights* 14 (2007): 85–125.

Nganwa, Peace. "Ethiopia Resources for Poverty Eradication: A Background Paper." Report for Ethiopia on Poverty, Development Initiatives. Accessed April 10, 2013. http://devinit.org/wp-content/uploads/2013/08/Ethiopia-Resources-for-poverty-eradication.pdf.

Office of the High Commission for Human Rights. *Human Rights and Poverty Reduction: A Conceptual Framework*. Geneva: Office of the High Commission for Human Rights, 2004.

Palacio, Ana. "The Way Forward: Human Rights and the World Bank." October 2006. Accessed April 15, 2014. http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:21106614~menuPK:445673~pagePK:64020865~piPK:149114~theSitePK:445634,00.html.

Radelet, Steven. "A Primer for Foreign Aid." Working Paper 92 (Center for Global Development, 2006). Accessed July 2006. http://www.cgdev.org/files/8846_file_WP92.pdf.

Saturnino M. Borras Jr., Ruth Hall, Ian Scoones, Ben White, and Wendy Wolford. "Towards a better understanding of global land grabbing: an editorial introduction." *Journal of Peasant Studies* 38/2 (2011): 209–216.

Scheinin, Martin. "Indigenous People's Land Rights under the International Covenant on Civil and Political Rights." Report of Norwegian Centre for Human Rights (April 28, 2004). Accessed November 5, 2013. http://www.galdu.org/govat/doc/ind_peoples_land_rights.pdf.

Sethi, Amen. "Karuturi debacle prompts Ethiopia to review land policy." The Hindu, June 1, 2013. Accessed November 5, 2013. http://www.thehindu.com/news/international/world/karuturi-debacle-prompts-ethiopia-to-review-land-policy/article4772306.ece.

Stebek, Elias N. "Investment: Land Contracts with Foreign Investors and Ethiopia's Normative Setting Focus." *Mizan Law Review* 5 (2011): 175–214.

Stevens, Phoebe. "The global land grab: an analysis of extant governance institutions." *International Affairs Review* 20 (2011): 1–21.

Soderberg, Susanne. "Taming Corporations or Buttressing Market-led Development? A Critical Assessment of the Global Compact." *Globalizations* 4 (2007): 500–513.

United Nations International Covenant on Civil and Political Rights of December 16, 1966.

PART 3

Integrating Human Rights in Development

CHAPTER 7

Market Development and Human Rights Protection

Enforcing the UN Guiding Principles on Business and Human Rights in Ethiopia

Solomon Abay Yimer

Abstract

This study assesses the need to enforce the UN Guiding Principles on Business and Human Rights in Ethiopia. The human rights violations by business entities in the country and the governmental and non-governmental interventions are discussed to identify the shortcomings. The development, content, and debate on international enforcement of the UN Principles are discussed to draw lessons on their use. It is argued that integrating market development and human rights protection in the country requires tripartite action by the government, business entities themselves, and non-governmental organizations and other non-business entities, and that enforcing the UN Principles in the country will be useful for this.

Keywords

market development – human rights – human rights violations – human rights protection – UN Guiding Principles – Ethiopia

1 Introduction

Following the international rise of a free market policy in the post-1990s, the UN has issued two sets of principles which aim at enhancing the horizontal application of human rights (between business entities and individuals) along with the historic vertical application (between individuals and governments). The first set, i.e., the 'Global Compact Principles', requires business entities to support and respect the protection of internationally proclaimed human rights and to make sure that they are not complicit in the abuse of human rights.[1] The

1 See Principles 1 and 2 of the Global Compact 2000 (hereafter referred to as the Global Compact Principles), accessed August 15, 2013, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html.

 | DOI 10.1163/9789004280250_009

second set, i.e., the 'Guiding Principles on Business and Human Rights', sets principles in areas of the state's duty to protect human rights, the corporate responsibility to respect human rights, and the state's duty to provide for access to remedies.[2] The principles are grounded in recognition of the obligation of the state to respect, protect, and fulfill human rights and fundamental freedoms, the duty of business entities to comply with applicable laws and to respect human rights, and the need for rights and obligations to be matched with appropriate and effective remedies when breached.

Ethiopia has adopted a free market economic policy following the change of government in 1991. As shown in the next section, the number of business entities has grown in the country since then. The adoption of a free market policy has also necessitated changing the role of government from direct ownership to regulating market activities. In this light, the government has attempted at regulating business entities. However, instances of human rights violations by business entities are seen from time to time.

Following this introduction, the second part reviews the policy reform, market development, human rights violations, and government intervention in the country with a view to assessing the state of integration between market development and human rights protection. The third part discusses the background and development of the UN Principles, the contents and understanding behind them, and the progress and debate regarding their international enforcement with a view to drawing lessons on their use. The fourth part discusses the level of participation of the business and non-business entities in Ethiopia in the Global Compact Governance and the shortcomings in the exercise of human rights protection in the country (vis-à-vis the understanding and lessons from the international enforcement of the UN Principles) with a view to showing the need for enforcing the UN Principles in the country. The fourth part recapitulates the main points and concludes.

2 The Market Development and Human Rights Protection in Ethiopia

2.1 *The Market Development*

Ethiopia adopted a free market economic policy following the change of government in 1991 and undertook reforms towards this end in the period until

2 See the "UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework 2011" (hereafter referred to as the Guiding Principles on Business and Human Rights), accessed August 15, 2013, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

1995.[3] It adopted an agriculture-led industrialization policy and industrial development strategy which proclaimed a free market with government regulation in the period after 1995.[4] It implemented the policy through successive five-year development plans, privatized and re-established government enterprises, and encouraged the growth of private business entities while also retaining government ownership of certain sectors.[5]

Accordingly, the total number of principally registered business entities has grown from 8,170 in 1992/93 to more than 119,789 by the end of 2012/13 and most of the operators are individual traders and private limited companies (see Table 7.1 below). The total number of registered investment projects has also grown from 545 in 1992/93 to 68,878 by the end of 2012/13 and most of the projects are domestic (see Table 7.2 below).

TABLE 7.1 *Growth of number of principally registered business entities in Ethiopia*

Type of Operator	Total Number by End of Year	
	1992/93	2012/13
Individual traders	7,613	82,142
Private business organizations	528	37,293
Government owned enterprises registered as traders	29	354
Total	8,170	119,789

SOURCE: DATABASE OF THE MINISTRY OF TRADE OF ETHIOPIA.[6]

3 See the Transitional Period Charter of Ethiopia No. 1/1991, *Negarit Gazeta*, Year 50, No. 1, Addis Ababa, July 22, 1991; and *Ethiopia's Economic Policy during the Transitional Period* (An Official Translation, Addis Ababa, November 1991).

4 See the *Rural Development Policies, Strategies and Programs* (Amharic Version, Addis Ababa, Hidar 1994 Eth.C. – 2001 GC); and the *Industrial Development Strategy* (Amharic Version, Addis Ababa, Nehasie 1994 Eth.C. – 2002 GC). The latter recognizes government intervention to regulate economic activities on two grounds: when the market fails and/or the development objective of the country necessitates.

5 This approach of the government was justified recently by the developmental state approach. The latest five-year development plan is the *Growth and Transformation Plan 2010/11–2014/15* (Ministry of Finance and Economic Development – MOFED, November, 2010), accessed August 20, 2013, http://www.mofed.gov.et/English/Resources/Documents/GTP%20English2.pdf. It was preceded by the Federal Democratic Republic of Ethiopia, *Plan for Accelerated and Sustained Development to End Poverty* (*PASDEP*) *2005/06–2009/10* (MOFED, September 2006); and the Federal Democratic Republic of Ethiopia, *Sustainable Development and Poverty Reduction Programme* (*SDPRP*) *2002/03–2004/05* (MOFED, 2003).

6 The database is not available online. The number of unregistered small-scale business entities has also grown through the years. There is no actual data on this.

TABLE 7.2 *Growth of number of registered investment projects in Ethiopia*

Investment Project by Origin	Total Number by End of Year	
	1992/93	2012/13
Foreign investment	3	10,221
Domestic private investment	542	88,533
Domestic government owned investment	0	124
Total	545	68,878

SOURCE: DATABASE OF THE ETHIOPIAN INVESTMENT AGENCY.[7]

2.2 *The Human Rights Violations*

The annual reports on the five-year development plans of Ethiopia show that the business entities and investors in the country contribute to economic development of the country.[8] Operations of the business entities and investors have, however, also led to human rights violations, a number of which have also been noticed by the government.

Use of chemicals, long hours of work, low wages, poor conditions of work, child labor, and poor waste management have been common in *the floriculture sub-sector of the commercial agriculture sector*, and these have led to violations of the human rights of workers, women, children, and others (including the right to minimum conditions of work, the right to be free from forced sex, the right to a clean environment, and the right to health).[9]

7 The database is not available online.

8 Note the Annual Reports of MOFED on the Growth and Transformation Plan of 2010/11 –2014/15, on the *Plan for Accelerated and Sustained Development to End Poverty* (PASDEP) of *2005/06–2009/10*, and on the *Sustainable Development and Poverty Reduction Programme* (*SDPRP*) of *2002/03–2004/05*. All reports are available from the website of MOFED, accessed August 20, 2013, http://www.mofed.gov.et/English/Pages/Home.aspx.

9 See Tadesse Amare and Nigussu Aklilu, "Ethiopian NGOs Work to Improve Conditions for Flower Producers," Pesticides News 82 December 2008, accessed August 20, 2013, www.pan-uk.org/pestnews/Issue/pn82/PN82_p4-5.pdf; The Embassy of Japan in Ethiopia, A Series of Studies on Industries in Ethiopia, March 2008, accessed August 20, 2013, http://www.et.emb-japan.go.jp/Eco_Research_E.pdf, 8 & 9; and Gudeta, Dejytnu Tilahun, "Socio-economic and Environmental Impact of Floriculture Industry in Ethiopia," 2011–2012 (Thesis defended at Humboldt University of Berlin (Germany) within the framework of the European

Land clearing which has been common in the fruit, vegetable, coffee, cotton, grain, rice, tea, oil seeds, and sugar cane sub-sectors of the commercial agricultural sector has led to violations of individual and collective human rights (including the right to property and compensation, the right to choose one's place of residence, and the right to local culture) and the business entities which have received the cleared lands have been complicit in the process.[10]

Low wages, poor safety, poor conditions of work, refusals of employers to bargain with workers, and pollution have been common in *the medium and large-scale sub-sectors of the manufacturing and mining sectors*, and these have led to violations of the rights of workers and others (including the right to minimum conditions of work, the right to collective bargaining, the right to a clean environment, and the right to health).[11]

Poor conditions of woman and child labor in *the small-scale and informal sub-sectors of the manufacturing and mining sectors* have also led to violations of the rights of women and children (including the right to be free from forced labor, the right to health, and the right to education).[12]

There have been widespread abuses in the price, quality, quantity and supply of goods, and lack of information disclosure in *the wholesale and retail sub-sectors of the goods market*, and these have led to violations of the right to property, the right to food, the right to health, and the right to information of individuals.[13]

Erasmus Mundus Programme "Erasmus Mundus International Master of Science in Rural Development") (Course N° 2004–0018/001- FRAME MUNB123), accessed August 20, 2013, http://lib.ugent.be/fulltxt/RUG01/001/894/550/RUG01-001894550_2012_0001_AC.pdf.

10 See Graham Peebles, "Ethiopian development and the destruction of lives," accessed August 10, 2013, http://www.redressonline.com/2013/08/ethiopian-development-and-the-destruction-of-lives/; and John Vidal, Billionaires and Mega-Corporations behind Immense Land Grab in Africa, *World News Daily Information Clearing House*, March 11, 2010, accessed August 20, 2013, http://www.informationclearinghouse.info/article24965.htm.

11 See the Annual and Conditions of Work Inspection Reports of the Ministry of Labour and Social Affairs for the years from 2008 up to 2012. See also the Annual Country Reports on Human Rights Practices (on Ethiopia) of the US Bureau of Democracy, Human Rights and Labour for these years, accessed August 20, 2013, http://www.state.gov/j/drl/rls/hrrpt/.

12 See Ibid.

13 See the Annual and Trade Inspection Reports of the Ministry of Trade and the Regional Trade Bureaus for the years from 2008 up to 2012. The author has lived experience of this.

Price and quality abuses which have been common in *the health and education sub-sectors of the services market* have also led to violations of the right to life, the right to health, and the right to education.[14]

Poor safety, poor conditions of work, and child labor have also been common in *the transport and construction sub-sectors* of the services trade sector, and these have led to violations of the rights of workers, children, women, and others (including the right to life and the right to health).[15]

Low and arbitrary wages, woman and child trafficking, and pollution which have been common in *the hotel, restaurant and tourism sub-sectors* of the services trade sector have also led to violations of the rights of workers, women, children, and others (including the right to equal pay for equal work, the right to be free from forced sex, the right to education, the right to a clean environment, and the right to health).[16]

2.3 *The Government Intervention*

Cognizant of the human rights violations reviewed in the preceding section, the Ethiopian government has taken measures intended to protect human rights and to guide business entities and investors to respect human rights.

With a view to enforcing the human rights of workers, women, and children in the various sectors, the Ministry of Labour and Social Affairs has, in cooperation with the Council of Ministers, issued a national occupational safety and health directive, a national woman worker health and safety directive, and a national child labor prevention strategy.[17] It has also, in cooperation with the Ministries of Agriculture, Urban Development and Construction, Energy and

14 See the Annual Reports of the Ministries of Health and Education for the years from 2008 up to 2012. The author has lived experience of this and conducted face-to-face discussions with operators and users of the services in the sub-sectors. The discussions confirmed the existence of the problems.

15 See the Annual and Conditions of Work Inspection Reports of the Ministry of Labour and Social Affairs for the years from 2008 up to 2012. The author has lived experience of this and conducted face-to-face discussions with operators and users of the services in the sub-sectors. The discussions confirmed the existence of the problems.

16 The author has conducted face-to-face discussions with operators and users of the services in the sub-sectors. The discussions confirmed the existence of the problems. See also the human trafficking report, accessed April 24, 2014, http://gvnet.com/humantrafficking/Ethiopia.htm.

17 See the Occupational Safety and Health Directive (Amharic, 2008); Woman Worker Health and Safety Directive (Amharic, 2005); and Child Labour Prevention Strategy (Amharic, 2005) from the archives of the Ministry. See also the Year Books of the country from 2005 up to 2012.

Mines, and Transport and Communication, inspected conditions of work, conducted worker right advocacy, and enforced the national occupational safety and health directive and the woman worker health and safety directive.[18] The Judiciary, the Council of Ministers, the Ministry of Labour and Social Affairs, and the Ministry of Education have also created child right courts, enforced the national child labor prevention strategy, led child right advocacy, and implemented measures intended to expand the access of children to education.[19]

With a view to controlling pollution in the different sectors and thereby ensuring the protection of human rights, the House of Peoples' Representatives (i.e. parliament), the Council of Ministers, the Ministry of Agriculture, and the Environmental Protection Authority have issued and enforced environmental impact assessment laws and a Code of Practice for agricultural investment.[20]

With a view to making the processes of land clearing and compensation in the commercial agricultural and other sectors consensual thereby ensuring the protection of human rights during those processes, the House of Peoples' Representatives, the Council of Ministers, and the Ministry of Agriculture have issued and enforced national expropriation and compensation laws.[21]

With a view to controlling the problems of abuse of price, quality, quantity and supply, and lack of information disclosure in the goods market thereby ensuring the protection of human rights, the House of Peoples' Representatives has enacted trade practice and consumers' protection laws and the Council of

18 See Annual Reports of the Ministries for the years from 2009 up to 2012 and the Memoranda of Understanding signed between them. See also the Year Books of the country from 2009 up to 2012 and the ILO Technical Memorandum on Ethiopia Labour Inspection Audit (2009), accessed September 25, 2013, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/ wcms_119248.pdf.

19 See the Annual Reports of the Ministries of Labour and Social Affairs and Education and the Year Books of the country from 2006 up to 2012.

20 See Environmental Impact Assessment Proclamation No. 299/2002, *Federal Negarit Gazeta*, 9th Year No. 41, December 3, 2002 (which is applicable to all new and existing investment projects) and the regulations, directives, and codes issued under it from the archives of the Ministry of Agriculture and the Environmental Protection Authority. See also the Year Books of the country from 2002 up to 2012.

21 See Expropriation of Land holdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005, *Federal Negarit Gazeta*, 11th Year No. 43, July 15, 2005; Payment of Compensation for Property Situated on Landholding Expropriated for Public Purposes Council of Ministers Regulations No. 135/2007, *Federal Negarit Gazeta*, 13th Year No. 36, May 18, 2007; and the Annual Reports of the Ministry of Agriculture for the years from 2008 up to 2012. See also the Year Books of the country from 2005 up to 2012.

Ministers, the Ministry of Trade, the Regional Trade Bureaus, and the police have inspected the price, quality, and quantity of goods in the market, coordinated the establishment of consumers' associations, facilitated the government supply of goods, and required the public disclosure of prices by market actors.[22]

The Council of Ministers and the Ministries of Health and Education have also conducted health service and higher education quality audits and issued and enforced a national health sector policy and strategic plan, a national health insurance law, a national general education quality improvement package, and a higher education accreditation guideline with the goal of controlling the problems of price and quality abuse in the health and education sub-sectors ensuring the universal provision of health services.[23]

The Council of Ministers and the Ministry of Transport and Communication have also issued and enforced a law on vehicle liability insurance against third-party risks with a view to protecting the property and other rights of consumers and victims of accidents in the transport sector.[24]

On top of the above, the government has established and assigned regulatory tasks to 21 sector specific agencies and the ministries with a view to them shaping the market development.[25] It has also enforced general measures

22 See Trade Practice Proclamation No. 329/2003, *Federal Negarit Gazeta*, 9th Year No. 49, Addis Ababa, April 17, 2003; Trade Practice and Consumers' Protection Proclamation No. 685/2010, *Federal Negarit Gazeta*, 16th Year No. 49, Addis Ababa, August 16, 2010; the Annual Reports of the Ministry of Trade and the regional trade bureaus; and the Year Books of the country from 2006 up to 2012. Trade Practice and Consumers' Protection Proclamation No. 685/2010 has been revised and enacted as Trade Competition and Consumers' Protection Proclamation No. 813/2013, *Federal Negarit Gazeta*, 20th Year No. 28, Addis Ababa, March 21, 2014.

23 See the Health Sector Strategic Plan (HSDP-III) 2005/6–2009/10 of the Ministry of Health; Social Health Insurance Proclamation No. 690/2010, *Federal Negarit Gazeta*, 16th Year No. 50, August 19, 2010; the General Education Quality Improvement Package (GEQIP) of November 2008 of the Ministry of Education; the Private Higher Education Institutions Accreditation Guideline of the Ministry of Education (Amharic, 2003 Ethiopian Calendar); and the Year Books of the country from 2006 up to 2012.

24 See the Vehicle Insurance against Third-Party Risks Proclamation No. 559/2008, *Federal Negarit Gazeta*, 14th Year No. 7, January 9, 2008; and the Annual Reports of the Ministry of Transport and Communication for 2010, 2011, and 2012.

25 It has established the National Bank of Ethiopia (as regulator of the financial market), the Ethiopian Electricity Authority (as regulator of the electricity supply market), the Ethiopian Telecommunications Authority (as regulator of the telecom services and equipment supply market), the Ethiopian Civil Aviation Authority (as regulator of the air transport, aviation, and related services market), the Maritime Affaires Authority of

which have aimed at building regulatory and governance capacities of the regulatory agencies and the ministries along with strengthening the judiciary and arbitration tribunals.[26] It has also signed foreign investment treaties and domestic lease agreements to facilitate investment and protect investor rights.[27]

Some of the non-governmental organizations operating in the country have also advocated respecting human rights by business entities and called for appropriate government intervention to ensure this as the 2006–2008 global

---

Ethiopia (as regulator of the marine transport and related services market), the Ethiopian Radiation Protection Authority (as regulator of the market for radiation services and use of radioactive materials), the Education Relevance and Quality Agency of Ethiopia (as regulator of the quality and relevance of higher education), the Ethiopian Roads Authority (as regulator of the construction and use of highways and roads of the national network), the Transport Authority of Ethiopia (as regulator of the road and rail transport and related services market), the Ethiopian Drug Administration and Control Authority (as regulator of the manufacture, trade, use, and trial of drugs and medical equipment), the Ethiopian Revenue and Customs Authority (as regulator of customs clearing agents and controller of customs), the Ethiopian Broadcasting Authority (as regulator of the broadcasting services market), the Ethiopian Commodity Exchange Authority (as regulator of the commodity exchange market), the Ethiopian Investment Agency (as registrar and general regulator of investment), the Quality and Standards Authority of Ethiopia (as the standard setter for the quality of goods and services), the Environmental Protection Authority of Ethiopia (as general regulator of the environmental effect of trade and investment), the Privatization and Public Enterprises Supervising Agency of Ethiopia (as facilitator of the privatization process and supervisor of government enterprises), the Public Financial Enterprises Agency of Ethiopia (as supervisor of government-owned financial institutions), the Ethiopian Intellectual Property Office (as protector and regulator of the use of intellectual property), the Ethiopian Information and Communication Technology Agency (as coordinator of the development and use of Information and Communication Technology), and the Information Security Agency of Ethiopia (as regulator of the information network of the country and use of information). Other sectors and regulatory tasks are assigned to the ministries. (See the House of Peoples' Representatives (i.e., parliament) Proclamations and Council of Ministers Regulations of the country which established the institutions.).

26 See the annual reports of MOFED, *supra* n. 8; and the Year Books of the country from 2006 up to 2012. These measures have been useful to increase the remediation of human rights violations.

27 See the investment treaties and lease agreements archived at the Ethiopian Investment Agency, the Ministry of Finance and Economic Development, and the Ministry of Agriculture of Ethiopia (sample documents are accessible from the websites of the institutions).

financial and economic crisis and its effects unfolded and the size of the incoming foreign investment increased in the country.[28]

The government has also appreciated the need for further work to ensure respect for human rights and adopted a general National Human Rights Enforcement Strategy for the period from 2013 up to 2015.[29]

All the aforementioned measures show the existence of governmental attempts to protect human rights. The problem of human rights violations by business entities, however, still lingers and a solution has to come by increasing governmental and non-governmental interventions as well as the human rights commitments of business entities themselves. All these are foreseen by the UN Guiding Principles on Business and Human Rights. The following two parts discuss the development, content and international enforcement of these Principles, and the rationale for enforcing them in Ethiopia.

3 The Development, Content, and International Enforcement of the UN Principles

3.1 *Background and Development of the Principles*

The creation of state responsibility to respect human rights dates back to the Age of Enlightenment of the 18th century (and beyond). The attempt to require business entities to respect human rights is, however, a post-second-half-of-the-20th-century phenomenon since codes began to be developed for Transnational Corporations in the 1970s and 1980s. The first initiatives were the Sullivan Principles for South Africa (1977), the Draft Code of the United Nations Centre for Transnational Corporations (UNCTC) (1977–1992), the OECD Guidelines for Multinational Enterprises (1976), and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977).[30] The Sullivan Principles (1977) included principles designed to promote racial equality within U.S. companies operating in South Africa

28 The advocacy by the non-governmental organization called Action Professionals Association for the People (APAP) was prominent.

29 The strategy has been approved by the House of Peoples' Representatives (i.e., parliament) after a recommendation by the Council of Ministers (unpublished document). It is being enforced by the Ministry of Justice and the Human Rights Commission of the country.

30 See Emily F. Carasco and Jang B. Singh, "Human Rights in Global Business Ethics Codes," *Business and Society Review* 113/3 (2008): 347–361; and Emily F. Carasco and Jang B. Singh, "Towards holding transnational corporations responsible for human rights," *European Business Review* 22/4 (2010): 432–437.

during the struggle against Apartheid. The Draft Code of the UNCTC (1977–1992) included principles on consumer protection, information disclosure, and avoidance of abusive practices by TNCs based on general acceptance of the Universal Declaration of Human Rights. The OECD Guidelines for Multinational Enterprises (1976) included recommendations on business practices relating to human rights along with recommendations on disclosure of information, consumer protection, labor relations, anticorruption, taxation, and environmental protection. The ILO Tripartite Declaration concerning Multinational Enterprises and Social Policy (1977) included principles relating to human rights in the workplace to be respected by TNCs, states, and employer and employee organizations.[31]

The aforementioned initiatives were by non-business persons and entities. They were followed by a round table of senior business executives from Japan, Europe, and Northern America, which, as the first initiative of business entities, attempted to develop the Caux Round Table Principles for Business (1994).[32] These principles acknowledged the importance of respecting the rights of customers, employees, owners, investors, suppliers, competitors, and communities by TNCs, and they were followed subsequently by several initiatives aimed at strengthening self-regulation by TNCs.[33]

The worldwide expansion of free market policies and rise in transnational economic activities in the 1990s also resulted in heightened awareness of the impact of business entities on human rights. This led to UN work on global business ethics principles. Initially, New Global Sullivan Principles (1999) were jointly unveiled by Rev. Sullivan and the United Nations Secretary General Kofi Annan.[34] Then, the UN adopted the Global Compact 2000 which included principles in four areas: Human Rights, Labor, Environment, and Anti-Corruption.[35] In the period between 2000 and 2004, discourse continued on the division of responsibilities between the state and business entities to respect human rights, and the UN Commission on Human Rights (now the Human Rights Council) drafted the 'Norms on Transnational Corporations and

31 See ibid. for a detailed discussion of the initiatives.

32 See Carasco and Singh (2008), *supra* n. 30, 361–363.

33 Ibid.

34 See Carasco and Singh (2008), *supra* n. 30, 356 and 363; and Carasco and Singh (2010), *supra* n. 30, 437.

35 See Carasco and Singh (2008), *supra* n. 30, 363 and 364; Carasco and Singh (2010), *supra* n. 30, 437–438; the Global Compact Principles, *supra* n. 1; and the Global Compact Brochure, accessed August 15, 2013, http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf.

Other Business Enterprises' with a view to imposing treaty-type duties on business entities.[36] This received little support from governments and subsequent work of the Special Representative of the Secretary-General "on the issue of human rights and transnational corporations and other business enterprises" led to the adoption of a UN "Protect, Respect and Remedy" Framework in 2008 and the UN Guiding Principles on Business and Human Rights in 2011.[37] Adoption of the Framework resulted in the creation of a focal point around which the actions of initiatives on business and human rights could converge while the Guiding Principles elaborated on the principles of the framework.[38]

Taken together, the Global Compact, the "Protect, Respect and Remedy" Framework and the Guiding Principles on Business and Human Rights have called for a shift from the traditional concept of "responsibility of business entities to shareholders" to the new concept of "corporate social responsibility to stakeholders and citizens" and to the horizontal application of human rights (between business entities and individuals) along with the hitherto vertical application (between individuals and governments).[39]

3.2 *Contents of the Principles and the Understanding*

The Global Compact Principles 1 and 2 require business entities to support and respect the protection of internationally proclaimed human rights and to make sure that they are not complicit in the abuse of human rights.[40] The

36 See the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (hereafter referred to as the Report of the Special Representative), accessed August 15, 2013, http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf, 3; Wesley Crag, "Human Rights and Business Ethics: Fashioning a New Social Contract," *Journal of Business Ethics* 27 (2000): 205–214; and Nader Asgary and Mark C. Mitschow, "Toward a Model for International Business Ethics," *Journal of Business Ethics* 36 (2002): 239–246.

37 See the Report of the Special Representative, *supra* n. 36, 3–5 and the Annex (6–27); the UN Human Rights Council Resolution of June 16, 2011 (hereafter referred to as the UNHR Council Resolution) accessed August 15, 2013, http://www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf; and the general information, accessed August 15, 2013, http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html.

38 See the Report of the Special Representative, *supra* n. 36, 3.

39 See the Report of the Special Representative, *supra* n. 36; the UNHR Council Resolution, *supra* n. 37; and the general information, accessed August 15, 2013, http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html.

40 See the Global Compact Principles, *supra* n. 1.

Labour Principles (3, 4, 5, and 6) require them to uphold the freedom of association and effective recognition of the right to collective bargaining, the elimination of all forms of forced and compulsory labor, the effective abolition of child labor, and the elimination of discrimination in respect of employment and occupation.[41]

The 2008 "Protect, Respect and Remedy" Framework and the 2011 Guiding Principles on Business and Human Rights set Principles in three areas: the state's duty to protect human rights, the corporate responsibility to respect human rights, and the state's duty to provide access to remedies.[42] They are based on the understanding that states have obligations under international law to respect, protect, and fulfill human rights and that business entities are duty bound under national law to comply with all applicable laws including the laws on human rights.[43] They are also based on the conception that respect for human rights is complete under both national and international laws when rights and obligations are matched with appropriate and effective remedies for breach.[44] They are linked to the Principles in the Global Compact 2000 which in turn are grounded in the 1948 Universal Declaration of Human Rights (UDHR), the International Labour Organization's Declarations on Fundamental Principles and Rights at Work, and the related instruments.[45]

Framed this way, the Global Compact, the Framework, and the Guiding Principles incorporate five components: respect, support, do not be complicit, protect, and remedy.

---

41 Ibid.

42 See the Guiding Principles on Business and Human Rights, *supra* n. 2; and the Report of the Special Representative, *supra* n. 36.

43 See Ibid. Existing international law does not make private business entities directly accountable for human rights violations. The attempt is to make them indirectly accountable through nation states. See David P. Forsythe, *Human Rights in International Relations*, 3rd. ed. (Cambridge: Cambridge University Press, 2012), 293–294; and Matthias Herdegen, *Principles of International Economic Law* (Oxford: Oxford University Press, 2013), 108.

44 See the Global Compact Principles, *supra* n. 1; and the Report of the Special Representative, *supra* n. 36.

45 See the 'Note on the relationship between the Guiding Principles and Global Compact's Human Rights Principles', accessed August 15, 2013, http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf; and the general information, accessed August 15, 2013, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html; and http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html.

3.2.1 The Respect Component

The UN believes that general consistency with the UDHR is important even if some principles of the UDHR may not be directly applicable to business entities.[46] It also expects that while business entities may take on additional responsibilities voluntarily, and operational conditions may dictate them in specific circumstances, the corporate responsibility to respect human rights is a baseline responsibility of all companies in all situations.[47]

The logic is that while governments have the primary responsibility to ensure respect for human rights, business entities also negatively or positively impact human rights; hence they need to bear responsibility both 'not to infringe' and 'to promote respect for' human rights.[48] It is also believed that respecting human rights is useful for business success itself by promoting the rule of law, addressing consumer concerns, enabling value chain management, increasing worker productivity and retention, and building good community relationships.[49]

With this general understanding, the UN asks business entities to prevent and mitigate any adverse impacts on human rights related to their operations, products, and services even if these impacts have been carried out by their suppliers and business partners.[50] It requires them to respect all the internationally recognized human rights included in the International Bill of Human

46 See the Guiding Principles on Business and Human Rights, *supra* n. 2, 13–26.

47 Ibid.

48 See the Guiding Principles on Business and Human Rights, *supra* n. 2, 13–26. For a discourse on the "doing good" and "avoiding bad" dimensions of corporate social responsibility, see Patrick E. Murphy and Bodo B. Schlegelmilch, "Corporate social responsibility and corporate social irresponsibility: Introduction to a special topic section," *Journal of Business Research* 66 (2013): 1807–1813; Nick Lin-Hi and Karsten Müller, "The CSR bottom line: Preventing corporate social irresponsibility," *Journal of Business Research* 66 (2013): 1928–1936; and the other papers in this Issue of the Journal.

49 See the Guiding Principles on Business and Human Rights, *supra* n. 2, 13–26; and Trilok Chandra Srivastava, "Human-Rights in Management – A Global Language in New Millennium," *Indian Streams Research Journal* 2/10 (2012). Studies also show the existence of a strong linkage between respect for human rights and international investment. See Shannon Lindsey Blanton and Robert G. Blanton, "Human Rights and Foreign Direct Investment: A Two-Stage Analysis," *Business and Society* 45 (2006): 464–485.

50 They need to do three things under this requirement: first, to institute a policy commitment to meet the responsibility to respect human rights; second, to undertake ongoing human rights due diligence to identify, prevent, mitigate, and account for their human rights impacts; and third, to put processes in place to enable remediation for any adverse human rights impacts caused or contributed to. See the Guiding Principles on Business and Human Rights, *supra* n. 2, 13–26.

Rights and the core International Labour Organization's Declarations on Fundamental Principles and Rights at Work and to embrace, support, and enact a set of core values in the areas of the UN guiding principles and the spheres of their influence.[51] It requires them to respect human rights throughout their operations and to consider three sets of factors in determining the scopes of their responsibilities: the country and local context in which they are operating, the actual or potential human rights impacts of their activities within the context, and the relationships they have with the government, their business partners and suppliers, and other non-governmental actors.[52] It requires them to ensure that their operations are consistent with the legal principles applicable in the country of operation and to respect human rights whether they are operating in an area of weak governance or in a more stable context.[53] For all these, it requires them to undertake *due diligence*, i.e., periodic assessment of not only compliance with national laws but also of identifying, preventing, and mitigating the risk of infringing human rights.[54]

---

51 See the Guiding Principles on Business and Human Rights, *supra* n. 2, 13–15. The understanding is that a business entity has the potential to impact human rights positively and negatively and that a responsibility falls on everyone in society to develop awareness and to uphold respect for human rights. The UN publication: '*Human Rights Translated: A Business Reference Guide*' elaborates the main internationally proclaimed human rights from a business perspective. See http://www.unglobalcompact.org/docs/news_events/8.1/human_rights_translated.pdf (accessed August 16, 2013).

52 See the Guiding Principles on Business and Human Rights, *supra* n. 2, 13, 15, 19 and 25–26. The understanding is that a company cannot compensate for infringing human rights in one aspect of its operations by performing well elsewhere (Ibid., 13). The Global Compact Office has developed several guidance materials to assist business entities determine the scopes of their responsibilities. See the webpage: http://www.unglobalcompact.org/Issues/human_rights/Tools_and_Guidance_Materials.html (accessed August 16, 2013).

53 The understanding is that the corporate responsibility to respect human rights exists independently of the state's human rights duties, that business entities should strive to meet international standards when the national laws fall short of international standards, and that they are not expected to violate the national laws but to look for ways to support the spirit of international human rights standards when the national laws directly conflict with international standards. See the Guiding Principles on Business and Human Rights, *supra* n. 2, 13 and 25–26. The UN has developed guidance for business entities that engage in conflict-sensitive business practices in countries where there is weak governance. See the '*Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors*', accessed August 16, 2013, http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf.

54 *Due diligence* is a process of identifying and addressing the human rights impacts of a business enterprise across its operations and products, and throughout its supplier and

3.2.2 The Support Component

Supporting human rights means making a positive influence or contribution to promote or advance human rights in a business's sphere of influence.[55] The UN asks business entities to support or promote human rights through their core business activities, strategic social investment and philanthropy, advocacy and public policy engagement, and partnership and collective action.[56]

The logic is that business entities should not just avoid negative impacts, but also make a positive contribution to society and do their parts especially in ways relevant to their operations in helping to overcome the most acute and chronic challenges.[57] Supporting human rights is, however, a voluntary commitment.[58]

3.2.3 The 'Do Not Be Complicit' Component

Complicity means being implicated in a human rights abuse that another business person, government, individual, group, etc. is causing.[59] It exists when

---

business partner networks. Its elements are: (i) framing a statement of human rights policy, whether this is stand-alone or integrated into a broader corporate sustainability policy or code of conduct, (ii) assessing human rights impacts; (iii) integrating human rights policies throughout the company with resources and authority assigned accordingly, (iv) tracking and reporting performance, and (v) having in place effective company-level grievance mechanisms for employees, contractors, local communities, and others. See the UN Poster: A Human Rights Management Framework (available at the UN Global Compact's tools and guidance webpage) and the UN sample human rights policy documents, accessed August 16, 2013, http://www.business-humanrights.org/Documents/Policies.

55 See the Global Compact Principles, *supra* n. 1, Principle 1; the Guiding Principles on Business and Human Rights, *supra* n. 2, 13–26; the general information, accessed August 16, 2013, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html; and the explanation in the UN *Arc of Human Rights Priorities: A New Model for Managing Business Risk*, accessed August 16, 2013, http://www.unglobalcompact.org/Issues/human_rights/Tools_and_Guidance_Materials.html.

56 These are elaborated by the Global Compact Participants' Blueprint for Corporate Sustainability Leadership adopted at the Leaders' Summit in June 2010. See the Blueprint, accessed August 16, 2013, http://www.unglobalcompact.org/docs/issues_doc/lead/Blueprint_english.pdf; and the 2010 Leaders' Summit Summary Report, accessed August 16, 2013, http://www.unglobalcompact.org/docs/summit2010/2010_Leaders_Summit_Report.pdf.

57 See the Global Compact Principles, *supra* n. 1, Principle 1; and the general information, accessed August 16, 2013, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html.

58 Ibid.

59 See the Global Compact Principles, *supra* n. 1, Principle 2; and the general information, accessed August 16, 2013, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html.

there is an act or omission by a business person which helps another to carry out a human rights abuse and when there is knowledge by the business person that the act or omission could provide such help. It can be a direct complicity (where the business person provides goods or services that he knows will be used to carry out the abuse), a beneficial complicity (where the business person benefits from human rights abuses even if he did not positively assist or cause them), or a silent complicity (where the business person is silent or inactive in the face of systematic or continuous human rights abuse). With this understanding, the UN asks business entities to become aware of, prevent, and reduce complicity through due diligence, i.e., by adopting a systematic management approach to human rights.[60]

3.2.4 The Protect Component

The UN believes that governments should protect against human rights abuses by business entities. It asks them to prevent, investigate, punish, and redress human rights abuses which take place in domestic business operations through effective policies, legislation, regulations, and adjudication, and to set clear expectations that business entities domiciled in their jurisdictions respect human rights throughout their operations in every other country and context.[61] It asks them to ensure respect for human rights through their regulatory and policy functions and to ensure that policies are coherent across their departments and functions, and that their participations in multilateral

60 See the Global Compact Principles, *supra* n. 1, Principle 2; the Guiding Principles on Business and Human Rights, *supra* n. 2, 17ff; and the general information, accessed August 16, 2013, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html.

61 This requirement assumes that governments bear the duty to ensure the rule of law, equality before the law, and fairness, and to provide adequate accountability, legal certainty, and legal transparency. It has home and host state dimensions. However, there is no direct state responsibility for actions of private actors under international law. There is state responsibility only when abuse of the private actors is attributable to the state or the state fails to prevent, investigate, punish, and redress private actors' abuse. There is also no home state duty to regulate extra-territorial activities of business entities under international law. Attempt to create this duty has also failed within the WTO framework. There is only strong reason for the home state to make clear its expectation that business entities should respect human rights abroad when it is involved in (or supports) the business activities and when doing so is good for its reputation. See the Guiding Principles on Business and Human Rights, *supra* n. 2, 3–12; David P. Forsythe, *supra* n. 43, 278, 293–294 and 298; and Razeen Sappideen, "Property rights, human rights, and the new international trade regime," *The International Journal of Human Rights* 15/7 (2011): 1013–1030. See also Lieselot Verdonck's paper in this book.

institutions are aligned with their human rights obligations.[62] It also asks them to ensure that human rights are respected in the state-business nexus and to provide guidance, assistance, and enforcement mechanisms to ensure that business entities are not involved in gross human rights abuses in conflict-affected areas.[63]

The understanding behind all these is that governments have a duty, under existing international law, not only to respect but also to protect against human rights abuses by all actors in society, including business entities.[64]

Concrete actions for governments under the protect component are, therefore, threefold: enacting and enforcing laws that require business entities to

62 This requirement implies that governments should: enforce specific laws that aim at or have the effect of requiring business entities to respect human rights; ensure that other laws do not constrain but enable respect for human rights; guide business entities on how to respect human rights; and encourage or require business entities to communicate how they address human rights impacts (with appropriate balance on legitimate confidentiality). It also means that governments should ensure that market regulators are aware of and observe the states' human rights obligations; that governments should retain adequate policy and regulatory ability (to meet human rights obligations) when concluding international treaties with other states or contracting with business entities (by balancing between investor protection and regulation); and that governments should retain adequate ability to meet human rights responsibilities and take the initiative to promote respect for human rights when acting as a member of multilateral institutions. See the Guiding Principles on Business and Human Rights, *supra* n. 2, 3–12.

63 The requirement regarding the state-business nexus implies that governments should ensure that enterprises owned, controlled, or supported by them do not abuse human rights and conduct human rights due diligence; that they should exercise adequate oversight (i.e., include human rights clauses and monitor enforcement) when contracting with or legislating for business enterprises to provide services (i.e., when privatizing the delivery of services); and that they should promote respect for human rights when conducting transactions with private business entities (e.g., procurement). The requirement regarding conflict-affected areas implies that the governments should engage at the earliest stage possible to help business entities identify, prevent, and mitigate human rights-related risks; that they should adequately assist business entities to assess and address the heightened risk of abuse; that they should deny access to public support and service for a business involved in human rights abuse; and that they should ensure that their current policies, legislation, regulations, and enforcement measures are effective in addressing human rights abuses. See the Guiding Principles on Business and Human Rights, *supra* n. 2, 3–12.

64 See the Guiding Principles on Business and Human Rights, *supra* n. 2, 3–12. The 'subjectivity' of business entities under international law is debated. See Merja Pentikäinen, "Changing International 'Subjectivity' and Rights and Obligations under International Law – Status of Corporations," *Utrecht Law Review* 8 (2012).

respect human rights, creating a regulatory environment that facilitates respect for human rights by business entities, and providing guidance to business entities on their responsibilities.

3.2.5 The Remedy Component

The UN asks both business entities and governments to remedy human rights violations. It asks business entities to remedy human rights violations that they cause or contribute to and to put in place grievance mechanisms for remediation through collaborative arrangements with other business entities or organizations and/or through recourse to mutually accepted external experts or bodies.[65] It asks governments to ensure that there is access to effective judicial and non-judicial remedies for those affected when human rights are violated by business entities.[66] It asks them to ensure that the government-based judicial mechanisms are able to effectively address business-related human rights abuses and do not erect barriers which prevent victims from presenting their cases (such as administrative fees or lack of language interpreters).[67] It also asks them to ensure that the non-judicial grievance mechanisms exist as part of a comprehensive state-based system for remedy, have the capacity to hear and adjudicate business-related human rights complaints, and are effective and appropriate.[68] The understanding is that respecting human rights is complete when violations are remedied and there is effective access to remedy.

3.3 *International Enforcement of the Principles and the Debate*

3.3.1 Scope of Application of the Principles

The UN belief is that the Guiding Principles on Business and Human rights neither create new international law obligations nor diminish the existing ones, but elaborate and integrate the existing obligations and practices into one whole.[69] With this in mind and understood together with the UDHR, the ILO Conventions, and the related instruments, the Principles mean the ladder of responsibility for business entities and duty for governments as presented in Chart 7.1.

65 See the Guiding Principles on Business and Human Rights, *supra* n. 2, 24–25.

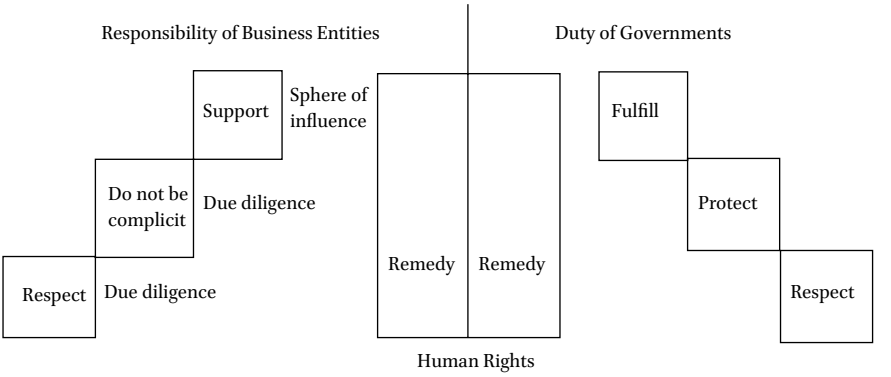
66 Ibid., 27–35.

67 Ibid.

68 Ibid.

69 See the Guiding Principles on Business and Human Rights, *supra* n. 2, 1.

CHART 7.1 *Ladder of human rights responsibility of business entities and duty of governments*



SOURCE: OWN DRAWING

As such, the Principles make the responsibility of business entities and the duty of governments complementary and applicable to all states and to all business entities (whether transnational or national) regardless of size, sector, location, ownership, and structure.[70]

3.3.2 The Mechanism for Enforcement of the Principles

The initiatives of the 1970s, 80s, and 90s to develop codes for Transnational Corporations were guided by several institutions.[71] The efforts were also to impose human rights obligations on corporations in the same way treaties impose obligations on states.[72]

The UN global compact governance system has deviated from these and grown to serve as a focal point for voluntary enforcement. It has evolved from a 'Working Group on Business and Human Rights' to a 'Global Compact Office' in the period between 2000 and 2004 and to the present multi-centric structure in the period between 2006 and 2008.[73] It is based on three elements:

70 Ibid.

71 See Carasco and Singh (2008), *supra* n. 30, 347–361; Carasco and Singh (2010), *supra* n. 30, 432–437; and the Report of the Special Representative, *supra* n. 36, 3.

72 Ibid.

73 See the Report of the Special Representative, *supra* n. 36, 3; the general information from: http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html; and the Global Compact Governance Framework document entitled 'The Global Compact's Next Phase 6 September 2005', accessed August 16, 2013, http://www.unglobalcompact.org/docs/about_the_gc/gc_gov_framew.pdf.

governance legitimacy which makes the Guiding Principles on Business and Human Rights legitimate as a United Nations initiative; *voluntarism* which recognizes the voluntary commitment of business leaders (when joining the Compact) to internalize the principles and to take action in support of the broad UN goals; and *implementation accountability* which imposes transparency and accountability on implementation of the business leaders' commitments followed by integrity measures of the Compact which may include de-listing from the Compact for repeated failure to publicly disclose progress.[74] It currently exists as an open platform for business and non-business entities to proactively network and engage in areas of the guiding principles and as a multi-centric framework of seven entities: a Triennial Global Compact Leaders' Summit, a Local Network, an Annual Local Networks Forum, a Global Compact Board, a Global Compact Office, an Inter-Agency Team, and a Global Compact Donor Group.[75]

74 See the 2008 Global Compact Governance Framework Update, accessed August 16, 2013, http://www.unglobalcompact.org/docs/about_the_gc/governance_update2008.pdf.

75 The Triennial Global Compact Leaders' Summit is a gathering of the top executives of all the Global Compact participants and other stakeholders to discuss the Global Compact and corporate citizenship at the highest level. The Local Network is a group of participants that come together to advance the Global Compact and its principles within a particular country or geographic region. The Annual Local Networks Forum is an occasion for Local Networks from around the world to share experiences, review and compare progress, identify best practices, and adopt recommendations. The Global Compact Board is a multi-stakeholder advisory body consisting of four constituency groups: business entities, civil society, labor, and the United Nations. It meets annually to provide ongoing strategic and policy advice for the initiative as a whole and make recommendations to the Global Compact Office, its participants, and other stakeholders. The Global Compact Office is the UN entity formally entrusted with the support and overall management of the Global Compact initiative. The Inter-Agency Team comprises seven UN agencies which are expected to ensure coherent support for the internalization of the principles within the United Nations and among all participants: they are the Office of the UN High Commissioner for Human Rights (OHCHR), the International Labour Organization (ILO), the United Nations Environment Programme (UNEP), the United Nations Office on Drugs and Crime (UNODC), the United Nations Development Programme (UNDP), the United Nations Industrial Development Organization (UNIDO), and the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women). The Global Compact Donor Group is a group of voluntary contributors (governments and donors) to a UN Trust Fund. See the general information, accessed August 15, 2013, http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html.

3.3.3 The Progress

International enforcement of the Global Compact 2000 was very limited until 2008.[76] Participation in the Global Compact Governance has increased through time and there had been 12,330 participants from 145 countries by April 2014.[77] Of these, 8,079 were business entities (including private and public companies, subsidiaries, and state-owned business enterprises) while 4,244 were non-business entities (including academic institutions, global and local business associations, global and local labor unions, global and local NGOs, city administrations, foundations, and non-business public sector organizations).[78] Seven UN Agencies have also worked with the Global Compact Office.[79] The participation has grown most in Europe followed by the Americas, Asia/Oceania, and Africa/MENA in that order.[80]

The number of local networks has also exceeded 100 with the highest growth being in Europe followed by Africa/MENA, the Americas, and Asia/Oceania in that order.[81]

The total number of Communications on Progress has also grown to 24,951 while a total of 4,389 business participants have been expelled from participation under the integrity measures of the Global Compact Office.[82]

3.3.4 The Debate

The post-2006 Global Compact participation of business entities to respect human rights is praised to be better than the situation in the 1980s and 1990s and it is believed that the shift of approach from imposing obligations to voluntarism and networking, followed by the requirement of annual

76 See Jennifer Ann Bremer, "How global is the Global Compact?" *Business Ethics: A European Review* 17 (2008).

77 See the UN Global Compact Database (hereafter referred to as the Global Compact Database), accessed April 24, 2014, http://www.unglobalcompact.org/participants/search.

78 Ibid.

79 Ibid.

80 See the UN Global Compact Local Network Report 2012 (hereafter referred to as the Global Compact Local Network Report), accessed August 16, 2013, http://unglobalcompact.org/docs/publications/LN_Report_2012.pdf.

81 Ibid., 5 and 14.

82 See the Global Compact Monthly Bulletin for April 2014, accessed April 24, 2014, http://bulletin.unglobalcompact.org/t/r-1353634BFD8F153F2540EF23F30FEDED. Of the active business entities, 6,138 have been communicating with the Global Compact Governance while 1,941 of them have been non-communicating. See the Global Compact Database, *supra* n. 77.

Communication on Progress and the Global Compact integrity measure, has contributed to it.[83]

There is, however, debate on the desirability of the voluntarism approach. On one side, there is a position that historic and sociological analyses of the nature of corporate behavior and decision-making show that the voluntarism approach does not hold in practice.[84] It is also argued that there are several transnational business entities which oppose human rights standards and engage in abusive and anti-human rights practices and that not asking them to respect human rights will amount to letting unregulated capitalism reign.[85] There is also argument that the existing initiatives to make business entities accountable for human rights, including the Global Compact Governance, are inadequate and that adopting an integrated regulation approach which combines a convention on corporate human rights responsibilities at the international level, a home and a host country law at the national level, and a voluntary code of conduct at the institutional level, is necessary.[86] After recognizing the need for adopting regulation for corporate human rights responsibilities at the international level but by noting the difficulties on its development, another argument favors placing emphasis on host and home state regulations since these provide stronger bases than international law.[87]

On the other side, there is a position that the voluntarism approach is an approach of neo-liberalism in corporate governance which tries to forge a balance between public and private regulations and whose merit has to be seen

83 See the Global Compact Local Network Report, *supra* n. 80, 6ff; the Global Compact note on 'The Importance of Voluntarism', accessed April 24, 2014, http://www.unglobalcompact.org/docs/about_the_gc/Voluntarism_Importance.pdf; Forsythe, *supra* n. 43, 294–295 and 308–309; and Carasco and Singh (2010), *supra* n. 30, 436–443.

84 See Nicholas Connolly, "Corporate social responsibility: a duplicitous distraction?" *The International Journal of Human Rights* 15 (2012): 1013–1030.

85 See Forsythe, *supra* n. 43, 282–288; Carasco and Singh (2010), *supra* n. 30, 438; and Susanne Soederberg, "Taming Corporations or Buttressing Market-Led Development? A Critical Assessment of the Global Compact," *Globalizations* 4 (2007): 500–513.

86 The argument is that the Global Compact Governance promotes voluntarism by focusing on the question of 'who' violates human rights and by adopting a 'business case or societal expectation' approach to respecting human rights while the focus should have been on the human person 'whose' rights are violated and on the creation of a compulsory regime that humanizes business. See Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (2012): 1–240.

87 See Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Oxon: Routledge, 2011), 1–287.

through time.[88] It is also argued that there are a number of business entities which do not oppose human rights standards but engage in business activities that are compatible with human rights, and that several of them have become engines of progressive economic development associated with improved civil-political and socio-economic rights in the countries where they have operated.[89]

On balance, it is argued that many business entities will opt for short-term profit at the expense of human dignity, and hence, that there must be countervailing power either from governments or from human rights organizations and movements.[90] It is also argued that respecting the dignity, hence the human rights, of the 2.6 billion moderate and extremely poor global population by business entities which target this population is ethical and, hence, a good basis for asking business entities to respect human rights.[91] Given the hitherto absence of a single definition of what constitutes corporate social responsibility, it is also argued that requiring business entities to adhere to the international human rights standards sets a standard mechanism for measuring their corporate social responsibility performance.[92]

---

88 See Jorge A. Arevalo and Francis T. Fallon, "Assessing corporate responsibility as a contribution to global governance: the case of the UN Global Compact," *Corporate Governance* 8 (2008): 456–470; David Sadler and Stuart Lloyd, "Neo-Liberalizing Corporate Social Responsibility: A Political Economy of Corporate Citizenship," *Geoforum* 40 (2009): 613–622; Marinilka Barros Kimbro and Zhiyan Cao, "Does voluntary corporate citizenship pay? An examination of the UN Global Compact," *International Journal of Accounting and Information Management* 19 (2011): 288–303; and Richard C. Warren, "Are we making progress in international business ethics?" *Humanomics* 27 (2011): 212–224.

89 See Forsythe, *supra* n. 43, 288–289.

90 See Forsythe, *supra* n. 43, 291–293.

91 See Denis G. Arnold and Andres Valentin, "Corporate social responsibility at the base of the pyramid," *Journal of Business Research* 66 (2013): 1904–1914.

92 See Karin Buhmann, "Corporate social responsibility: what role for law? Some aspects of law and CSR," *Corporate Governance* 6 (2006): 188–202; Diego Quiroz-Onate and Mhairi Aitken, "Business and human rights: A critical assessment of the notion of CSR and measurement," *Journal of International Trade Law and Policy* 6 (2007): 79–90; Esther M.J. Schouten, "Defining the corporate social responsibility of business from international law," *Managerial Law* 49 1/2 (2007): 16–36; and Michael Stohl and Cynthia Stohl, "Human rights and corporate social responsibility: Parallel processes and global opportunities for states, corporations, and NGOs," *Sustainability Accounting, Management and Policy Journal* 1 (2010): 51–65.

Of course, some have also argued that the use of human rights as a standard for corporate social responsibility will narrow down the stakeholder theory (i.e., the theory that the corporation has to be responsible to its stakeholders who are not necessarily human

From the point of view of self-regulation, research has generally shown that private codes in the form of negotiated agreements, accompanied by independent monitoring and public reporting, have contributed to changing corporate behavior when such agreements have the backing of governments which are expected to assist in implementation.[93] A study has also found that the inclusion of human rights clauses in trade agreements among governments has boosted the corporate practice of human rights.[94] Another study has also found that business entities that joined the Global Compact Governance were more likely to adopt corporate statements on human rights and more likely to receive positive outside assessment of their human rights performance.[95]

The Global Compact movement has also brought about a new psychological environment in which business entities are expected by many to engage in socially responsible policies centered on international human rights standards and there is a growing activism whereby business entities are frequently urged by citizens and governments to undertake a more active commitment towards international human rights.[96] There is also increasing pressure on governments to adopt norms and policies which ensure that business entities contribute to, rather than contravene internationally recognized human rights.[97]

---

rights holders). See Bert van de Ven, "Human rights as a normative basis for stakeholder legitimacy," *Corporate Governance* 5 (2005): 48–59.

93 See Forsythe, *supra* n. 43, 309.

94 See Emilie Hafner-Burton, *Forced to be Good: Why Trade Agreements Boost Human Rights* (Ithaca: Cornell University Press, 2009). It is also found that the inclusion of human rights clauses in economic cooperation agreements among governments, which increase the duties of governments to give effective protection against human rights violations, is on the rise. See Herdegen, *supra* n. 43, 107–108.

95 See Patrick Bernhagen and Neil J. Mitchell, "The Private Provision of Public Goods: Corporate Commitments and the United Nations Global Compact," *International Studies Quarterly* 54 (2010): 1175–1187.

96 See Forsythe, *supra* n. 43, 277 and 301–309; Kevin Jackson, "Natural law, human rights and corporate reputational capital in global governance," *Corporate Governance* 8 (2008): 440–455; Cristina Neesham et al., "Profit-making vs human value: philosophy's contribution," *Equality, Diversity and Inclusion: An International Journal* 29 (2010): 593–608; and Shaomin Li and Ajai Gaur, "Financial giants and moral pygmies? Multinational corporations and human rights in emerging markets," *International Journal of Emerging Markets* 9 (2014): 11–32.

97 See Forsythe, *supra* n. 43, 277 and 301–309; Adefolake Adeyeye, "Universal standards in CSR: are we prepared?" *Corporate Governance* 11 (2011): 107–119; Alice de Jonge, "Transnational corporations and international law: bringing TNCs out of the accountability vacuum," *critical perspectives on international business* 7 (2011): 66–89; Barcelona Panda, "Multinational corporations and human rights violations: Call for rebuilding the

Business entities are also increasingly recognizing that their actions can affect human rights and that respecting human rights can be in their business interest.[98] It is, therefore, argued that the new environment necessitates increasing the knowledge and determination of the leaders of business entities to respect human rights.[99]

Accordingly, it is concluded that there is a promising situation of public-private action while it is also true that the primary responsibility for human rights still rests with national governments.[100] It is also concluded that the regulatory role of a host government is still high since there is a home state reluctance to regulate transnational business entities for human rights.[101]

4 The Need for Enforcing the Principles in Ethiopia

4.1 *The Current Level of Participation in the Global Compact Governance*

Currently, only one domestic Business Company, named DH Geda Blanket Factory Plc, participates in the UN Global Compact Governance.[102] All the other domestic and foreign business entities and investors operating in the country do not participate in the Global Compact Governance.[103] There is also no Global Compact Local Network in the country.[104]

Five non-business entities (two local Non-Governmental Organizations and three local business associations) are registered as participants in the Global Compact Governance.[105] The two Non-Governmental Organizations are the

laws of twenty-first century," *Journal of Financial Crime* 20 (2013): 422–432; and Bethel Uzoma Ihugba, "The governance of corporate social responsibility: Developing an inclusive regulation framework," *International Journal of Law and Management* 56 (2014): 105–120.

98 See Forsythe, *supra* n. 43, 308.

99 See Anthony P. Ewing, "What Executives Need to Know (and Do) About Human Rights (February 2013)," accessed April, 2013, http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/what-executives-need-to-know.pdf.

100 See Forsythe, *supra* n. 43, 309; and Carasco and Singh (2010), *supra* n. 30, 437–443.

101 See Forsythe, *supra* n. 43, 307.

102 It has been a participant in the Global Compact Governance since January 24, 2014. See the Global Compact Database, *supra* n. 77. Information regarding the company is available from its website, accessed April 24, 2014, http://blanket.dhgeda.com/.

103 See the Global Compact Database, *supra* n. 77.

104 Ibid.

105 Ibid.

Organization for Social Development and the Ethiopian Change and Development Association.[106] The three business associations are the Mekelle Chamber of Commerce of Ethiopia, the Mekelle Women Entrepreneurs Association, and the Addis Ababa Chamber of Commerce and Sectoral Associations.[107]

4.2 *Rationale for Enforcing the Principles in the Country*

Except for the DH Geda Blanket Factory Plc which committed to participation in the Global Compact Governance in January 2014 and started to develop human rights policies along with the other areas of the Global Compact Ten Principles,[108] the business entities and investors operating in the country do not have expressed human rights clauses and policies in their constitutive and other documents.[109] They are mostly unaware of the existence of the UN Principles on business and human rights while those that are aware of existence of the principles do not see the importance of respecting human rights in relation to their business operations: this is true regarding both the domestic and foreign business entities and investors operating in the country.[110]

106 They have been participants in the Global Compact Governance since March 23, 2011 and March 22, 2013, respectively (ibid). The Organization for Social Development works to promote corporate social responsibility in the country (note the information from its website, accessed April 24, 2014, http://osdethiopia.org/). The Ethiopian Change and Development Association is established as a think tank for issues of development in the country (information is obtained from a brochure of the organization. It does not have an active website).

107 They have been participants in the Global Compact Governance since July 10, 2004, September 11, 2005 and April 3, 2008, respectively. See the Global Compact Database, *supra* n. 77.

108 See *supra* n. 102.

109 See the constitutive documents and minutes of the business entities and investors archived in the Ministry of Trade, the Ethiopian Investment Agency, the Federal Documents Authentication and Registration Office, and the regional trade and documents registration offices (unpublished documents) (accessed in 2013 and 2014). The author has also consulted documents and conducted face-to-face discussions with managers of several investment and business entities in diverse sectors located in Addis Ababa and four regions in 2013 and 2014 to know the presence of human rights clauses in their operational documents. Most of them do not have these clauses.

110 The author has found, from his face-to-face discussions with managers of the investment and business entities located in Addis Ababa and four regions in 2013 and 2014 that about 90 percent of them are unaware of the existence of the UN Principles while the rest are aware of the existence of the principles without being participants of the Global Compact Governance but believe that a human rights protection issue is not important in relation to their business operations.

This absence of an expressed human rights policy, unawareness of the UN Principles, and weak appreciation of the importance of respecting human rights are accompanied by the violations of human rights discussed under part two above. The discussions under part three above have also shown the understanding within the UN Principles, and the lessons from practice, that respecting human rights by business entities is useful to the success of business itself, that due diligence means business entities need to have a human rights policy under which they will conduct periodic assessment of not only compliance with laws but also of identifying, preventing, and mitigating the risk of infringing human rights, and that adopting a human rights policy by business entities is likely to increase their commitment to the respect for human rights. They have also shown that the commitment to respect human rights is complete when violations are remedied. Given these, making the business entities in Ethiopia know the UN Principles and adhere to them by adopting a human rights policy, conducting due diligence, and remedying human rights violations are legitimate. This justifies enforcing the UN principles in the country.

The government action to regulate the market and thereby to ensure protection of human rights has also remained partial. The government has, of course, tried to implement human rights-related measures through the ministries, enacted a trade practice and consumers' protection law, assigned regulatory tasks to 21 sector specific regulators and the ministries, concluded foreign investment treaties and domestic lease agreements, and approved a National Human Rights Enforcement Strategy for 2013 up to 2015.[111] However, the government has largely remained an administrative body (as opposed to a regulator) in this regard and the enforcement of the human rights-related measures of the different ministries has been very weak. The trade practice and consumers' protection law has also not been strongly enforced.[112] Also, only the financial sector has experienced vibrant substantive and disclosure regulations targeted at market entry, operation, and exit while the regulations in the other sectors have often related to the facilitation of market entry (i.e., licensing). The works of the regulators are also not focused on the protection of human rights. The recently approved National Human Rights Enforcement Strategy (2013–2015) is also not focused on the horizontal enforcement of human rights

111 Note the discussions under Section 2.3 above.

112 Weakness of enforcement and content incompleteness were the main reasons for the revision of the law from time to time. See the official explanations to the revisions of the law archived in the House of Peoples' Representatives (i.e. parliament) (unpublished documents; not available online).

between business entities and individuals.[113] The foreign investment treaties and domestic lease agreements of the government also do not have human rights clauses.[114] The government appears to be very much influenced by the agenda of attracting investment and this is coupled with the absence of a home state duty to regulate extra-territorial activities of foreign investors and business entities under international law.[115] All these imply that the government has to increase its regulation and thereby strengthen the protection of human rights. Enforcing the UN Principles in the country will mean alerting the government to do this.

Both the government and the private sector's redress mechanisms for human rights violations are also weak in the country despite the hitherto efforts to strengthen them. The government courts in the urban areas lack human rights benches except for the children's rights courts and are overburdened by case backlogs while there is little access to government judiciary in rural areas, reliance being on traditional conflict resolution mechanisms which are not known to outsider investors and business entities.[116] The private commercial arbitration tribunals operating in the country also do not address human rights protection issues while the Human Rights Commission and the Ombudsman Office do not target human rights violations by the private sector.[117] The business entities which violate or are complicit in the violation of

113 It addresses issues in the vertical enforcement of human rights between government and individuals.

114 See the investment treaties and lease agreements archived at the Ethiopian Investment Agency, the Ministry of Finance and Economic Development, and the Ministry of Agriculture of Ethiopia, *supra* n. 27.

115 Note the discussion under the Protect Component of the UN Principles, *supra* n. 61.

116 The author has lived experience of this.

117 Note the structures and works of the private commercial arbitration tribunals in the country from the papers in Yazachew Belew (ed.), The Resolution of Commercial/Business Disputes in Ethiopia: Towards Alternatives to Adjudication?, *Ethiopian Business Law Series* 5 (2012). The powers and functions of the Human Rights Commission and the Ombudsman Office are available from their establishing legislation: the Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000, *Federal Negarit Gazeta,* 6th Year No. 40, Addis Ababa, July 4, 2000; and the Institution of the Ombudsman Establishment Proclamation No. 211/2000, *Federal Negarit Gazeta*, 6th Year No. 41, Addis Ababa, July 4, 2000. The Commission has power to investigate human rights violations by both governmental and non-governmental institutions although it has not usually done the latter in practice while the powers of the Ombudsman Office are legally limited to investigation of acts of maladministration by governmental institutions which violate constitutional rights (see articles 6 of Proclamations No. 210/2000 and 211/2000 and the annual reports of the Commission).

human rights also do not often remedy the violations on their own initiative. All these imply that the functions of government to ensure access to effective judicial and non-judicial remedies for those affected by violations of human rights by business entities and the commitments of business entities to remedy their human rights violations have to be strengthened. Enforcing the UN Principles in the country will mean alerting the government and the business entities to do so.

The non-governmental organizations and other non-business entities operating in the country are also doing hardly anything regarding the matter of business and human rights. A number of them have been active regarding the traditional matter of the respect for human rights by the government. They have shied away from the new field of enforcing respect for human rights by business entities. Even those that are registered as participants of the UN Global Compact Governance are contributing little on this regard.[118] Enforcing the UN Principles in the country will mean calling the non-governmental organizations and other non-business entities to pay attention to this missing task and to commit to participating in the Global Compact Governance.[119]

5 Conclusion

The voluntarism approach in the Global Compact Governance is based on the expectation that business entities can self-regulate themselves and that respecting human rights by business entities is useful to the success of business itself by promoting the rule of law, addressing consumer concerns, enabling value chain management, increasing worker productivity and retention, and building good community relationships. The due diligence element in the UN principles also means that business entities need to have policies under which they will conduct periodic assessment of not only compliance with laws but also of identifying, preventing, and mitigating the risk of infringing human rights. It is believed, and learned from practice, that conscious inclusion and implementation of the due diligence element along with a human rights policy (and clauses) by business entities increases respect for

118 See websites of some of the non-business entities registered as participants of the Global Compact Governance (Section 4.1 above). The author has conducted discussions with managers of the entities to learn about their achievements and future plans. All of them have attempted to create awareness about the Global Compact Principles through discussion workshops, but contributed less in influencing the regulation and self-regulation of business entities. They are optimistic about their future roles in this regard.

119 Calling on the non-governmental organizations to do this also, of course, requires creating a favorable working environment for them in the country.

human rights, reduces complicity in relation to violations, and facilitates support for the fulfillment of human rights. It is also understood that the commitment to respect human rights is complete when violations are remedied. The business entities and investors operating in Ethiopia do not have human rights protection policies (and clauses) so various non-remedied human rights violations have resulted from their operations as shown in part one of this study. It is also true, as shown in part four of this study, that they are mostly unaware of the existence of the UN Principles on business and human rights while those that are aware of the existence of the principles do not see the importance of respecting human rights in relation to their business operations. It is, therefore, important that they are taught the contents, assumptions, and expectations behind the UN Guiding Principles on Business and Human Rights, and work towards having and enforcing a human rights protection policy (and clauses).

The responsibility of government to regulate business entities and thereby to ensure the protection of human rights is also high in the country since self-regulation by business entities is weak or non-existent. It is important that the government effectively transforms itself from an administrative to regulator state type and balances between the development agenda and protection of human rights, i.e., between investor/business protection (in the interest of investment/business attraction) and investor/business regulation (in the interest of human rights protection). It is equally important that it focuses its regulatory functions on human rights protection by expressly including and enforcing human rights policy clauses in its regulatory instruments. It also needs to revise the recently approved National Human Rights Enforcement Strategy (2013–2015) to focus it on the horizontal enforcement of human rights between business entities and the citizen along with the vertical enforcement between government and the citizen. It is also important that the government negotiates with home state governments of the foreign business entities and investors operating in the country to integrate its own authority to regulate and home state role to discipline the foreign business entities and investors in the interest of human rights protection. This is legitimate given the lesson from international experience that the major responsibility to regulate business entities for human rights rests with national (largely host) governments and that the inclusion of human rights clauses in trade and economic cooperation agreements among governments boosts the corporate practice of human rights. The government also needs to strengthen the judicial and non-judicial mechanisms for sanctioning corporate irresponsibility and remediation since the self-initiative of the business entities in the country to remedy their human rights violations is weak.

The non-governmental organizations and other non-business entities operating in the country are also not in line with the international development

when they shy away from the matter of enforcing respect for human rights by business entities. Given that modern regulatory theory also recognizes tripartite regulation of business entities (by governments, the business entities themselves, and third parties), the non-governmental organizations and other non-business entities need to work beyond the traditional field of respecting human rights by government. They need to volunteer to the Global Compact Governance to work towards fulfillment of its goals regarding business and human rights. The non-governmental organizations and other non-business entities which are already registered as participants of the Global Compact Governance also need to become more active advocates of the respect for human rights by business entities.

All the above means that integrating market development and human rights protection in the country requires tripartite action by business entities, the government, and non-governmental organizations and other non-business entities. Enforcing the UN Principles on business and human rights in the country is justified since it has been foreseen this tripartite action and enforcement of the UN Principles will mean increasing the human rights-related commitments and actions of the business entities themselves, the government, and non-governmental organizations and other non-business entities.

Bibliography

Adeyeye, Adefolake. "Universal standards in CSR: are we prepared?" *Corporate Governance* 11 (2011): 107–119.

Amao, Olufemi. *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries*. Oxon: Routledge, 2011.

Arevalo, Jorge A., and Francis T. Fallon. "Assessing corporate responsibility as a contribution to global governance: the case of the UN Global Compact." *Corporate Governance* 8 (2008): 456–470.

Arnold, Denis G., and Andres Valentin. "Corporate social responsibility at the base of the pyramid." *Journal of Business Research* 66 (2013): 1904–1914.

Asgary, Nader, and Mark C. Mitschow, "Toward a Model for International Business Ethics." *Journal of Business Ethics* 36 (2002): 239–246.

Bernhagen, Patrick, and Neil J. Mitchell. "The Private Provision of Public Goods: Corporate Commitments and the United Nations Global Compact." *International Studies Quarterly* 54 (2010): 1175–1187.

Blanton, Shannon Lindsey, and Robert G. Blanton. "Human Rights and Foreign Direct Investment: A Two-Stage Analysis." *Business and Society* 45 (2006): 464–485.

Bremer, Jennifer Ann. "How global is the Global Compact?" *Business Ethics: A European Review* 17 (2008): 227–244.

Buhmann, Karin. "Corporate social responsibility: what role for law? Some aspects of law and CSR." *Corporate Governance* 6 (2006): 188–202.

Carasco, Emily F., and Jang B. Singh. "Towards holding transnational corporations responsible for human rights." *European Business Review* 22 (2010): 432–437.

Carasco, Emily F., and Jang B. Singh. "Human Rights in Global Business Ethics Codes." *Business and Society Review* 113 (2008): 347–361.

Connolly, Nicholas. "Corporate social responsibility: a duplicitous distraction?" *The International Journal of Human Rights* 15 (2012): 1013–1030.

Crag, Wesley. "Human Rights and Business Ethics: Fashioning a New Social Contract." *Journal of Business Ethics* 27 (2000): 205–214.

De Jonge, Alice. "Transnational corporations and international law: bringing TNCs out of the accountability vacuum." C*ritical Perspectives on International Business* 7 (2011): 66–89.

Deva, Surya. *Regulating Corporate Human Rights Violations: Humanizing Business*. Oxon: Routledge, 2012.

Forsythe, David P. *Human Rights in International Relations*. 3rd. ed. Cambridge: Cambridge University Press, 2012.

Hafner-Burton, Emilie. *Forced to be Good: Why Trade Agreements Boost Human Rights*. Ithaca: Cornell University Press, 2009.

Herdegen, Matthias. *Principles of International Economic Law*. Oxford: Oxford University Press, 2013.

Jackson, Kevin. "Natural law, human rights and corporate reputational capital in global governance." *Corporate Governance* 8 (2008): 440–455.

Kimbro, Marinilka Barros, and Zhiyan Cao. "Does voluntary corporate citizenship pay? An examination of the UN Global Compact." *International Journal of Accounting and Information Management* 19 (2011): 288–303.

Li, Shaomin, and Ajai Gaur. "Financial giants and moral pygmies? Multinational corporations and human rights in emerging markets." *International Journal of Emerging Markets* 9 (2014): 11–32.

Lin-Hi, Nick, and Karsten Müller. "The CSR bottom line: Preventing corporate social irresponsibility." *Journal of Business Research* 66 (2013): 1928–1936.

Murphy, Patrick E., and Bodo B. Schlegelmilch. "Corporate social responsibility and corporate social irresponsibility: Introduction to a special topic section." *Journal of Business Research* 66 (2013): 1807–1813.

Neesham, Cristina, Charmine E.J. Härtel, Ken Coghill and James Sarros. "Profit-making vs human value: philosophy's contribution." *Equality, Diversity and Inclusion: An International Journal* 29 (2010): 593–608.

Panda, Barcelona. "Multinational corporations and human rights violations: Call for rebuilding the laws of twenty-first century." *Journal of Financial Crime* 20 (2013): 422–432.

Pentikäinen, Merja. "Changing International 'Subjectivity' and Rights and Obligations under International Law – Status of Corporations." *Utrecht Law Review* 8 (2012).

Quiroz-Onate, Diego, and Mhairi Aitken. "Business and human rights: A critical assessment of the notion of CSR and measurement." *Journal of International Trade Law and Policy* 6 (2007): 79–90.

Sadler, David, and Stuart Lloyd. "Neo-Liberalizing Corporate Social Responsibility: A Political Economy of Corporate Citizenship." *Geoforum* 40 (2009): 613–622.

Sappideen, Razeen. "Property rights, human rights, and the new international trade regime." *The International Journal of Human Rights* 15 (2011): 1013–1030.

Schouten, Esther M.J. "Defining the corporate social responsibility of business from international law." *Managerial Law* 49 1/2 (2007): 16–36.

Soederberg, Susanne. "Taming Corporations or Buttressing Market-Led Development? A Critical Assessment of the Global Compact." *Globalizations* 4 (2007): 500–513.

Srivastava, Trilok Chandra. "Human-Rights in Management – A Global Language in New Millennium." *Indian Streams Research Journal* 2 (2012).

Stohl, Michael, and Cynthia Stohl. "Human rights and corporate social responsibility: Parallel processes and global opportunities for states, corporations, and NGOs." *Sustainability Accounting, Management and Policy Journal* 1 (2010): 51–65.

Uzoma Ihugba, Bethel. "The governance of corporate social responsibility: Developing an inclusive regulation framework." *International Journal of Law and Management* 56 (2014): 105–120.

Van de Ven, Bert. "Human rights as a normative basis for stakeholder legitimacy." *Corporate Governance* 5 (2005): 48–59.

Warren, Richard C. "Are we making progress in international business ethics?" *Humanomics* 27 (2011): 212–224.

Yazachew Belew, ed. "The Resolution of Commercial/Business Disputes in Ethiopia: Towards Alternatives to Adjudication?" *Ethiopian Business Law Series* 5 (2012).

CHAPTER 8

The Quest for Effective Remedies in the Home States of Transnational Corporations

Legal Realism Versus Legal Reality

Lieselot Verdonck

Abstract

This paper examines the availability of effective legal remedies in the home state of transnational corporations that violate the rights of local communities in developing countries. In this regard, three fundamental obstacles in the quest for justice are identified. First, courts may dismiss claims for lack of jurisdiction. Second, finding liability on the part of the subsidiary of a transnational corporation so as to award compensation can suffer from flaws in the regulatory framework of the host state, which generally constitutes the applicable law. Third, the principle of the corporate veil provides the opportunity to parent companies to escape liability. Given the unjust consequences of this state of affairs, this paper identifies opportunities to redress the current lack of effective legal remedies in the home state of transnational corporations.

Keywords

business and human rights – effective legal remedies – home state litigation – establishing jurisdiction – applicable law – parent liability – Ethiopia

1 Introduction

By recognizing a right to improved living standards and to sustainable development as well as a right to a clean and healthy environment,[1] the Ethiopian constitution is clearly committed to protecting the Ethiopian population against corporate conduct that deprives them of their economic, social, and

1 Articles 43.1, 44.1, 90.1, and 92.1 of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, *Federal Negarit Gazeta*, Year 1, No 1 Addis Ababa, August 21, 1995.

 | DOI 10.1163/9789004280250_010

cultural rights (ESC rights). At the same time, however, the country seeks to attract foreign investors, in particular in the mineral and agricultural industry, in an attempt to stimulate economic growth and reduce poverty.[2] In order to abide by the terms of its constitution and to protect the environment, livelihood, and health of its people, the Ethiopian government should design and enforce an effective regulatory framework. Nevertheless, in a world of economic globalization one may wonder why developing countries, like Ethiopia, bear the responsibility to protect their people against abuses by wealthy corporations, whose economic might and corresponding international leverage regularly exceed that of a single state.

Although the focus on non-state actors in the international arena is increasing, international law has yet to follow this trend. This is illustrated by the United Nations (UN) Framework on the protection of human rights in the context of business drafted by the Special Rapporteur on the issue of human rights and transnational corporations and other business enterprises, John Ruggie.[3] This framework is based on three pillars: the state's 'duty' to protect, the corporation's 'responsibility' to respect, and the provision of effective remedies. This wording might not immediately warn inattentive readers, but there is an important difference between describing an actor's obligation as a 'duty' or a 'responsibility'. Only the former is legally enforceable. Consequently, when a corporation violates the ESC rights of laborers or communities, these victims cannot enforce their human rights *as such* against the perpetrator.[4] Instead, they need to invoke national regulations, adopted by the state under its legal obligation to protect.

---

2 "The vision for the coming 15 to 20 years [...] is to establish a [...] private sector led mining sector [...] contributing not less than 10% of the GDP thereby enhancing the socioeconomic development and eradication of poverty in Ethiopia." "National Report on Mining to the United Nations Commission on Sustainable Development," Ethiopian Ministry of Mines and Energy, accessed August 2, 2013, http://sustainabledevelopment.un.org/dsd_aofw_ni/ni_pdfs/NationalReports/ethiopia/mining.pdf; "Former agricultural investment support directory launched as agricultural investment land administration agency," Ethiopian Ministry for Agriculture, accessed October 7, 2013, http://www.moa.gov.et/documents/93087/537174/Agricultural+Investment+Agency.pdf/60fb6d53-6ee7-4bf9-8ad4-c766efce77e5.

3 "Report on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Human Rights Council, 17th session, U.N. Doc. A/HRC/17/31 (2011) (henceforth UN Guiding Principles).

4 Unless in a constitutional system where human rights apply horizontally, such as South Africa.

However, which state should impose such regulations on transnational corporations (TNCs) in a globalized world? After all, these corporations generally have their headquarters in a developed country or an emerging economy, but they operate across borders, including in developing countries. According to the UN Guiding Principles, only the state in which the corporation operates (the host state) is legally obliged to regulate corporate behavior. The state in which the parent company of the transnational group is based (the home state), on the other hand, only has a moral obligation to regulate the behavior of its corporations operating abroad.[5]

Accordingly, this legal framework means that countries lacking the necessary resources and expertise are left alone in regulating powerful TNCs. Moreover, regardless of their ability, developing countries are also reluctant to impose stringent standards, as they fear divestment. These legal realist considerations should urge developed countries to take a clear stance towards human rights violations by 'their' TNCs in developing countries. The question thus arises whether victims of such violations currently have access to effective legal remedies in home states, or whether developing countries, such as Ethiopia, bear the sole or primary responsibility for safeguarding the rights of their people. In other words, have legal realist findings in any way impacted the quest for effective legal remedies?

This question will be answered by analyzing two recent judicial decisions rendered in the Netherlands (*Akpan* v. *Shell*[6]) and the United Kingdom (UK) (*Vava* v. *AASA*[7]). Following a brief statement of the facts underlying each particular case, three issues are addressed that are fundamental to assessing the availability and effectiveness of these remedies. Firstly, to what extent can victims sue the parent company and its subsidiary in the TNC's home state? This procedural question essentially examines whether home state courts have jurisdiction over foreign-based subsidiaries and their parent companies. If such jurisdiction is established, two substantive questions remain. Under the rules on conflict of laws, what law is applicable to decide upon the subsidiary's liability? And, can parent companies be held liable for their subsidiary's conduct? The results of this analysis will demonstrate that effective legal remedies in developed countries are scarce. As a consequence, whether equitable or not, developing countries are saddled with the immense responsibility of protecting the ESC rights of laborers and of communities living in the vicinity of large investment projects.

5 Commentary under principle 2 of the UN Guiding Principles (see n. 2).

6 Rb. Den Haag January 30, 2013, (*Akpan & Vereniging Milieudefensie* v. *Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*), LJN BY9854 (Neth.).

7 *Flatela Vava & Others* v. *Anglo American South Africa Ltd.*, [2012] EWHC (QB) 1969 (Eng.).

2 Facts Giving Rise to the Lawsuits

2.1 *Akpan* v. *Shell*

Oil extraction in the Niger Delta comes with a huge cost for its communities whose sustenance largely depends upon agriculture, forestry, and fishery. There are dozens of oil spills every year and, according to a recent report of the UN Environmental Programme, it will take up to 30 years to rehabilitate the environment in Ogoniland alone – that is if no new spills occur.[8] Whenever the oil spilled is not immediately cleaned up, the consequences for nearby communities are dramatic. A fire can ignite and destroy large areas of vegetation.[9] The resulting crust of bituminous substances precludes the growing of vegetation and crops for many years.[10] If there is no such fire, the oil penetrates into the soil and spreads to adjacent farms and fishponds, destroying crops, killing fish, and reducing agricultural yields for many years.[11] In addition, the water and soil contamination causes divergent illnesses, ranging from stress-related diseases to skin problems, diarrhea, nausea, cancer, and neurotoxicity.[12]

In May 2008, four Nigerian farmers and a Dutch NGO sued Shell and its local subsidiary, the Shell Petroleum Development Company (SPDC),[13] in The Hague. They sought to pillory the environmental pollution caused by oil leaks from SPDC's pipelines and wells in the Niger Delta. The plaintiffs demanded Shell to immediately clean up the oil, rehabilitate the area, compensate the victims, and prevent future leakages by maintaining its equipment and securing it against acts of sabotage as well as to adopt and implement an adequate reaction plan for future leakages.

---

8 "Environmental Assessment of Ogoniland," UNEP, 12, accessed November 20, 2013, http://www.unep.org/disastersandconflicts/CountryOperations/Nigeria/EnvironmentalAssessmentofOgonilandreport/tabid/54419/Default.aspx.

9 Ibid., 168.

10 Ibid., 168.

11 Ibid., 167.

12 Ibid., 39–42.

13 In Nigeria, companies can explore and produce oil provided that they are domestically incorporated and operate on the basis of a joint venture or a production sharing agreement with the state-owned Nigerian National Petroleum Corporation (NNPC). SPDC is a joint venture of NNPC (55 percent), Royal Dutch Shell (30 percent), Elf Petroleum Nigeria (10 percent) and General Italian Oil Company (5 percent). Section 44(3) constitution of Nigeria (1999); sections 1(1) & 2(2) Petroleum Act (2004) Cap. (P10); section 54(1) Companies and Allied Matters Act (1990) Cap. (59); section 5 Nigerian National Petroleum Corporation Act (1990) Cap. (320); Deep Offshore and Inland Basin Production Sharing Contracts Decree (1999) Cap. (9).

On January 30, 2013, the Court of The Hague ruled that only SPDC and not Shell could be held liable for the oil spills for reasons of negligence.[14] Moreover, only one farmer was awarded compensation, as there was insufficient evidence that the spills in the other two villages were caused by such negligence. The Dutch NGO and the other farmers appealed the judgment.[15]

2.2 *Vava* v. *AASA*

This lawsuit finds its origins in the poor working conditions in the gold mines of South Africa, where mineral extraction constitutes one of the main stimuli for economic growth.[16] However, this growth does not necessarily benefit marginalized black communities, who have to work in appalling conditions. One of the main players in the extractive industry is Anglo American, a company that has been based in the UK since 1998, when it moved its headquarters from Johannesburg to London. Many miners who worked in the underground gold mines of Anglo American South Africa (AASA) – currently a wholly-owned subsidiary of Anglo American – have contracted silicosis, a lung disease, due to excessive exposure to high dust levels without adequate protection.[17]

In September 2011, 19 former employees sued AASA in the London High Court of Justice to seek compensation for their lung disease, and follow-up suits have involved over 2,000 claimants.[18] In July 2013 the High Court denied having jurisdiction. Some claimants appealed this decision, while others have been pursuing their claims before the South African courts in Johannesburg.

---

14 *Akpan* v. *Shell* (see n. 6); Rb. Den Haag January 30, 2013, (*Oguru & Others* v. *RDS Plc. and SPDC of Nigeria Ltd.*), LJN BY9850 (Neth.); Rb. Den Haag January 30, 2013, (*Tete Dooh & Another* v. *RDS Plc. and SPDC of Nigeria Ltd.*), LJN BY9845 (Neth.). Henceforth, this paper will only refer to the case of Akpan, in which compensation has been awarded.

15 The NGO, Vereniging Milieudefensie, appealed the three judgments because Shell was not held liable for its subsidiary's spills. "Nigerianen en Milieudefensie in hoger beroep tegen Shell," Vereniging Milieudefensie, accessed July 31, 2013, http://www.milieudefensie.nl/nieuws/pers/berichten/nigerianen-en-milieudefensie-in-hoger-beroep-tegen-shell.

16 Mineral extraction accounted for 9 percent of South Africa's GDP in 2009. "Mineral Accounts for South Africa: 1989–2009," Statistics South Africa, accessed April 20, 2013, http://www.statssa.gov.za/publications/D04052/D040522009.pdf.

17 The disease is characterized by shortness of breath, a persistent cough, and chest pains, and makes patients more susceptible to tuberculosis. "Silicosis and black miners," Leigh Day, accessed July 31, 2013, http://www.leighday.co.uk/Illness-and-injury/International-and-group-claims/Gold-mining-silicosis-(1)/Silicosis-and-black-miners.

18 *Vava* v. *AASA* (see n. 7).

3 Procedural Challenges: Jurisdiction of Courts in Developed Countries

3.1 *Suing the Parent Company*

There is no doubt that parent companies of transnational groups that are registered in a particular country can be sued before its courts. Within the European Union (EU), for instance, this issue is governed by the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (henceforth Brussels I Regulation).[19] In conformity with its principal rule, persons should be sued before the courts of the Member State where they are domiciled (art. 2).[20] A company's domicile can be established on the basis of three factors, notably its statutory seat, its central administration, and its principal place of business.[21] These notions have an autonomous EU meaning.[22] Whereas 'statutory seat' clearly refers to the company's place of registration, there is no authoritative case law of the Court of Justice on the precise meaning of the other two concepts.[23] When interpreting these notions in *Vava* v. *AASA*, Judge Silber held that the 'central administration of a company' means the place where management and entrepreneurial decisions are adopted, whereas the 'principal place of business' corresponds to the location of its economic activities.[24]

In sum, courts within the EU can definitely hear claims against parent companies located on their territory, even in relation to disputes that originate in a foreign jurisdiction. It is even perfectly possible that a particular company can be sued in several EU Member States. An example relevant to the cases discussed is Shell that can be sued in the UK (its statutory seat) and the Netherlands (its central place of administration).[25]

3.2 *Suing the Foreign-Based Subsidiary*

Victims generally also want to sue the company that actually committed the human rights violation. However, it is likely that the defending party will

19 Council Regulation (EC) No. 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.01.2001, 1.

20 Defendants can also be sued before the courts of the state in which the harmful event occurred or may occur (*forum delicti commissi*). Article 5.3 Brussels I Regulation (see n. 19).

21 See Article 60 Brussels I Regulation (see n. 19).

22 They should thus be interpreted independently from their application and understanding in any individual Member State.

23 *Vava* v. *AASA*, §43 (see n. 7).

24 Ibid.

25 Cf. *Akpan* v. *Shell* (see n. 6).

invoke an exception of inadmissibility for reason of its foreign nationality. Under what circumstances can foreign companies nevertheless be sued before the courts of their parent's home state?

The Court of The Hague and the London High Court have both – out of necessity – applied a different approach to decide this question. In *Akpan* v. *Shell*, the Court took account of the correlation between the claims against parent and subsidiary, whereas in *Vava* v. *AASA* the Court examined the degree of independence of the subsidiary from its parent so as to decide where the former company had its place of central administration.[26] Under any circumstances, suing a foreign subsidiary because of its conduct in a foreign jurisdiction will inevitably raise concerns under the common law principle of *forum non conveniens*.[27] Therefore, this exception of inadmissibility is explained first and foremost.

3.2.1 Forum Non Conveniens[28]

In common law jurisdictions, plaintiffs should always be aware of *forum non conveniens*. This principle compels judges to ascertain whether there is a more appropriate forum to settle a particular dispute and to serve justice, which regularly results in a summary dismissal of lawsuits against foreign defendants for foreign conduct.[29]

---

26 There are also other rules that can establish jurisdiction over foreign companies. Dutch courts, for instance, have jurisdiction when litigation in a foreign forum is impossible or when the case is sufficiently connected to the Dutch sphere of law and the plaintiff cannot be required to bring the case before a foreign court. Article 9(b)-(c) Rv [Codex on Legal Claims] (Neth.). Similar rules exist in, *inter alia*, France, Germany, and Switzerland. Michael D. Goldhaber, "Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard," *UC Urvine Law Review* 3 (2013): 135.

27 *See* Richard Meeran, "Tort Litigation against Multinational Corporations for Violations of Human Rights: An Overview of the Position Outside the United States," *City University of Hong Kong Law Review* 3 (2011): 11–14.

28 The Brussels I Regulation has eliminated this rule for EU companies; courts may not refuse jurisdiction over a company that has its domicile in their territory if the alternative forum lies outside the EU. ECJ, C-281/02 *Owusu* v. *Jackson* [2005] ECR I-1383; Goldhaber, "Corporate Human Rights Litigation," 132 (see n. 26); Meeran, "Tort Litigation Against Multinational Corporations," 13–14 (see n. 27).

29 The application of this rule might differ slightly from one common law jurisdiction to another. In the UK, for instance, judges have to assess whether there is a clearly and distinctly more appropriate forum and whether there are nevertheless reasons of justice requiring the exercise of jurisdiction. In Australia, the defendant needs to establish that the court approached is a clearly inappropriate forum. Meeran, "Tort Litigation Against Multinational Corporations," 11–12 (see n. 27).

Recently, UK courts have softened the application of *forum non conveniens*, however, and have accepted jurisdiction when the plaintiff establishes:

> that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available.[30]

Also in Québec, for instance, courts have accepted jurisdiction when the plaintiffs demonstrate that proceedings elsewhere cannot possibly be instituted or reasonably required, provided that the dispute is sufficiently connected with Québec.[31]

3.2.2 'Correlated Claims' Approach

First of all, courts can accept jurisdiction over claims against foreign companies when there is a correlation with the claims targeting the other defendant(s) such that reasons of efficiency require their joint hearing. This 'correlated claims' approach thus assumes that victims simultaneously bring a lawsuit against the parent company and subsidiary, as jurisdiction over the latter is ancillary to that over the parent.

In *Akpan* v. *Shell* the Court of The Hague applied the Dutch rule on jurisdiction over correlated claims rather leniently.[32] Firstly, the Court ruled that there was a sufficient nexus between the claims against both defendants, because they related to the same damage arising out of the same set of facts.[33] Such interpretation would apply to any case in which parents and subsidiaries are sued for human rights abuses by the latter. Secondly, even if the claim against the parent would ultimately prove to be unsuccessful, the Court would retain jurisdiction over the foreign subsidiary.[34] This lenient attitude was perhaps

30 *Connelly* v. *RTZ Corporation Plc. & Others*, [1997] UKHL 30, §30 (Eng.); see also Meeran, "Tort Litigation against Multinational Corporations," 11 (see n. 27).

31 *Anvil Mining Ltd.* v. *Association Canadien contre l'Impunité*, 2012 QCCA 117, §§95–103 (Canada).

32 The Brussels I Regulation did not apply as SPDC is not domiciled within the EU. Art. 4(1) Brussels I Regulation; Article 7(1) Rv. [Codex on Legal Claims] (Neth.); Rb. Den Haag February 24, 2010, (*Akpan & Vereniging Milieudefensie* v. *Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd.*), LJN BM1469 (interlocutory decision), §3.4 (Neth.).

33 *Akpan* v. *Shell*, interlocutory decision, §§3.5–3.6 (see n. 32).

34 The Court expressly stated not to be bound by *forum non conveniens*. *Akpan* v. *Shell*, §4.6 (see n. 6).

announced by the Court's consideration that there is an international trend to hold parent companies liable in their home state for damage caused by foreign subsidiaries, "whereby several times already the foreign subsidiary was sued simultaneously with the parent company."[35]

Several other countries have a similar rule to accept jurisdiction.[36] Nevertheless, these rules generally seek to prevent situations in which national defendants are merely sued in order to establish jurisdiction over foreign defendants.[37]

3.2.3 'Central Administration' Approach

The 'correlated claims' approach could not be applied in *Vava* v. *AASA*, as the plaintiffs only brought proceedings against the South African subsidiary of Anglo American. Instead, they advanced a more proactive approach to accepting jurisdiction: they argued that UK courts had jurisdiction over AASA under the Brussels I Regulation, because its management and entrepreneurial decisions were in fact adopted at Anglo American's headquarters, so that it had its central administration in the UK.[38]

Judge Silber accepted in an interlocutory decision that the claimants could "at least argue" that AASA had its central administration in the UK.[39] In the final decision on jurisdiction, however, Judge Smith did not accept this proposition.[40] His reasoning was twofold. Firstly, the plaintiffs had not demonstrated that Anglo American exercised such control over AASA that it in fact adopted its management and entrepreneurial decisions.[41] The Judge considered it logical, and thus insufficient, that a parent greatly influences its subsidiary's

35 *Akpan* v *Shell*, §4.5 (see n. 6) [non-official translation].

36 See, e.g., Article 9 Wet houdende het Wetboek van Internationaal Privaatrecht [Act on the Code of International Private Law] (Belgium); Rule 6.20(3) of the Civil Procedure Rules, 1998, No. 3132 (L. 17) (UK).

37 See, e.g., Article 5 of the Act on the Code of International Private Law (Belgium) (see n. 36) *and* Rule 6.20(3) of the UK Civil Procedure Rules, providing that there should at least be an arguable case against the first defendant for permission to be granted to the co-defendant.

38 *Vava* v. *AASA* (see n. 7).

39 Ibid., at §§59–62. The judge took five factors into consideration: the absolute and relative value of AASA's assets; the fact that it only infrequently holds board meetings; the weight accorded to the parent's policy and strategy in decision-making; the close working links between AASA's CEO and the parent company; and the existence of two committees that should safeguard the group's overall strategy and policies.

40 *Vava* v. *AASA*, July 24, 2013 [2013] EWHC (QB) 2131 (Eng.).

41 Ibid., §§34–54.

decision-making process.[42] Secondly, Judge Smith simply did not accept that a subsidiary could ever have its central administration at its parent's headquarters, unless the influence rises to such extent that the subsidiary only acts through its parent's constitutional organs.[43] This amounts to a requirement to pierce the corporate veil (see *infra*) by demonstrating that the subsidiary's establishment is fraudulent or a sham. Accordingly, Judge Smith dismissed the case for reasons of *forum non conveniens*, but granted the plaintiffs leave to appeal.[44]

If *Vava* v. *AASA* acts as a precedent, it will seriously impact the possibility of suing foreign-based subsidiaries in the UK. In 2011, for instance, the Nigerian Bodo community sued Shell and SPDC before the London High Court in order to claim compensation for oil spills.[45] Another recent lawsuit has been brought by Tanzanian villagers against a locally operated mine and its UK-based parent, African Barrick Gold, for alleged complicity in human rights violations committed by Tanzanian security forces.[46] Will the claims against the Nigerian and Tanzanian subsidiaries be dismissed for reasons of *forum non conveniens*?

3.2.4 Conclusion

At least from a purely procedural perspective, victims of human rights violations by TNCs can sue the parent company in its home state. Suing the foreign-based subsidiaries might be a legal struggle, however. This paper has not even touched upon the many practical burdens that limit access to these courts, in particular the costs of such proceedings and the problem of distance.[47] In

42 Ibid., e.g., §§34, 38, and 46.

43 He held that the Brussels I Regulation is aimed at providing a predictable test of jurisdiction, so that identifying a company's central administration is a factual question that should not involve legal assessments about the degree of control a parent may exercise. Ibid, §§71–74.

44 Ibid., §76.

45 SPDC acknowledged its liability in a settlement in exchange for a withdrawal of the claims against Shell, but no settlement seems to have been reached on the damages, so that the suit is still pending. *Bodo Community* v. *SPDC of Nigeria*, [2012] EWHC (QB) HQ11X01280; Goldhaber, "Corporate Human Rights Litigation," 130 (see n. 26); "11,000 Nigerians sue Shell in London Courts," Leigh Day, accessed August 10, 2013, http://www.leighday.co.uk/News/2012/March-2012/11,000-Nigerians-sue-Shell-in-London-Courts.

46 *Magige ghati Kesabo & Others* v. *African Barrick Gold Plc. & Another*, [2012] (QB) HQ13X02118; "Tanzanian villagers sue London based African Barrick Gold for deaths and injuries," Leigh Day, accessed August 10, 2013, http://www.leighday.co.uk/News/2013/July-2013/Tanzanian-villagers-sue-London-based-African-Barri.

47 Cf. Rachel Chambers, "Is Home State Litigation the Way to Fill the Lacuna in Corporate Legal Accountability for Human Rights Violations Perpetrated in Host States?" *JCL* 4 (2009): 145–146.

reality, victims will thus only truly be able to have recourse to these remedies when they receive some form of legal assistance, either from the state or from specialized NGOs or law firms.[48] Moreover, the procedural rules in the home state, which determine, *inter alia*, the course of legal proceedings, the burden and standard of proof, and standing rights, are not necessarily more beneficial than those applicable in the host state.[49]

Finally, the rules on the award of damages constitute one of the prevalent reasons why claimants sue TNCs in their home country. However, at least in the EU this will not hold true, as Article 15 of the EU Regulation on the law applicable to non-contractual obligations stipulates that the applicable law will also determine the question of damages.[50] As will be explained in the following sections, this will generally be host state law.

4 Substantive Law Questions

The inadequate regulation of corporate behavior in their own country is regularly another important reason why victims prefer to sue the corporation in its home state. However, rules on conflict of laws generally prescribe that courts have to apply the substantive law of the country in which the tort was committed. In the EU this is interpreted as being the country in which the damage occurred (*lex locus damnum*), as opposed to the place where the acts giving rise to the damage occurred (*lex loci delicti commissi*).[51] Notwithstanding some

48 See, e.g., Vereniging Milieudefensie in *Akpan* v. *Shell* and Leigh Day in *Vava* v. *AASA*.

49 A great burden in the UK, for instance, is the rule according to which unsuccessful litigants have to pay the other party's costs, unless they agree not to apply this rule or unless they are insured – this rule was recently largely eliminated for personal injuries. See, e.g., *Vava* v. *AASA*, [2013] EWHC (QB) 2326, §1 (Eng.); Michael Byers, "English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment," in *Liability of Multinational Corporations under International Law*, eds. Menno T. Kamminga & Saman Zia-Zarifi (The Hague: Kluwer, 2000), 244; Goldhaber, "Corporate Human Rights Litigation," 133–134 (see n. 26). The admissibility of collective actions in the Netherlands is an example of a situation in which procedural rules are more beneficial than in the host state, Nigeria. See *Akpan* v. *Shell*, interlocutory decision, §4.3 (see n. 32).

50 Regulation (EC) No 864/2007 of the European Parliament and of the Council of July 11, 2007 on the law applicable to non-contractual obligations, OJ L 199, 31.07.2007, p. 40 (henceforth Rome II Regulation); see also Goldhaber, "Corporate Human Rights Litigation," 132 (see n. 26) and Meeran, "Tort Litigation Against Multinational Corporations," 17 (see n. 27).

51 Article 4.1 Rome II Regulation. This regulation only applies to events which occurred after its entry into force on January 11, 2009, however (Articles 31–32 Rome II Regulation).

exceptions (see *infra*), home state courts will thus apply host state law in order to decide upon the liability of the subsidiary and the parent company. Moreover, even if courts apply home state law, they would still greatly depend upon host state law, such as its rules on how investigations into the causes of environmental degradation are carried out.

4.1 *Suing the Subsidiary: Applicable Law*

Interferences with ESC rights by extractive companies in developing countries generally result from poor working conditions and environmental degradation.[52] Under the rule of *lex loci delicti*, courts have to apply the law of the country in which the damage occurred, *id est* the host state, unless the parties to the dispute agree to apply home state law.[53] Accordingly, home state courts will apply the regulatory framework of the host state, even if it inadequately protects the ESC rights.

The impact this might have on the results of specific lawsuits is illustrated by the Nigerian cases filed in the Netherlands, in which compensation was awarded to only one of the four farmers for the spills that destroyed their means of sustenance. According to the Court, SPDC did not breach any duty of care, as the claimants could not establish that the oil spills were caused by ill-maintenance instead of sabotage by local people, who are desperate to grasp some of the benefits reaped by Shell and the Nigerian government, and the oil company had undertaken all reasonably available measures to prevent such sabotage.

This conclusion was largely impacted by two flaws in the Nigerian regulatory framework for the petroleum industry.[54] Firstly, victims of oil pollution only have a right to be compensated for damage caused to fisheries, crops, and

52 'Tort' is an autonomous EU concept (see n. 22). Recital 11 Rome II Regulation.

53 Article 4.1 Rome II Regulation. If both parties have their habitual residence in the same country, that law has to be applied (Article 4.2 Rome II Regulation). A subsidiary's habitual residence is the country in which it is vested (Article 23.1 Rome II Regulation). Moreover, victims of environmental damage can base their claim on the law of the country in which the event giving rise to the damage occurred (Article 7 Rome II Regulation). This rule will in principle not impact claims against the foreign subsidiary (unless claimants successfully argue that its decisions were taken at the parent's headquarters), but is highly relevant in identifying the law applicable to determine parent liability (see *infra* section B). Parties can also agree to apply the law of another country (Article 14 Rome II Regulation).

54 A general reform of the regulatory framework of the petroleum industry is currently under discussion, but had not yet been approved by the Nigerian parliament at the time of writing.

trees, and provided that they possess these goods.[55] Neither the pollution of public goods, such as water streams, nor potential health impacts, on the other hand, give rise to a right to compensation.[56]

Secondly, companies are not liable for leakages caused by sabotage, unless victims can demonstrate that a specific duty of care was violated.[57] This is dramatic in light of the procedure to determine the cause of a spill. Under the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria, a joint investigation team has been set up, which is composed of representatives of the company, the affected community, and the government. However, the Department of Petroleum Resources that represents the government is not an 'objective third party', as it is also responsible for the development and promotion of the oil industry.[58] Furthermore, the government receives the majority of SPDC's oil revenues after costs, via its majority-shareholding through NNPC and via taxes and royalties. Finally, due to the power imbalance between the community and the company and the lack of transparency during the investigation phase, the company has ample opportunity to ensure the spill is designated as being caused by sabotage.[59] This is heavily criticized by NGOs, such as Amnesty International,[60] all the more

55 Section 21(2) and 23 Petroleum (Drilling and Production) Regulations (2004) Cap. (P10); Section 11(5)(b-c) Oil Pipelines Act (1990) Cap. (338). Although according to Nigerian customary law these goods are commonly owned by the community, individual members can acquire possession if they use and cultivate them over a given period of time, which can be demonstrated by a declaration of the local chief. *Akpan* v. *Shell*, §§4.16–4.17 (see n. 6).

56 *Akpan* v. *Shell*, interlocutory decision, §5.4 (see n. 32); "Nigeria: Petroleum, Pollution and Poverty in the Niger Delta," Amnesty International, 73, accessed August 15, 2013, http://www.amnesty.org/en/library/info/AFR44/017/2009.

57 See n. 76; Cf. *Akpan* v. *Shell*, interlocutory decision, §§4.38–4.54 (see n. 32).

58 "The True 'Tragedy': Delays and Failures in Tackling Oil Spills in the Niger Delta," Amnesty International, 42, accessed August 15, 2013, http://www.amnesty.org/en/library/info/AFR44/018/2011/en.

59 "Another Bodo Oil Spill: Another Flawed Oil Spill Investigation in the Niger Delta," Amnesty International, 8–11, accessed August 15, 2013, http://www.amnesty.org/en/library/info/AFR44/037/2012/en; Amnesty International 2011, 32–33 (see n. 58). In the Dutch lawsuits, the village of Akpan first denied access to the polluted area, whereas the village of Oguru and Efanga refused to sign the final report of the joint investigation team. *Akpan* v. *Shell*, §2.6 (see n. 6); *Oguru* v. *Shell*, §2.6 (see n. 14).

60 See, e.g., "Bad Information: Oil Spill Investigations in the Niger Delta," Amnesty International, 19–27, accessed August 15, 2013, http://www.amnesty.org/en/library/asset/AFR44/028/2013/en/b0a9e2c9-9a4a-4e77-8f8c-8af41cb53102/afr44028 2013en.pdf; Amnesty International 2012, 8–10 (see n. 59).

because of the high risk of leaks from SPDC's old and ill-maintained pipelines due to corrosion, which was confirmed by experts and by an internal report by Shell itself.[61]

In sum, if the host state does not comply with its obligation to design and enforce an adequate regulatory framework, any remedy that might be available in the TNC's home state will ultimately prove to be unsuccessful.

4.2 *Suing the Parent Company: Rule of Liability*

One pressing question remains: can the parent company be held liable for its subsidiary's conduct? After all, these companies often exercise a high degree of control over their subsidiary's policies, and, at the very least, they could induce respect for human rights. Nevertheless, this question is pertinent and its answer discouraging, due to the sacred principle of the corporate veil: a subsidiary and the shareholding parent company are two distinct entities with separate legal personalities.[62] Parents can thus not be held liable merely because they are a controlling shareholder.

The corporate veil does not prevent holding the parent company directly liable for breaching its own duties, however. Accordingly, if this company is legally obliged to monitor its subsidiary's behavior *vis-à-vis* anyone affected by its activities, it could be held liable for not taking all reasonable measures for preventing human rights violations of which it was or should have been aware.[63] This is the doctrine of 'foreign direct liability'. The applicability of this doctrine depends upon the question whether the law applicable to the dispute, namely host state law (*lex locus damnum*), incorporates such rule. Nevertheless, courts can apply home state law, following an agreement between the litigating parties or when the plaintiff opted for the law of the

61 *Oguru* v. *Shell*, §§2.5 & 2.13–2.15 (see n. 14).

62 Cf. Meeran, "Tort Litigation Against Multinational Corporations," 5 (see n. 27); Adam McBeth, *International Economic Actors and Human Rights* (London: Routledge, 2010), 272. However, governments could derogate from the principle of the corporate veil by adopting a presumption that parent companies are liable for their subsidiaries' acts. See Olivier De Schutter, "Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations," unpublished seminar paper in collaboration with the Office of the U.N. High Commissioner for Human Rights (December 9, 2006), 39–41, accessed August 17, 2013, http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf.

63 Cf. *Akpan* v. *Shell*, §3.2 (see n. 6). The plaintiffs claimed that Shell breached its obligation to encourage its subsidiary to prevent oil spills and to adequately react in the case of a leak.

country in which the event (the decision) giving rise to the damage occurred in the case of environmental damage.[64]

4.3 *Creating Foreign Direct Liability through Home State Regulations*

Many scholars urge the governments of developed countries to impose upon their corporations a due diligence obligation in relation to their foreign subsidiaries. The question is thus whether developed countries currently have such regulations in force, and how 'home state responsibility' can be created?[65]

In light of the cases discussed, it is particularly relevant to look at the applicable law in the Netherlands and the UK. Under the Dutch law, companies should report in their annual review the social and environmental aspects of their operations, including those of their subsidiaries.[66] The UK Companies Act requires that the directors of UK-registered companies have regard to, *inter alia*, the impact of their operations on the community and the environment.[67] In addition, the annual business reviews of these companies should provide information on their environmental, social, and community policies, and their effectiveness.[68] However, neither the Dutch law nor the UK Companies Act explicitly provide for any liability for inadequately monitoring the behavior of foreign subsidiaries.

The legal reality of business and human rights is thus unjust; despite the acknowledgement that developing countries lack the necessary resources, expertise, and economic and political leverage to address abuses by TNCs on their own, home states do not assume any competence in the matter. Worse

64 Articles 7 and 14 Rome II Regulation. Meeran argues that the claim should be based on home state law, where the decisions were adopted. See Meeran, "Tort Litigation Against Multinational Corporations," 17 (see n. 27).

65 This paper will only briefly address these questions. For a detailed analysis, see, e.g., Christen Broecker, "'Better the Devil You Know' Home State Approaches to Transnational Corporate Accountability," *NYU Journal of International Law and Politics* 41 (2008–09): 159–217; Chambers, "Home State Litigation" (see n. 47); Sara L. Seck, "Conceptualizing the Home State Duty to Protect Human Rights," in *Corporate Social and Human Rights Responsibilities*, eds. Karin Buhmann *et al.* (London: Palgrave MacMillan, 2011), 25–51; Sara L. Seck, "Home State Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance," *German L.J.* 13 (2012): 1363–1385; Sara L. Seck, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?" *Osgoode Hall L.J.* 46 (2008): 565–603.

66 Richtlijn 400 Raad voor de Jaarverslaggeving [Guideline of the Council for Annual Reporting] (2003).

67 Section 172(1)(e) *juncto* 1 Companies Act, 2006, c. 46.

68 Section 417(5)(b) Companies Act, 2006, c. 46.

even, they hide themselves behind notions of 'sovereignty' and 'imperialism': they pretend that such regulations would interfere with the sovereign right of the host state to exploit its resources in accordance with its own policies. For sure, this lack of political will in home states needs to be addressed, but how?

As there is no general agreement that states are legally obliged to adopt home state regulations, human rights advocates should at the very least try to sensitize governments. This requires that arguments denouncing such regulations, in particular the non-interference in the internal affairs of other states, should be tackled. One advocate of extraterritorial regulations has advanced interesting arguments to conclude that such regulations are not imperialistic, when they aim at giving a voice to local communities who want to protect their natural resources.[69] A very convincing argument is advanced by the UN Special Rapporteur, John Ruggie. He argues that the jurisdictional basis of such regulations would be territorial but with extraterritorial effects; this is not the same as criminally prosecuting a foreign perpetrator for extraterritorial conduct.[70]

If home states decide to adopt extraterritorial regulations, they should impose a due diligence obligation on parent companies regarding their subsidiary's behavior. A general exception to the principle of the corporate veil for human rights violations would be too radical; parent companies should not be automatically presumed to be responsible for the abusive behavior of subsidiaries.[71] The due diligence obligation is one of means, not of result. Parents should thus monitor their subsidiary's conduct abroad and, comparable to the rule of superior responsibility under international criminal law, they should be held liable if they have control over their subsidiary and had knowledge or ought to have had knowledge of the human rights violations, but failed to adopt all reasonably available measures to prevent them.

Nevertheless, it should be stressed that such regulations cannot by themselves put an end to abusive corporate behavior, as they cannot rectify flaws in the regulatory framework of the host state. After all, prior to holding the parent liable for insufficiently monitoring its subsidiary, victims first have to establish that the latter committed a tort and that they have a right to compensation under host state law. However, this also requires that the hands of governments

69 See, e.g., Seck 2008, 2011 & 2012 (see n. 65).

70 John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: Norton, 2013), 139–141.

71 *Contra* Broecker, "Home State Approaches," 196–198, (see n. 65) (discussing foreign direct liability as entailing an automatic imposition of liability). Muchlinski, for instance, argues in favor of a rebuttable presumption of joint and several parent liability for its subsidiary's acts, whereby the presumption can be rebutted by establishing its independence. Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell, 1999), 331.

of developing countries are not tied by restrictive bilateral investment agreements. Such agreements regularly include clauses that aim at protecting foreign investors against the imposition of more stringent regulations that would undermine their investment. Home states and foreign investors should thus be willing to accept an exception for human rights standards, whereas host states should ensure a better coordination between trade and human rights departments so that negotiators take account of the impact of specific clauses on the state's obligation to protect human rights.[72] In sum, the obligations of home and host states will always be complementary.[73]

4.4 *Foreign Direct Liability Under Common Law: Chandler v. Cape*

4.4.1 Liability for Labor Conditions

There arguably already exists a limited rule of due diligence in common law.[74] In *Chandler* v. *Cape*, a parent company was held liable for its subsidiary's unsafe working environment, as a result of which the claimant, a former employee, had contracted asbestosis.[75] Notwithstanding its acknowledgment that parent companies do not have a general duty of care to prevent their subsidiaries from causing damage to third persons, the London judges ruled that a specific duty of care might exist if three conditions are met.[76] First, the damage has to be foreseeable. Second, a 'relationship of proximity' must exist between the party owing the duty (the parent company) and the party to whom it is owed (the employees). Third, the imposition of a duty of care has to be fair, just, and reasonable.[77] In *Chandler* v. *Cape* the Court concluded that the parent company had violated its specific duty of care towards its subsidiary's employees.[78]

---

72 Cf. Ruggie, *Just Business*, 86–87 (see n. 70).

73 Cf. McBeth, *International Economic Actors and Human Rights*, 280 (see n. 62).

74 Meeran writes that "in an MNC context (…) the Chandler decision will have its greatest influence on MNC operations in states with English-based tort systems." Cf. Meeran, "Tort Litigation Against Multinational Corporations," 10 (see n. 27).

75 *David Brian Chandler* v. *Cape Plc.*, [2011] EWHC 951 (QB), *aff'd*, [2012] EWCA (Civ) 525 (Eng.).

76 *Chandler* v. *Cape* [2011], §64 (see n. 75); *Chandler* v. *Cape* [2012], §§32 and 63 (see n. 75).

77 There are four situations in which these last two conditions will automatically be met. In *Chandler* v. *Cape*, for instance, the parent company was considered to have assumed responsibility over its subsidiary's employees. *Chandler* v. *Cape* [2011], §66, 71 and 75 (see n. 75); *Chandler* v. *Cape* [2012], §§69–70 (see n. 75).

78 More specifically the Court held that the parent's activities were in a relevant respect the same as those of its subsidiary, it had or ought to have had a superior knowledge of health and safety in the particular industry and it knew or ought to have known that the

In line with *stare decisis*, this '*Chandler* v. *Cape*' rule is part of the common law legal system and thus of the substantive law of other common law nations, such as Nigeria and South Africa.[79] Importantly, this judgment might signal an evolution towards translating corporate social responsibility into legally binding obligations. Nevertheless, its conditions of application are rather stringent and judges could always distinguish a particular case from the facts underlying *Chandler* v. *Cape*. For instance, could the same reasoning be applied, when a TNC violates the rights of communities living in its vicinity?

4.4.2 Chandler v. Cape for Nearby Communities?

The applicability of the '*Chandler* v. *Cape*' rule was explicitly considered in *Akpan* v. *Shell*, in relation to members of nearby villages who suffered damage due to oil spills.[80] The Court of The Hague concluded that Shell did not breach a specific duty of care for not taking appropriate steps to prevent oil spills by SPDC. The analysis by the Court is worrisome.[81]

First of all, the Court said that in *Chandler* v. *Cape* the parent company and subsidiary were based in the same country. If this distinction was valid, it would exclude any foreign direct liability in the case of TNCs. Furthermore, the rule of *Chandler* v. *Cape* has already been considered by common law judges in situations in which parent and subsidiary were located in different countries.[82]

Secondly, the Court made a distinction between the relationship of a parent company with its subsidiary's employees and with members of nearby communities.[83] Otherwise, a specific duty of care would exist in relation to "a virtually unlimited group of people in many countries." If common law judges follow this reasoning, it would mean a huge setback for justice, as interferences by companies with the rights of communities represent 45 percent of the cases

---

subsidiary's system of work was unsafe, and that the subsidiary or its employees would rely on it using that superior knowledge. *Chandler* v. *Cape* [2012], §§78–80 (see n. 75).

79 Cf. *Akpan* v. *Shell*, §§4.22–4.25 (see n. 6).

80 Nigerian law, including common law, was applied, and under Dutch law there is currently no rule of direct foreign liability, contrary to *Chandler* v. *Cape*.

81 As Meeran opines, "there should be no principled objection to the imposition of a duty of care on a [...] parent that has an integral involvement in controlling, managing or designing operations and processes which it is foreseeable may adversely affect workers, communities or the environment [...]." Meeran, "Tort Litigation Against Multinational Corporations," 6 (see n. 27).

82 *Connelly* v. *RTZ Corporation Plc. & Others*, [1998] (QB) *unpublished* (Eng.).

83 *Akpan* v. *Shell*, §4.29 (see n. 6).

of corporate human rights violations.[84] Such categorical distinction based on the victims' identity is not justified; judges should rather look at what parent companies actually knew and did.

Thirdly, the Court took account of the fact that the damage was caused, at worst, by a tort of negligence on the part of the subsidiary as opposed to active behavior.[85] Such consideration makes the specific duty of care very much dependent upon host state law, though, because if there is no rule prohibiting specific behavior, the subsidiary can, at most, be accused of having committed a tort of negligence, excluding parent liability.

5 Conclusion

By analyzing recent home state litigation, this paper has portrayed a shocking image of the current legal reality of business and human rights: if large investment projects result in environmental degradation or create serious health hazards, in violation of the ESC rights of laborers and nearby communities, victims will not necessarily have access to an effective legal remedy in the TNC's home state.

When suing the foreign-based subsidiary, victims are likely to face jurisdictional disputes, in particular in common law countries due to *forum non conveniens*. Furthermore, if jurisdiction is accepted, the effectiveness of the legal remedy depends upon the adequacy of corporate regulations in the developing country concerned. Suing the parent company will generally not raise any jurisdictional obstacles, but holding it to account for its subsidiary's conduct will likely result in a legal struggle. In common law systems, such liability might be found if victims successfully demonstrate that the parent company held a specific duty of care towards them. Until today, only laborers have ever met the required burden of proof. Human rights advocates should thus try to sensitize their governments to incorporate a rule of foreign direct liability into their legislation.

In conclusion, TNCs are currently not sufficiently restrained by the presence of effective legal remedies in their home state. Developing countries that seek to stimulate economic growth through the exploitation of natural resources, such as Ethiopia, are thus lumbered with the immense responsibility to adequately regulate economic actors and to provide effective remedies against human rights abuses.

84 Ruggie, *Just Business*, 23 (see n. 70).

85 *Akpan* v. *Shell*, §4.30 (see n. 6).

Bibliography

Broecker, Christen. "'Better the Devil You Know' Home State Approaches to Transnational Corporate Accountability." *NYU Journal of International Law and Politics* 41 (2008–09): 159–217.

Byers, Michael. "English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment." In *Liability of Multinational Corporations under International Law*, edited by Menno T. Kamminga & Saman Zia-Zarifi, 241–249. The Hague: Kluwer, 2000.

Chambers, Rachel. "Is Home State Litigation the Way to Fill the Lacuna in Corporate Legal Accountability for Human Rights Violations Perpetrated in Host States?" *JCL* 4 (2009): 133–147.

De Schutter, Olivier. "Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations." Unpublished seminar paper in collaboration with the Office of the U.N. High Commissioner for Human Rights (December 9, 2006), accessed August 17, 2013, http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf.

Goldhaber, Michael D. "Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard." *UC Urvine Law Review* 3 (2013): 127–149.

McBeth, Adam. *International Economic Actors and Human Rights*. London: Routledge, 2010.

Meeran, Richard. "Tort Litigation against Multinational Corporations for Violations of Human Rights: An Overview of the Position Outside the United States." *City University of Hong Kong Law Review* 3 (2011): 1–41.

Muchlinski, Peter. *Multinational Enterprises and the Law*. Oxford: Blackwell, 1999.

Ruggie, John. *Just Business: Multinational Corporations and Human Rights*. New York: Norton, 2013.

Seck, Sara L. "Conceptualizing the Home State Duty to Protect Human Rights." In *Corporate Social and Human Rights Responsibilities*, edited by Karin Buhmann *et al.*, 25–51. London: Palgrave MacMillan, 2011.

Seck, Sara L. "Home State Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance." *German L.J.* 13 (2012): 1363–1385.

Seck, Sara L. "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?" *Osgoode Hall L.J.* 46 (2008): 565–603.

CHAPTER 9

The Role of Grants in Local Development Efforts

Case Study on Local Autonomy and Accountability from a Human Rights-Based Approach in Ethiopia

Solomon Negussie Abesha

Abstract

Since the introduction of decentralization in 1992 in Ethiopia, the allocation of grants has become the primary source of covering the costs of local expenditures. This study explores the allocation of grants to *Wereda* (district) level of government and examines its link with local development efforts, i.e. its role in the fulfillment of socioeconomic rights on the basis of a human rights-based approach. This necessitates analyzing whether government spending is in line with the principles of a human rights-based approach to ensure both the required results (of poverty alleviation) and the process of determining their economic and political choices. Although the principles are sufficiently stipulated in the Ethiopian constitution,[1] there are serious concerns about ensuring accountability, public participation, empowerment of disadvantaged groups, and local institution building.

Keywords

Ethiopia – grants – human rights-based approach – autonomy – accountability – participation

1 Introduction

Theoretically, decentralization has become an essential political and economic agenda to provide opportunities for people at the local level to be involved in determining their socioeconomic choices. It is also argued that decentralization is necessary to empower local communities to be responsible for their development. Further, decentralization is considered as a tool to garner development when linked to many aspects of good governance – including

1 Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, *Federal Negarit Gazeta*, Year 1, No 1 Addis Ababa, August 21, 1995 (hereinafter referred to as the 1995 constitution).

 | DOI 10.1163/9789004280250_011

autonomy, responsibility, equity, accountability, bringing government closer to the people, and responsiveness to community concerns. The theoretical appeal of decentralization can be meaningful only when it is put into practice in the form of devolving administrative as well as fiscal powers. This is because policymakers argue that, when local governments are afforded substantial power, the notion of development can really take root. However, empirical studies in many decentralized or federalized systems have shown that local governments face challenges due to limited financial resources so that they remain dependent on various forms of intergovernmental transfers. The dearth of financial resources at subnational levels entails the implementation of different types of transfer instrument – revenue sharing, conditional, and unconditional grants. Both instruments are intended to enhance local development and help promote good governance, but the issue revolves on how to keep the balance between autonomy and accountability.

This paper aims at exploring the allocation of grants to *Wereda* (district) level of government in Ethiopia and its link with local development efforts – towards the fulfillment of socioeconomic rights. Implementation of social, economic, and cultural rights depends to a large extent on the contents of the principles of good governance. It is observed that the different principles of good governance are included in the legal provisions protecting human rights. Some of them are the principles of accountability, transparency, and public participation which build a direct link between good governance and human rights. The importance of good governance is strengthened because of the legally binding natures of its principles embodied in the human rights instruments. They also create the necessary condition for the fulfillment of social and economic rights. Thus, there is a great deal of interaction between human rights and principles of good governance. The case study scrutinizes the types of grants employed and the nature of 'cooperation' between the levels of government. The study will assess the extent to which local autonomy is exercised with accountability. A study in relation to the role of grants and some principles of good governance helps to show not only the management of financial resources but also their contribution to the fulfillment of the right to development. The focal point of this exploratory study will be two urban and two rural *Weredas* in Oromia and Amhara regions. By collecting primary and secondary data, it will also attempt to identify major challenges in the opportunities.

2 Objective and Methodology

This study aims to analyze whether intergovernmental transfers are utilized to promote local development through a case study of selected local

governments in the Amhara and Oromia regions. It also seeks to analyze the interaction between decentralization, governance (whether autonomy is exercised within accountability), and human rights. By doing so, it contributes to the study on whether decentralization and local self-administration are exercised in a manner that enhances public participation, transparency, accountability, and fiscal autonomy. Local governments are the focal point for this study because decentralization is meaningful for democratic governance and socioeconomic development at the local level only when communities are empowered to participate in decision-making and authorities are accountable for their decisions.

The case study involves urban and rural *Weredas* from the Oromia and Amhara regions. From the former, Sebeta Awes and Sebeta town and, from the latter, Kalu *Wereda* and Kombolcha city are included. These two big regions were the first to introduce sub-regional decentralization and it is assumed that the lessons drawn from them can be relevant for others. However, the findings cannot be generalized for all local governments throughout the country.

This article is based on primary sources of information (through interviews, focus group discussions and experience sharing) and secondary data (financial and socioeconomic data). The author held discussions with advisors at the regional level, heads of Regional Bureaus of Finance and Economic Development (BoFED), heads and finance experts of *Wereda* Bureaus of Finance and Local Development (BoFLD), and municipal council speakers. In addition, relevant literature, federal and regional constitutions, and other laws, policy documents, and related publications have been used.

3 Theoretical Discussion: Intergovernmental Fiscal Transfer and Human Rights-Based Approach

3.1 *Grants and Revenue Sharing: Implications for Autonomy*

As a result of the nature of the division of tax power, subnational levels of government usually face a shortage of revenue to cover their expenditure. To redress this imbalance between expenditure need and revenue capacity, intergovernmental transfers are needed. In developing countries like Ethiopia, transfers are used as the major source of subnational revenue. The importance of transfers can be seen from their contribution to the overall subnational expenditures, and their share to the federal budget and to GDP. But depending on the type and nature of transfers, subnational governments could politically or administratively be dependent on the federal government. There are different kinds of transfers, but the most widely used ones are 'grants' and 'revenue sharing'.

Revenue sharing refers to the sharing of revenue generated mostly through the federal administration of taxes, but shared with the states based on a certain principle. In this scheme the actual proportion of tax to be allocated to the respective states can be determined by either the derivation/origin principle or the equity principle.[2] Grants are broadly categorized into two types: conditional and unconditional grants. Unconditional grants are characterized by the absence of significant restrictions on the use of funds, as it is the recipient's discretion to spend the money for any preferred purposes.[3] In principle, designing a mechanism for allocating revenue for general purpose grants has to address two major questions:[4] how should the total volume of revenue transferred from the center (to the states as a whole) be determined? And how should this gross amount be distributed amongst the states? Normally, similar issues are raised in the process of intra-state transfer of revenue, and the solutions adopted at the federal level could also be used at the state level.

A conditional grant, sometimes called a specific or categorical grant, is aimed at spending in a specific sector selected by the federal government mainly for economic reasons. In the implementation of conditional grants issues may arise as to the goals, design, and management of grants. Normally, the grant conditions determine the degree of local discretion. As the conditions become more specific, sub-national governments will have no option other than spending in the area specifically required by the federal government. Conditional grants may further be classified as *matching*, when the recipient government is ready to share the cost, and *non-matching*, when the grant fully covers the cost of expenditure.

There are various justifications for transfers. The principal one is its aim to correct vertical imbalance – the imbalance between expenditure need and revenue raising capacity of the sub-national governments. It also aims to compensate for the disparity in economic wellbeing between regional or sub-regional levels of government to provide a comparable level of public services. This is what is commonly known as equalization of fiscal disparity between sub-national levels of government. Transfers can also be used to provide basic services throughout the country or to fulfill minimum national standards

2 Teresa Ter-Minassian, "Intergovernmental Fiscal Relations in a Macroeconomic Perspective: An Overview," in *Fiscal Federalism in Theory and Practice*, ed. Teresa Ter-Minassian (Washington DC: International Monetary Fund, 1997), 11–12.

3 However, the center may not be completely deprived of the power of general auditing and surveillance of the spending of grants.

4 For a detailed analysis, see Solomon Negussie, *Fiscal Federalism in the Ethiopian Ethnic-based Federalism System* (Addis Ababa: Artistic printers, 2008).

demanded by the federal government. In this case, mostly conditions are set by the federal government. Another rationale for the use of transfers is to correct substantial spill-over benefits to adjacent authorities (e.g. fire department services) or costs incurred by local government (e.g. due to water or air pollution).

Transfers are also instruments of promoting local development. Local development in terms of increasing productivity, infrastructural development, economic activities, etc. requires not only the presence of institutions of governance but also adequate financial capacity. Finance acquired in the form of grants takes the lion share of local budget which is expected to cover local expenditure in terms of providing services, creating capacity, and promoting local investment.

3.2 *Human Rights-Based Approach* (*HRBA*)

The human rights-based approach is a normative concept based on international human rights standards, operationally directed towards promoting the realization of human rights. It is, however, in relation to development and poverty reduction that this concept has gained the utmost recognition. The link between HRBA and development starts with the 1986 Declaration on the Right to Development and received international commitment through the introduction of the MDGs (Millennium Development Goals) which were unanimously adopted by the UN member states in 2000. This program required strong commitment from the international community as a whole for its fulfillment, and the developing countries to integrate the HRBA in their strategies and programs to achieve the goals.[5] This necessitated government spending to be in line with the HRBA to ensure both the required results and the process of exercising the rights.

As Amartya Sen argued in his seminal work, 'Development as Freedom',[6] development has to be conceived in terms of human rights. Sen argued that development should be understood broadly as "a process of expanding the real freedoms that people enjoy" not merely as economic growth.[7] He further asserted that:

> growth of national product or of individual incomes can, of course, be very important as means to expanding the freedoms enjoyed by the

5 Guido Schmidt-Traub, "The Millennium Development Goals and human rights-based approaches: moving towards a shared approach," *The International Journal of Human Rights* 13/1 (2009): 72–85.

6 Amartya Sen, *Development as Freedom* (New York: Random House, 1999).

7 Ibid., 3.

> members of the society. But freedoms depend also on other determinants, such as social and economic arrangements as well as political and civil rights.[8]

This shows the connection between freedom and development; freedom becomes both an end and a means of development, and vice versa. As such, there is no need to prioritize socioeconomic rights over political rights. This interconnection further developed through the principles which form the core of the human rights-based approach. They are interdependence of rights, participation, accountability, non-discrimination, and empowerment.[9]

In line with the above argument, the 1995 constitution of Ethiopia provides robust provisions on civil and political rights (Articles 29–32) the contents of which are more or less in line with internationally recognized protections of such rights. It further incorporates provisions for the protection of economic, social, and cultural rights (Article 41), and the right to development (Article 43). The National Policy Principles and Objectives enshrined in Articles 89 and 90 add emphasis to this protection by requiring any government organ at federal and regional level to develop policies that ensure the enjoyment of the rights by citizens. All these constitutional principles reiterate the importance of the principles of a HRBA. As a whole, the principles of a HRBA are relevant to creating a link between human rights, governance and service delivery, and development.

3.2.1 Interdependence of Rights

The 1986 UN Declaration on the right to development defines development as:

> a comprehensive economic, social, cultural and political process with the object of the constant improvement of the well being of the entire population and all individuals, on the basis of their active, free, and meaningful participation.[10]

8 Ibid.

9 See Stephen P. Marks and Bard A. Andreassen, eds., *Development as a Human Right: Legal, Political, and Economic Dimensions* (Cambridge, Mass: Harvard School of Public Health, 2007); Amartya Sen, *Development as Freedom* (New York: Random House, 1999); Patrick Twomey, "Human Rights-Based Approaches to Development: Towards Accountability," in *Economic, Social and Cultural Rights in Action,* eds. Mashood A. Baderin and Robert McCorquodale (Oxford: Oxford University Press, 2007), 45–69.

10 UN Declaration on the Right to Development, Para 2, 1986.

This definition appears to be a composite of civil, political, economic, social, and cultural human rights. It is also widely argued that the definition covers all areas of life such as health, environment, housing, education, distribution of resources, enhancement of people's capabilities, and widening of people's choices.[11] Using the UDHR (Universal Declaration of Human Rights) as a philosophical underpinning, several international human rights instruments (such as the ICCPR, ICESCR, CEDAW, CRC, ICERD[12]) have been adopted which later on turned to the advancement of the human rights-based approach to development – for the fulfillment of not only civil and political rights but also economic, social, and cultural rights. Albeit categorizing human rights, international instruments recognized that human rights are universal, interrelated, and interdependent. We deal with civil and political rights mainly regarding their importance to guarantee citizens the right to participate in and/or challenge the execution of the overall government expenditure. Thus, integrating policies and processes of development with the standard and principles of international human rights reflects the nature of the human rights-based approach. By definition, therefore, the HRBA gives an emphasis to the *processes* as well as the *outcomes* of development policies and programs. The interrelationship between the rights implies that the enjoyment of a particular right depends on the level of realization of the other rights.

3.2.2 Participation

Highlighting the importance of participation, the 1986 Declaration on the Right to Development (Preamble, Para 2) states that "the process of development must be genuinely participatory, promoting the active, free and meaningful participation of the entire population and of all individuals." Thus, the right to participation is strongly dependent on the realization of other human rights such as the freedom of expression, the freedom of information, the right to association, and the right to assembly. These are the platforms that ensure the informed and active participation of individuals and groups in relation to the formulation, implementation, and monitoring of the consequences of intergovernmental fiscal relations in general, and in prioritizing expenditures at all levels of government.

---

11 Twomey, *supra* n. 9, 48.

12 UDHR – Universal Declaration on Human Rights; ICCPR – International Convention on Civil and Political Rights; ICESCR – International Convention on Economic, Social and Cultural Rights; CRC – Child Rights Convention; CEDAW – Convention on the Elimination of Discrimination Against Women; ICERD – Convention on the Elimination of All forms of Racial Discrimination. Ethiopia is a party to the above conventions.

The participation of citizens in public affairs is a hallowed principle and is the basis of democracy. Participation is important not only for the fact that it is a means for political legitimacy and supplements the democratic system, but it is also a practical necessity of public administration. As J. Stiglitz pointed out,

> participation does not refer simply to voting. Participatory process must entail open dialogue and broadly active civic engagement, and it requires that individuals have a voice in the decisions that affect them.[13]

Of course, one may argue that a freely elected government cannot be required to establish and utilize participatory mechanisms for each and every one of its decisions.[14] But the experiences in many countries have shown that the decisions of public authorities in a democratically elected government have over time significantly affected the interests of a number of citizens or undermined the interests of minorities. That is why:

> active, free and meaningful participation requires significant community involvement to ensure that there is a fair distribution of the benefits of development, not for a particular segment of the population.[15]

Thus, social participation is important to ensure appropriate and transparent utilization of resources.

3.2.3 Accountability

The concept of accountability can be analyzed broadly or narrowly. It can also be analyzed in terms of political, social, financial, administrative, or legal accountability.[16] Accountability, in the human rights sense, is about translating commitments into actions for the benefit of citizens. This creates a relationship where government at all levels becomes a duty-bearer with respect to the rights of citizens within its respective jurisdiction.[17] The government duty

13 Joseph Stiglitz, "Participation and Development: Perspective from the Comprehensive Development Paradigm," *Review of Development Economics* 6/2 (2002): 165.

14 Jose Bengoa, *Participation, Development and Human Rights*, Working Paper, UN Commission on Human Rights, E/CN.4/sub.2/SF/2005/3, 3.

15 UN Declaration on the Right to Development, 1986, Article 2 (3).

16 Henk Addink, *Human Rights and Good Governance* (Utrecht: SIM special No. 34, 2010), 95–100.

17 See Arjun Sengupta, "The Human Right to Development," in *Development as a Human Right: Legal, Political, and Economic Dimensions*, eds. Stephen P. Marks and Bard A. Andreassen (Cambridge, Mass: Oxford University Press, 2007), 6–35.

to fulfill the rights of citizens can be controlled through political, fiscal, administrative, and legal accountability.

Political accountability is related to the governance structure, the electoral process, 'check and balance', the forms and mechanisms of social participation, and institutional mechanisms to ensure public accountability. Fiscal accountability is especially relevant to intergovernmental fiscal relations. Ensuring fiscal discipline is a means to forge economic and political solidarity in a federal system. Lack of financial accountability can be a source of conflicts in multicultural federations. Therefore, giving proper meaning to the equitable distribution of resources through intergovernmental fiscal relations implies collective responsibility at all levels of government. As Girma argues,

> unless the consolidated government sector exercises fiscal discipline and limits the disincentive effects of excessive taxation, it would have adverse effects on the performance of the economy and on macroeconomic stability.[18]

3.2.4 Non-Discrimination and Empowerment of Marginalized Groups

The human rights-based approach requires that non-discrimination and empowerment of vulnerable and marginalized groups be given equal attention as the other principles. Giving them access to public decisions is also an important aspect of participation. Non-discrimination implies giving particular attention to discrimination, equality, equity, and vulnerable groups. These groups include women, minorities, indigenous peoples, and people with disabilities, but there is no universal checklist of who is most vulnerable in a given context.[19] Who is vulnerable and how to answer the question at national and local level is usually a challenge. This is because the answer depends on available official data disaggregated by race, religion, language, sex, age, migrants, or other concerns. Usually, discrimination is caused by political, social, cultural, or institutional discriminatory practices.[20] Non-discrimination requires

18 Abu Girma, "Fiscal Federalism in Theory and Practice," *Ethiopian e-Journal* 5/1(2013): 11.

19 Jakob K. Hansen and Hans-Otto Sano, "The Implications and Value Added of a Rights-Based Approach," in *Development as a Human Right: Legal, Political, and Economic Dimensions*, eds. Stephen P. Marks and Bard A. Andreassen (Cambridge Mass: Harvard School of Public Health, 2007), 50.

20 Domestic human rights institutions have the mandate to protect the rights of individuals usually emanating from discriminatory practices in terms of violating civil, political, social, and economic rights. See Eva Brems, et al. eds., *National Human Rights Institutions and Economic, Social and Cultural Rights* (Cambridge: Intersentia, 2013).

not only equitable distribution of resources but also appropriate action against policies, laws, and administrative practices which may lead to discriminatory practices. Empowerment is understood in a broader sense as aiming at "[giving] people the power, capacities, capabilities and access needed to change their own lives, improve their own communities and influence their own destinies."[21] Thus, with regard to vulnerable groups, it helps to pay particular attention not only to their economic problems but also to the wider aspects of human rights. Accordingly, the principle requires that policies and programs be based on empowerment as opposed to charity.[22] Federalism is usually adopted to redress the problem of discrimination and to protect minorities at national or local levels and empower hitherto marginalized groups.

The 1995 constitution of Ethiopia affirms the commitment to respect, protect, and fulfill the entire spectrum of human rights in all development efforts of the government. It provides robust provisions on civil and political rights, the content of which is more or less in line with internationally recognized protections of such rights. Moreover, under its supremacy clause (Article 9(4)), the constitution provides that all international treaties ratified by Ethiopia are an integral part of the law of the land.[23] It guarantees the right to development (Article 43), and further incorporates provisions for the protection of 'economic, social and cultural rights' (Article 41). The constitution (Articles 89–92) also adds emphasis to the principles of participation, transparency, accountability, and general good governance. The emergence of a human rights-based approach to development strengthens the commitment to the enjoyment of rights. This necessitates government spending to be in line with the HRBA to ensure both the required *results* and the *process* of exercising the rights. In this regard, the principles which form the core of the human rights-based approach have to be taken into consideration.

4 Background to Regional Decentralization in Ethiopia

Although some studies have indicated that the decentralization process in Ethiopia dates back to the imperial era, the process of assigning powers and functions to subnational levels of government has generated significant interest since the change in government in 1991. The Transitional Government of

21 Hansen and Sano, *supra* n. 19, 50.

22 Ibid.

23 It is subject to different arguments as to whether international human rights instruments should have equal status with the texts of the constitution.

Ethiopia established by a Charter[24] in May 1991 paved the way for the devolution of powers and functions to the newly established regional governments. The step primarily taken was the formation of a three-tiered administrative system and the corresponding decentralization of administrative and fiscal powers.[25] The 1995 constitution further affirms the political commitment and follows a dual structure where each government has legislative and executive powers on matters that fall under the respective jurisdictions (Article 50/2). Accordingly, the constitution enumerates the major powers and functions that are assigned to the federal government (Article 51). Regional governments hold all residual powers in addition to those explicitly listed in the constitution (Article 52).

The administrative structure of the regional states is divided into Zones, which in turn are divided into *Weredas* (districts). The *Weredas* are further subdivided into smaller units called *Kebeles*. The *Weredas* can be considered as the basic unit of administration with their own elected councils to decide on the choice of the provision of basic services. The primary expression of constitutional authority in Ethiopia comes through the directly elected parliamentary form of government and all the federal, regional, and *Wereda* governments have legislative, executive, and judicial functions. Each regional government has a state council and likewise the *Weredas* have councils with members directly elected by the people. The 1995 constitution also provides that adequate power shall be granted to the lowest administrative units to enable people to directly participate in their own affairs (Article 50/4). However, until 2002 regions were operating as a centralized unitary system since the devolutionary process stalled at the regional level: powers and responsibilities were not devolved to lower levels of administration, there was no check and balance between the legislature and the executive, and *Weredas* and *Kebeles* were accountable to the unelected body at the Zonal level (intermediary between *Weredas* and regional government).[26] In general, a multi-tiered federal system which seeks to achieve the objectives of decentralization has to properly determine which level of government carries what type of expenditure

24 The Transitional Period Charter of Ethiopia No. 1/1991, *Negarit Gazeta*, Year 50, No. 1, Addis Ababa, July 22, 1991.

25 For the details of the reorganization of regional governments and devolution of powers and functions during the transition period, see Proclamation No. 7/1992, and for the divisions of taxes and fiscal relations, see Proclamation No. 33/1992.

26 Since the 2002/03 fiscal year in most of the regions, the status of zones has been reduced to a coordinating role to gradually devolve powers and responsibilities to the lower levels of administration. See the 2001 revised state constitutions.

responsibility, whether local governments have the power to tax and spend, and at the same time how they become accountable to the citizens.

5 Main Features of Intergovernmental Fiscal Relations in Ethiopia

With regard to expenditure assignments, the 1995 constitution follows a dual structure where each government has legislative and executive powers on matters that fall under the respective jurisdictions (Article 50/2). Accordingly, national defense, foreign policy, currency, inter-regional trade, and citizenship are major functions left for the federal government (Article 51). Regional governments are made responsible for formulating and executing economic and social development policies, strategies and plans of the region, and establishing and administering a regional police force and maintaining public order (Article 52/2). States hold all the residual powers in addition to those explicitly listed in the constitution (Article 52/1). And both the federal government and the states have to cover their respective financial expenditures but if the federal government allocates grants, it has the power to audit and inspect the proper utilization of the subsidies it grants to the states (Article 94/1&2).[27]

With regard to taxation power, the constitution divides it into three categories, namely 'the federal power of taxation', 'the state power of taxation', and 'concurrent power of taxation'.[28] Those listed under the federal and state power are the exclusive revenue sources for the federal and regional governments respectively. The concurrent taxes are levied and administered by the federal government whereas the states share the revenue on the basis of a formula designed by the House of Federation (HoF).[29] As a result of the division of tax

27 However, it should be noted that the extent of power envisioned by the constitution is not yet clear. The provisions of the constitution have to be interpreted in the context of 'self-rule' and 'shared-rule' envisioned in the federal arrangement.

28 See Articles 96–98 of the 1995 constitution.

29 According to Article 62(7) of the constitution, the mandate to determine the revenue sharing arrangement and design grant formula is bestowed upon the HoF. The current arrangement is set to divide revenue generated from concurrent taxes as per the following scheme: direct taxes from companies in the proportion of 50:50 and indirect taxes in the proportion of 70:30 between the federal government and the states, respectively. Similarly, direct taxes from large-scale mining and petroleum operations are divided in the proportion of 50:50, whereas royalties are divided in the proportion of 60:40 (HoF minutes, 2nd ordinary meeting March 13, 2003). As per the 2010 ERCA report, the major share of revenue goes to Addis Ababa, Oromia, Tigray, Amhara, and SNNPR, and their share is

and expenditure, almost all multilevel governments face two kinds of fiscal imbalance: vertical and horizontal.[30] In Ethiopia, the extent of vertical fiscal imbalance is considerably high. Since 1995 states were able to generate a maximum of 17–19 percent of their total expenditure while the rest was covered through federal transfers. The fiscal disparity between the states is also high (horizontal imbalance). For instance, in 2007 one of them covered only 9 percent of its total expenditure while another covered 29 percent. This disparity can be attributed to the variations with regard to their economic environment for private investment, management, and administrative capacities, skilled manpower, the characteristics of urbanization, as well as population and geographical size. Also the impact of corruption, absence of supervision, control, and local accountability cannot be underestimated.

To overcome these imbalances, federal constitutions mandate the transfer of revenue in the form of sharing tax bases, sharing tax revenues, and allocation of grants.[31] However, the processes, extent, and nature of transfers to reach the desired level of equalization vary widely across federations. Federal general grants distributed on a formula basis represent about 30 to 35 percent of the federal budget and cover 80 to 85 percent of regional expenditures. Since 1995 the HoF decided on grant formulas in 2000, 2003, 2007, 2009, and 2012 with several revisions on the formulas in between those years. In developing grant formulas, the HoF usually declares that it strives to equitably distribute financial resources so that regional governments will be able to provide citizens 'equal access to publicly funded social services'. Formula revisions were usually triggered by complaints on the details of the variables in the grant formula[32] but there are also concerns over whether grants are properly spent for the fulfillment of socioeconomic priorities identified through the participation of citizens.

In the course of deepening decentralization and broadening the mandates of *Wereda*/local governments, the federal government launched the District

increasing every year. However, the arrangement has to be scrutinized on how it is implemented and whether it is feasible in the future.

30 The former refers to the mismatch between the revenue means and the constitutionally assigned expenditure responsibilities of subnational governments. The latter refers to the financial disparity between constituent units and their inability to provide a comparable level of services to their citizens.

31 Anwar Shah, "Introduction: Principles of Fiscal Federalism," in *The Practice of Fiscal Federalism: Comparative Perspective,* ed. Anwar Shah (Montreal: Forum of Federations, MQUP).

32 E.g., the percentage allocated to population size was 33.3, 60, 55, and 65 percent in the 1995, 98, 2000, and 2003 grant formulas respectively. But since 2007 population is not taken as a separate variable.

Level Decentralization Program (DLPD) in 2003 followed by municipal decentralization. The reforms not only changed the legal framework but also resulted in the transfer of block grants from regional to local governments. The formula adopted at the federal level has also been adapted by three regional states: the Oromia Regional State, the Amhara Regional State, and the Southern Nations, Nationalities and Peoples Regional State (SNNPRS). The volume of grant transfer varies among regional governments, but regional governments transfer on average 60 percent of their total budget to *Weredas* although *Weredas* complain that the grant is not sufficient. The use of specific-purpose grants can be inferred from the programs and priorities of the federal government on poverty alleviation, and the provision of basic services and infrastructures. There are different sector-based programs administered by federal agencies on health, education, agriculture and safety-net programs, water, roads, resettlement framework, and programs for Millennium Development Goals. Recently, the use of specific grants for MDG programs has become a major instrument in federal-regional fiscal relations as it has been explicitly included in the federal budget law since the 2010/11 fiscal year. For instance, in the 2011/12 fiscal year (2004 Eth calendar) of the total federal government budget, 39.4 percent was allocated to the regions in the form of general and MDG grants. Of the total federal budget 12.73 percent (or 32.33 percent of the total grant) was allocated in the form of a MDG grant. Similarly, for the 2012/13 fiscal year 41.03 percent of the federal budget was allocated to the regions which comprise 14.51 percent allocated for MDG grants aimed at meeting the Millennium Development Goals. So, a new trend has been observed in a specific allocation of grants for MDG or Local Investment Programs. The overall outcome of such grant depends upon how it is spent for the intended purposes and how adequately it is administered, in addition to the regular flow of general grants to the regions. All levels of government benefiting from the use of grants have to aim at spending grants in order to fulfill the economic, social, and cultural rights, and citizens should also exercise their civil and political rights to ensure that the grant will be spent on the intended objectives. This implies that the quality of governance has to be viewed from a human rights perspective in a holistic manner.

6 Data Analysis

6.1 *Socioeconomic Profiles*

As mentioned earlier, the purpose of this study is to assess the role of grants on local development on the basis of principles of the human rights-based approach. The case study includes two rural and two urban *Weredas* (local

governments) randomly selected from the Amhara and Oromia regions: Kalu *Wereda* and Kombolcha city from the Amhara region, and Sebeta Awes and Sebeta town from the Oromia region. Both rural and urban local governments have a local *Wereda* or city council whose members are directly elected by the local people, executive council, and court. They also have administrative subunits called *Kebeles* which have their own councils.[33] The socioeconomic profiles of the *Weredas* and their powers and functions are provided as a prelude to discussing the available data.

Kalu *Wereda* and Kombolcha city are found in the South Wollo administrative zone. Kombolcha city administration, which was formerly part of Kalu *Wereda*, is one of the 167 *Weredas* of the region. It has an estimated area of 524.68 km^2 and a population size of 104,236.[34] The city has nine *Kebeles* of which four are rural *Kebeles*. The city administration is one of the industrial zones of the region. According to the regional standard, it is one of the first-grade metropolitan areas of the region due to its geographical and economic importance. It is located on the main route connecting the Amhara region with the port city of Djibouti. At present, the city council has 120 members of whom 48.35 percent are women. Kalu *Wereda*, with a total population of 207,129,[35] has 30 rural and four urban *Kebeles*. The *Wereda* is largely characterized by rural economies, predominantly subsistence agricultural activities. The *Wereda* is responsible for socioeconomic development activities in the areas of health, education, agriculture, provision of clean water, and provision of safety net programs. Like other *Weredas* it has a council, cabinet/administration and judicial bodies. According to the informants, the *Wereda* council plays a limited role in supervising the administration as council members are junior members of the party and have very limited educational backgrounds. Although the *Wereda* collects local revenue from agriculture and small-scale trade, it is substantially dependent on revenue transferred from the regional treasury.[36]

Sebeta town and Sebeta Awas are the two contingent *Weredas* within the special zone of Oromia located around 25 km West of Addis Ababa. Sebeta

33 For hierarchies of administrative units and their powers and functions, see the regional state constitutions.

34 Federal Democratic Republic of Ethiopia, Central Statistics Agency (CSA), Population Forecast for 2013 (hereinafter referred to as the CSA, 2013 Forecast). Further details provided in the 'Kombolcha City Profile', prepared by the City Council, 2012 (unpublished).

35 CSA, 2013 Forecast, *supra* n. 34. Further socioeconomic profiles of the *Wereda* can be found in the 'Kalu Wereda Profile', prepared by the *Wereda* civil service office, 2011 (unpublished).

36 See Table 1 below for the details of the types of grants and the amount of transfer.

town is one of the 39 urban *Weredas* and Sebeta Awas is one of the 265 rural *Weredas* in the Oromia region.[37] The town of Sebeta was recently separated from Sebeta Awas and established its own town/city administration. It is one of the largest industrial zones in the special zone of Oromia and has eight *Kebeles* with a total area of 99 km^2. The population estimate in 2013 is about 63,391.[38] The town is one of the fastest developing areas in the region due to its closeness to Addis Ababa. It has also been exposed to administrative crises as a result of frequent changes of mayors and other administrative posts accused of land-related maladministration. Sebeta Awas has an estimated population size of 156, 978 of which 52 percent are men. According to the Agricultural and Rural development office, the estimated size of the *Wereda* is 875 km^2 of which 87 percent is arable land with 2 percent reserved for industry. It is known for its forest coverage near to Addis Ababa. The available information shows that the *Wereda* council supervision over the executive or the horizontal accountability of the executive cannot be explained beyond the formal biannual meetings between the two bodies. With regard to financial capacity, Sebeta Awas' ordinary expenditure need is mainly addressed through grants transferred from the region. Sebeta town on the other collects regional revenue and transfers to the regional government the amount which is above its budget approved by the regional council.[39]

6.2 *Powers and Responsibilities*

Although not explicitly mentioned in the federal constitution, local governments (*Weredas*) have been important[40] administrative units since the devolution of power in 1992. The 1995 constitution allows states to establish local governments according to their own socioeconomic circumstances but it also imposes an obligation to devolve adequate power to government units closer to the people. Following the 2002 amendment of state constitutions and the introduction of district-level decentralization programs, *Weredas* have become important self-governing units.[41] Formally, the *Weredas* in the Oromia region are not hierarchically accountable to the zonal administration and have

37 See 'Profiles of Oromia' prepared by the Regional Bureau of Finance and Economic Development, 2012 (unpublished archive).

38 CSA, 2013 Forecast, *supra* n. 34.

39 For instance, in the 2011/12 fiscal year, the total amount collected in the city was 105 Million and 70 percent was transferred to the region; see Table 4 below.

40 However, in the SNNPRS, zones have power over *Weredas* in their jurisdiction.

41 For instance, see the powers and functions of *Weredas* in the Amhara and Oromia regional state constitutions.

jurisdiction over various aspects of planning, finance, and administration. The existence and competence of *Weredas* are sanctioned by state constitutions. State constitutions define the powers and functions of the three branches of government at *Wereda* level: the council, the executive, and the judiciary. Accordingly, they can prepare and implement socioeconomic development programs; prepare, approve, and execute their own budget. They also implement policies, plans, guidelines, and laws of the regional government. *Weredas* are also responsible for promoting participatory governance and development. They also retain jurisdiction over *Kebeles*, which are below *Weredas*, for overseeing socioeconomic activities of *Kebeles*. In addition, they are important units for tax administration; in particular they collect rural land-use fees, agricultural income tax, and municipal taxes. But they do not have exclusive power to levy taxes and they depend strongly on regional taxes and grants. In general, the lists indicated above show the role *Weredas* can play in local development efforts. However, the actual practice with regard to local autonomy, accountability of authorities, and public participation in various jurisdictions remains yet to be investigated.

6.3 *Revenue Sources* (*Types and Purposes*) *and Autonomy*

Regional constitutions do not provide exclusive tax power to *Weredas* except administering land-use fees and agricultural income on the basis of rates determined by the regional governments. Some regional laws mention land and property taxes as exclusive revenue sources of urban local governments but they are collected on the basis of federal and regional laws and policies.[42] In some cases, in order to enhance local performance, local governments are entitled to a portion of regional revenue collected in their territories.[43] Usually the proceeds from these sources are not sufficient to cover the cost of their expenditure and a substantial portion is covered by regional grants. On the other hand, those urban areas such as Sebeta town which are centers of major regional revenue do not see the incentives as the major portions are transferred to the regional government.[44] However, as can be observed from the Tables 9.1, 9.2, 9.3 and 9.4 below, urban local governments collect the larger amount of regional revenue but both urban and rural governments are significantly dependent on regional grants to discharge their responsibilities. In all *Weredas* covered in this study, the bulk of general purpose grants is spent on

42 For instance, see Article 37 (1, 2) of the Oromia Urban Local Government Proclamation No.65/2003.

43 Ibid. This is the practice in both the Amhara and Oromia regions.

44 Interview (confidential), *Caffee* Oromia, September 21, 2013.

TABLE 9.1 *Kalu* Wereda *Revenue*

Fiscal year	Regional general Grant (in Million)	Locally collected regional revenue (in Million)	Total	Foreign asst. (in 'ooo)	Foreign loan	Specific-Purpose Grant (SPG)
2013/14	43.6	17.5	61.5	400		
2012/13	36.3	15.0	52,286,855	800	242	
2011/12	30.2	11.6	42,619,675	800	221	
2010/11	20.9	7.6	29,331,259	800	85	
2009/10	21.6058	3.7	26.6	407,174	924,329	

SOURCE: KALU *WEREDA* BUREAU OF FINANCE AND LOCAL DEVELOPMENT (ACCESSED NOVEMBER 2013).

TABLE 9.2 *Kombolcha City Revenue*

Fiscal year	Total Grant (in million)	Locally collected regional revenue (in million)	Recurrent	Capital	Specific-Purpose Grant (SPG)	
					Urban Local Government Development	others
2012/13	74.4		54.7	19.6	44.5	4.95
2011/12	68.8		44.4	20.5		
2010/11	73.4		53.1	20.3		
2009/10	51.1		25.7	25.5	18.94	

SOURCE: KOMBOLCHA CITY BUREAU OF FINANCE AND LOCAL DEVELOPMENT (ACCESSED NOVEMBER 2013).

TABLE 9.3 *Sebeta Awas* Wereda *Revenue*

Fiscal year	Annual budget	Total *Wereda* collected	Transfer from regional treasury	Percentage of transfer	Specific-Purpose Grant (SPG)	Remark
20011/12	40,957,878	104,886,051	30,471,827	74	1,721,629	
2010/11	31,022,119	8,358,490	22,661,629	73	4,125,856	
2009/10	27,151,899	7,417,818	19,734,081	73	537,555	

Fiscal year	Annual budget	Total *Wereda* collected	Transfer from regional treasury	Percentage of transfer	Specific-Purpose Grant (SPG)	Remark
2008/09	25,147,332	9,063,824	16,083,508	64	339,805	
2007/08	23,243,840	9,856,767	13,387,073	58		

SOURCE: SEBETA AWAS *WEREDA* BUREAU OF FINANCE AND LOCAL DEVELOPMENT (ACCESSED SEPTEMBER 2013).

TABLE 9.4 *Sebeta Town Revenue*

Fiscal year	Total revenue collected (in Million)	Annual budget approved (in Million)	Revenue transferred to the region (in Million)	Specific-Purpose Grant (SPG)	Remark
20012/13				- 182,406	- Microfinance
				- 300,000	- UN Development Fund
2011/12	105.5	32.2	73.3	-583,565	- Education Quality Program
				-23,430,000	- Referral Hospital
				-5,566,367	- Micro-enterprise
				-1.6 million	- National Development Fund
2010/11	53.96	39.1	14.9	-8 million	- Hospital
2009/10	44.6	26.83	17.8	207,845	- General Education Quality Improvement Program
2008/09	25.3	18.1	7.2		
2007/08	11.53	8.3	3.3		

SOURCE: SEBETA TOWN BUREAU OF FINANCE AND LOCAL DEVELOPMENT (ACCESSED SEPTEMBER 2013).

recurrent costs though they can in principle use the grant for any purpose they deem necessary. Thus, most local development projects are dependent on Specific-Purpose Grants (SPG) or local contributions in the form of cash or labor.[45] Recently, SPGs have covered the bulk of local capital projects in urban areas. For instance, as indicated in Table 9.2, during the 2011/12 and 2012/13 fiscal years, around 45 percent of the total expenditure of Kombolcha city was covered through SPG from the regional government, mainly allocated in the areas of road and microfinance projects. There are also specific allocations by federal ministries and donor agencies for promoting basic services and capacity building in the areas of education, health and safety-net programs (which are now transformed into House Asset Building Programs – HABP).[46]

In general, the political structure has been effectively controlled by the ruling party Ethiopian Peoples Revolutionary Democratic Front (EPRDF) for more than two decades. Political centralization has also been reflected in bureaucratic and legislative institutions. The point is that the party also exercises significant control over the affairs of regional and local governments with respect to their economic, administrative, and fiscal matters. It is within this political imperative that the system of intergovernmental fiscal relations has been put into practice.

6.4 *Lack of Adequate Participation*

Recognition of the need for citizen participation is guaranteed under the federal and regional constitutions.[47] Both constitutions guarantee the rights of citizens to be consulted with respect to policies and projects affecting their interest. All tiers of government have the duty to ensure the participation of people in the initiation, development, and implementation of policies. Furthermore, participation is seen as an essential element of development practices in various socioeconomic aspects through promoting dialogs, identification of priorities, and distribution of benefits. Thus, social participation is important to ensure appropriate and transparent utilization of resources.

As mentioned above, local governments heavily depend on general or specific grants transferred from regional government, federal ministries, and donor agencies. It is usually argued that the actual disbursement of finance is

45 Also see Serdar Yilmaz and Varsha Venugopal, *Local Government Discretion and Accountability in Ethiopia* (Working Paper 08–38, Georgia: Andrew Young School, 2008).

46 Since 2011 around 10 percent of the total number are graduating from Safety-net programs and participating in small-scale enterprises. Interview, *Wereda* bureau of finance and local development officer, October 11, 2013.

47 See Article 43(2) of the 1995 constitution.

highly influenced by regional and federal directives for the reason that local governments are subordinate to regional governments; they do not have financial autonomy and politically follow the decisions of regional officials.[48] But the informants strongly argued that local governments have the power to decide on local investment areas, spending priorities, and identification of beneficiaries. According to them, these are usually done at the local executive level and the local council rubber stamps the recommendations of the executive council. Financial expenditures allocated either through general or specific grants are always reported to the regional BoFED which can be considered a manifestation of upward accountability. Both case studies have shown that local public participation is undermined. If we can call it participation, local communities participate in the form of labor (rural road, forest, or terrain work) or financial contribution (paving urban cobblestone streets) after priorities are set and budgetary decisions are made by local authorities. In all the study areas local bureaus for finance and development post their annual budget, but the experts stress that no one challenged the priorities set by local executives.

Public participation can also be enhanced through a vibrant civil society and competitive politics which are important determinants for participatory governance. Because the legitimacy claimed through periodic elections does not suffice to promote a human rights-based approach to development, the formal structures of the *Wereda* and city administration, the *Kebeles* under their jurisdictions and *sub-Kebele* structures are very close to the people to ensure participation and to address the concerns of the community. Mass-based associations (youth, women, and farmers) and other arrangements can be considered forums for participation, but many interviewees argued that they hardly serve the purpose but rather ensure implementation without dissent at every level of government. As outlined in the conceptual background above, the meaningful exercise of civil and political rights is required for the fulfillment of socioeconomic and cultural rights and vice versa.[49] But the interrelationship between the two is hardly observed. In the various interviews and focus group discussions (FGD) it was also pointed out that this can be observed from the dominance and control of the ruling party at all levels of governance and mediums of participation. The implication is that upward accountability

48 See Zemelak Ayele, "Local Government in Ethiopia: Still an Apparatus of Control?" *Law, Democracy and Development* UWC 15 (2011): 1–27; Meheret Ayenew, "A Rapid Assessment of Wereda Decentralization in Ethiopia," in *Decentralization in Ethiopia*, eds. Taye Assefa and Tegegn Gebre-Egziabher (Addis Ababa: FSS, 2007), 69–102.

49 See Amartya Sen, *supra* n. 9.

prevails at the cost of dwarfed public participation and responsiveness to the community.

The transfer of grants is meant to empower local decision-making power despite its evolutionary process. However, the real decision-making power remains at the region by the party which exercises tight control over the lower levels. But the legal and policy foundations have been laid with the expectation that the federal system strengthens participatory governance whereby public officials will be responsive to local preferences and held accountable to citizens.

6.5 *Accountability Concerns*

Establishing accountability is an important consideration in development effectiveness. In order to ensure that government, as a duty-bearer, fulfills the rights of citizens there should be effective controlling mechanisms through legal, political, fiscal, and administrative accountability. These instruments help to identify the responsibility and to take appropriate actions. In this regard, political accountability is expected to ensure responsibilities through a 'check and balance' mechanism between the local council, the executive, and the judiciary. The various interviews and FGDs have concluded that local councils hardly exercise power of oversight and control over the executive on the proper utilization of the limited available resources. Although there are some political statements to broaden the role of local councils, lack of accountability to the councils of rural *Weredas* is serious due to severe capacity constraints as well as the limited finance available for capital projects. In urban areas, corrupt practices related to land, government procurement, and employment are more serious concerns of accountability.[50] Some of the informants emphasized that land-related corrupt practices are more serious concerns than misspending government budget. Although local governments can be forums for promoting public accountability, as it is shown above, the nature of participation implies weakness in public accountability. Of course, periodic assemblies are held at *Kebele* and sub-*Kebele* levels but, as Yilmaz and Venugopal stated, "cases where the *Kebele* and community try to hold the *Kebele* or *Wereda* authorities accountable for service delivery are rare."[51]

Accountability is relevant in intergovernmental fiscal relations especially in cases where subnational levels are strongly dependent on the allocation of

50 It was also pointed out that former mayors of Sebeta were dismissed from their post and convicted of corruption. Similarly former Kombolcha Mayors were dismissed from their post on similar allegations.

51 Yilmaz and Venugopal, *supra* n. 45, 12.

grants. Equitable distribution of grants requires proper utilization of resources in order to fulfill the socioeconomic rights of citizens. In order to ensure internal and external fiscal accountability, both the Amhara and Oromia regions have regional and local financial administration proclamations. The procedures followed for internal financial accountability and external accountability to the regional finance bureau or to donor agencies seem clear but not sufficient. This is because the mechanisms for oversight and supervision are not sufficient and there is no mechanism to assess the link between budget plan and performance. Informants at the regional BoFED level argued that local development efforts have shown significant changes in recent years due to strict financial and administrative guidelines to spend grants on the provision and promotion of basic local services, investing in pro-poor projects like micro-finances and cobblestones. Giving emphasis and enforcing decisions or programs directed from the higher hierarchies imply that local autonomy is compromised, but it could also be a necessary evil.

6.6 *The Need to Strengthen Empowerment of Marginalized Groups*

In Ethiopia, non-discrimination and empowerment of marginalized groups of society such as women, children, persons with disabilities, and so on is given appropriate political attention. It is also mentioned in various government policies that empowerment of marginalized groups is a means to eradicate poverty.[52] But there are different social, cultural, and economic obstacles for the realization of the rights of vulnerable groups. For instance, the fourth CEDAW report on Ethiopia indicated that despite actual achievements and progress having been made over the years there still are issues of eliminating discrimination against women in service delivery, labor, education, agriculture, and other benefits. Usually the budget allocated in the *Weredas* for education, women's affairs offices, youth and sports, and HIV-AIDS programs, are reported as attempts at non-discriminatory practices and empowerment of women and youth. But there is no gender disaggregated data in terms of empowering women in education, employment opportunities, and so on. With regard to disabilities, there is no well-structured office or policy implementation or budget allocation in the study areas. Using local budget to promote non-discrimination and advance the socioeconomic and cultural rights of disadvantaged groups shows some effort but by no means can be considered sufficient to achieve the goal. Institutional arrangement for representation and

52 For instance, see the Federal Democratic Republic of Ethiopia, "National Action Plan for Gender Equality (NAP-GE) 2006–2010" and "Plan for Accelerated and Sustainable Development to End Poverty (PASDEP) 2005/06-2009/10."

advancement of gender issues in the public sector is observed in all local governments. Political participation of women in the local councils is given appropriate attention. For instance, the representation of women in the Kombolcha city council has shown a significant increment, i.e. from 31 percent in 2008 to 48.3 percent in 2013. But they are underrepresented in the executive. Local government reports indicate that there is a clear political direction to empower disadvantaged groups. But finance bureau heads indicated that reports follow the sectoral allocation of budget. They also indicated that *Weredas* don't have human as well as financial capacity to study or evaluate, e.g., gender gaps.

7 Conclusion

The allocation of grants is the primary source of finance for local (*Wereda*) governments and it enables them to cover the costs of major economic and social services. The significance of grants emanates from the reason that *Weredas* have a poor revenue base. But to ensure better autonomy at the local level, this has to change towards a more decentralized fiscal system in terms of broadening their fiscal power and strengthening their decision-making power.

The HRBA emerged at the international fora in a broader sense that guarantees both economic growth and respect of political rights, and its principles are also embodied in the 1995 Ethiopian constitution, and other laws and policies. Devolution of power, individuals, and groups as right-holders, empowerment of marginalized groups and participation, equitable distribution of resources, efficiency, and accountability are some of the principles emphasized in the constitution which gives prominence to the relevance of respecting the human rights-based approach. In general, the HRBA is an indispensable component of deepening democracy and development. It offers an approach to move from basic electoral democracy to embracing government accountability and participation of citizens in development programs. In particular, it has the potential to foster pro-poor development efforts and it plays a role in securing good governance in every sphere of governance.

The case study has revealed a lack of public participation, weak accountability mechanisms, and the need for strengthening the empowerment of disadvantaged groups. Local autonomy can be meaningful if local authorities are responsive to the needs and priorities of local people. This is possible when people are empowered to decide on political and economic affairs affecting their interest. The absence or weak implementation of the principles of the HRBA implies the argument forwarded by some that economic growth is people's choice over civil and political rights. This study, however, employed the

broader meaning of development linking the values of the HRBA with the role of grants. All levels of government benefiting from the use of grants have to aim at spending grants on fulfilling the economic, social, and cultural rights and citizens should also exercise their civil and political rights to ensure that the grant will be spent on the intended objectives. This implies that the quality of governance has to be viewed from a human rights perspective in a holistic manner.

Recognizing human rights as an aspect of development policy is one thing, but its practical application requires a concerted effort by all levels of government. Therefore, it is vital to give practical meaning to the bulk of constitutional provisions related to the HRBA: institutions have to be put in place in a meaningful manner towards ensuring checks and balances, transparency in the planning and execution of budgets, accountability as well as direct participation of citizens in development efforts. These are the concrete manifestation of implementing human rights at sub-state level, ensuring the sustainability of development, and increasing the quality of governance.

Bibliography

Abu Girma. "Fiscal Federalism in Theory and Practice." *Ethiopian e-Journal* 5/1 (2013).

Addink, Henk. *Human Rights and Good Governance*. Utrecht: SIM special No. 34, 2010.

Bengoa, Jose. *Participation, Development and Human Rights*. Working Paper, UN Commission on Human Rights, E/CN.4/sub.2/SF/2005/3.

Brems, Eva, et al., eds. *National Human Rights Institutions and Economic, Social and Cultural Rights*. Cambridge: Intersentia, 2013.

Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995. *Federal Negarit Gazeta*. Year 1, No 1. Addis Ababa, August 21, 1995.

Federal Democratic Republic of Ethiopia. "National Action Plan for Gender Equality (NAP-GE) 2006–2010."

Federal Democratic Republic of Ethiopia. "Plan for Accelerated and Sustainable Development to End Poverty (PASDEP) 2005/06-2009/10."

Federal Democratic Republic of Ethiopia. Central Statistics Agency (CSA). Population Forecast for 2013.

Oromia Urban Local Government Proclamation No.65/2003.

Hansen, Jakob K., and Hans-Otto Sano. "The Implications and Value Added of a Rights-Based Approach." In *Development as a Human Right: Legal, Political, and Economic Dimensions*, edited by Stephen P. Marks and Bard A. Andreassen. Cambridge Mass: Harvard School of Public Health, 2007.

Marks, Stephen P., and Bard A. Andreassen. eds. *Development as a Human Right: Legal, Political, and Economic Dimensions*. Cambridge, Mass: Harvard School of Public Health, 2007.

Meheret Ayenew. "A Rapid Assessment of Wereda Decentralization in Ethiopia." In *Decentralization in Ethiopia*, edited by Taye Assefa and Tegegn Gebre-Egziabher, 69–102. Addis Ababa: FSS, 2007.

Schmidt-Traub, Guido. "The Millennium Development Goals and human rights-based approaches: moving towards a shared approach." *The International Journal of Human Rights* 13/1 (2009): 72–85.

Sen, Amartya. *Development as Freedom*. New York: Random House, 1999.

Sengupta, Arjun. "The Human Right to Development." In *Development as a Human Right: Legal, Political, and Economic Dimensions*, edited by Stephen P. Marks and Bard A. Andreassen, 6–35. Cambridge, Mass: Oxford University Press, 2007.

Shah, Anwar. "Introduction: Principles of Fiscal Federalism." In *The Practice of Fiscal Federalism: Comparative Perspective*, edited by Anwar Shah. Montreal: Forum of Federations, MQUP.

Solomon Negussie. *Fiscal Federalism in the Ethiopian Ethnic-based Federalism System*. Addis Ababa: Artistic printers, 2008.

Stiglitz, Joseph. "Participation and Development: Perspective from the Comprehensive Development Paradigm." *Review of Development Economics* 6/2 (2002).

Ter-Minassian, Teresa. "Intergovernmental Fiscal Relations in a Macroeconomic Perspective: An Overview." In *Fiscal Federalism in Theory and Practice*, edited by Teresa Ter-Minassian, 3–24. Washington DC: International Monetary Fund, 1997.

The Transitional Period Charter of Ethiopia No. 1/1991, *Negarit Gazeta*, Year 50, No. 1, Addis Ababa, July 22, 1991.

Twomey, Patrick. "Human Rights-Based Approaches to Development: Towards Accountability." In *Economic, Social and Cultural Rights in Action*, edited by Mashood A. Baderin and Robert McCorquodale, 45–69. Oxford: Oxford University Press, 2007.

UN Declaration on the Right to Development, 1986.

Yilmaz, Serdar, and Varsha Venugopal. *Local Government Discretion and Accountability in Ethiopia*. Working Paper 08-38. Georgia: Andrew Young School, 2008.

Zemelak Ayele. "Local Government in Ethiopia: Still an Apparatus of Control?" *Law, Democracy and Development* UWC 15 (2011): 1–27.

CHAPTER 10

Environmental Rights and Investment in Ethiopia

A Strenuous Relationship

Zerihun Yimer Geleta

Abstract

Environmental rights are emerging rights in the arena of international human rights law and international environmental law. Though the jurisprudence of the rights is still in its formative stages, they are being recognized in the sphere of international law and have been influencing municipal legislation aiming for environmental sustenance. This development is greatly influenced by the new development paradigm – sustainable development – that recognizes the need to engage in environmentally friendly development programs and activities.

This paper is devoted to identifying the problems related to the implementation of environmental rights and their links with investment in Ethiopia. Hence, the finding of the research reveals that the investment legislation, investment policy, and the practice of the investment organs have not given environmental rights significant emphasis. Even though the constitution of Ethiopia[1] and the environmental impact assessment law of the country[2] require public participation to give an opinion on projects affecting the environment, the right is not yet enforced. In other words, there is no clear procedure as to how communities participate in investment projects, which could negatively affect their environment. Hence, environmental rights and investment undertakings in Ethiopia are not well linked together owing to the aforementioned challenges. Eventually, the research has come up with legal and implementation gaps and indicates the way forward for the legislature or policy makers for the better implementation of environmental rights in Ethiopia.

Keywords

environmental rights – environmental sustenance – investment – sustainable development – public participation – environmental impact assessment

1 Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, *Federal Negarit Gazeta*, Year 1, No 1 Addis Ababa, August 21, 1995 (hereinafter referred to as the 1995 constitution).

2 Environmental Impact Assessment Proclamation No. 299/2002, *Federal Negarit Gazeta*, Year 9, No. 11 (hereinafter referred to as the EIA proclamation).

 | DOI 10.1163/9789004280250_012

1 The Concepts and Link Between Sustainable Development and Environmental Rights

1.1 *The Concept of Sustainable Development*

The concept of 'sustainable development' attempts to assess or quantify development in relation to the impact of its range of effects or potential effects on the local and global environmental media at risk. The 'environmental viability' of a given activity or process may then be determined independently of or in addition to other considerations and form part of the decision whether that activity is appropriate in its proposed form.[3] More importantly, sustainable development is particularly concerned with wider national or regional trends and the longer-term consequences of social and commercial developments, confronting decision makers with choices between the more immediate, quantifiable merits of a proposed course of action and the more speculative benefits of present 'self-denial' for future generations. A common definition of the concept is "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs."[4]

The 1992 United Nations Conference on Environment and Development (UNCED) – 'The Earth Summit' – which was held in Rio de Janeiro produced four major policy aims, including Agenda 21, which was a program of action applicable throughout the world to achieve a more sustainable pattern of development for the next century. In addition, a new UN Commission on Sustainable Development (CSD) was set up to monitor progress on Agenda 21 and held its first meeting in New York in June 1993.[5] The Earth Summit recommended that individual countries should prepare strategies and action plans to give national effect to these agreements. Agenda 21 placed great emphasis on the need for all sectors of society to participate in the formation of effective national strategies for sustainable development.[6] As the report makes clear, if sustainable development is to make a real impact, it will require the active participation of those with similar interests, in alliance with governments.[7]

In addition to its environmental roots the concept of sustainable development which emerged in the 1980s draws also on the experience of several decades of development efforts. For instance, in the 1950s and 1960s, the focus of economic progress was on growth and increases in output, based mainly on

3 John D Lesson, *Environmental law* (1995), 37–38.

4 Lesson, *Environmental law*, 39.

5 Lesson, *supra* n. 4, 38.

6 Ibid.

7 Ibid.

the concepts of economic efficiency.[8] By the early 1970s the large and growing numbers of poor in the developing world, and the inadequacy of 'trickle-down' benefits to these groups, led to greater efforts to directly improve income distribution.[9] The development paradigm shifted towards equitable growth, where distributional objectives were recognized as being distinct from and as important as economic efficiency.[10] Early attempts were made to weight benefits and costs of development projects according to the income level of the beneficiaries, thereby incorporating social equity concerns directly into economic decisions.[11] However, lack of success with such approaches resulted in a more pragmatic procedure, whereby the economic and social objectives of production were coupled with targeted poverty alleviating initiatives to assist low-income groups.[12]

1.2 *The Link Between the Environment and Sustainable Development*

The link between the 'environment' and 'development' is viewed differently by both developed and developing nations. The developed nations have inculcated the need for environmental sustenance into economic development plans while developing nations are yet to absorb it in practice even when expressly stated in their legislations and policies.[13] The reason for this is obvious. Most of the developing nations are economically and technologically far behind developed nations and still believe that the need to protect the environment is a strategy by the advanced countries to arrest their economic growth.[14]

'Sustainable development' and 'environment' are two interrelated concepts. The term sustainable development was brought into common use even before the Earth Summit by the World Commission on Environment and Development (the Brundtland Commission) in 1987. The Commission defined 'sustainable development' as "development that meets the needs of the present generation without compromising the needs of the future generations." The Brundtland

8 Mohan Munasinghe, *Environmental Economic and Sustainable Development* (Washington, D.C: World Bank, 1993), 1–2.

9 Munasinghe, *Environmental Economic and Sustainable Development,* 3.

10 Ibid.

11 Ibid.

12 Ibid.

13 The exception includes countries like Columbia and India that have robust legal provisions on the environment.

14 M.T. Okorodudu-Fubara, *Law of Environmental Protection* (Nigeria: Caltop Publications 1998), 3–6.

Commission report highlighted the need to simultaneously address both the developmental and environmental imperative.[15]

The 1972 Stockholm Conference provided the first platform where issues concerning the link between the environment and economic development were discussed with a wide range of participants from both developing and developed nations. Though the Conference was induced by the regional pollution and acid rain problems of northern Europe, it recorded some great success particularly in terms of the emergence of the sustainable development argument as a satisfactory resolution to the environmental versus development dilemma.[16]

The Conference also led to the establishment of the United Nations Environment Programme (UNEP), several other national environmental-protection agencies and international meetings that culminated in environmentally friendly resolutions and instruments.[17] The Declaration of the Human Environment adopted by the Stockholm Conference stated in part that:

> The natural resources of the earth must be safeguarded for the benefit of present and future generations through careful planning or management, and that the capacity of the earth to produce vital renewable resources must be maintained and wherever practicable, restored or improved.

The Declaration laid the foundation for subsequent conferences and international meetings on issues of the environment and development. Notable among these was the 1983 World Commission on Environment and Development (WCED). The Commission published its report that dealt with social, economic, cultural, and environmental issues, and for the first time gave some direction for comprehensive global solutions as well as popularizing the

15 World Bank, *Making Development Sustainable from Concept to Action* (Washington, D.C: World Bank, 1994), 1.

16 *Sustainable Development Timeline*, accessed April 27, 2014, http://www.iisd.org/rio+5/timeline/sdtimeline.htm.

17 Some of these include the 1977-UN Conference on Desertification (see http://infoserver.ciesin.org/docs/002-478/002-478.html for full details of the conference); the Convention on International Trade in Endangered Species of Flora and Fauna (CITES), which came into effect in 1975 (see http://www.unep.ch/cites.html for more information) and the Worldwatch Institute established in 1975 in the USA to raise public awareness of global environmental threats to the point where it will support effective policy responses (see http://www.worldwatch.org/ for more information) (accessed May 6, 2014).

term sustainable development.[18] The 1992 UN Conference on Environment and Development (UNCED) held in Rio de Janeiro[19] reiterated the relationship between the environment and sustainable development and declared that in order to attain sustainable development, environmental protection should constitute an integral part of the development process. Principle 10 of the Rio Declaration is particularly important as it formulated the link between human rights and environmental protection largely in procedural terms. It states:[20]

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The World Summit for Social Development held in Copenhagen in 1995 noted that sustainable development is not possible unless human rights (which also include environmental rights) are protected for all. Further recognition of the human rights angle to the sustainable development agenda has resulted in the human rights approach to development. This approach has been made stronger by the outcomes of the World Summit on Sustainable Development (WSSD), the progeny of the Rio Conference held in Johannesburg in 2002. This Summit, like its predecessors in Stockholm and Rio de Janeiro, focused on a key component of that blueprint: the relationship between human beings and the natural environment. The understanding of sustainable development was

18 See for the full report of the Commission, accessed May 6, 2014, http://www.rri.org/envatlas/supdocs/brundt.html.

19 Positive results of the conference include the publication of Agenda 21, the Convention on Biological Diversity, the Framework Convention on Climate Change, the Rio Declaration, and a Statement of Non-binding Forest Principles. See generally, http://www.ecouncil.ac.cr/rio/earthsummit.htm (accessed May 6, 2014).

20 Dinah Shelton, *Background Paper No. 1, Human Rights and Environment Issues in Multilateral Treaties Adopted between 1991 and 2001*, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, January 14–16, 2002, Geneva.

broadened and strengthened at the Summit, particularly the important linkages between poverty, the environment, and the use of natural resources. The Conference also maintained that sustainable development can be attained through recognition and enforcement of the right to a healthy environment.[21] The WSSD has therefore shed light on the need to protect human rights, environmental rights, and the environment itself, especially in the face of natural resource exploitation, which remains one of the highest causes of human rights abuses arising from environmental causes.

1.3 *The Concept of Environmental Rights and its Link with Development*

The concept of environmental rights is still evolving and thus it is difficult to ascribe an all-inclusive definition to it. For instance, the Ksentini Report,[22] without directly defining the concept, simply suggested the possible components of environmental rights.[23]

The definition of the rights can also be gleaned through the lenses of the growing body of international, regional, and national decisions, the sizeable number of conventions and proposals of academic writers, as well as contributions from other areas of law (including international human rights law and international labor law), which have contributed to the philosophy and jurisprudence of a pure, healthy, and decent environment.[24] Myriam Lorenzen describes the right to environment as to include the right to:

---

21 International Institute for Environment and Development (IIED), *Environment and Human Rights: a New Approach to Sustainable Development*, accessed May 7, 2014, http://www.iied.org/docs/wssd/bp_envrights_ftxt.pdf.

22 United Nations, *Human Rights and the Environment: Final Report of Special Rapporteur appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities,* U.N. Doc. E/CN.4/Sub.2/1994/9, (1994) ("the Ksentini Report"), 74.

23 United Nations, *Human Rights and the Environment*, 74. The suggested components of environmental rights include: (a) freedom from pollution, environmental degradation, and activities that adversely affect the environment or threaten life, health, livelihood, well-being, or sustainable development; (b) protection and preservation of the air, soil, water, sea-ice, flora, and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems; (c) the highest attainable standards of health; (d) safe and healthy food, water, and working environment; (e) adequate housing, land tenure, and living conditions in a secure, healthy, and ecologically sound environment; (f) ecologically sound access to nature and the conservation and use of nature and natural resources; (g) preservation of unique sites; and (h) enjoyment of traditional life and subsistence for indigenous peoples.

24 Okorodudu-Fubara, *supra* n. 14, 73–76.

> a clean and safe environment as the most basic one, the right to act to protect the environment as well as the right to information, to access to justice, and to participate in environmental decision-making.[25]

The United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,[26] views environmental rights as strengthening the role of members of the public and environmental organizations in protecting and improving the environment for the benefit of future generations. The Convention recognizes citizens' environmental rights to information, participation, and justice, and it aims to promote greater accountability and transparency in environmental matters.[27]

The Special Rapporteur on Human Rights and the Environment for the UN Sub-commission on the Prevention of Discrimination and Protection of Minorities produced its report in 1994. The Report underscored the importance of the protection of human rights by the rule of law as one of the means of "democratic expression of environmental and social claims, within a structured framework that guarantees legal action while fostering dialogue." The report gives equal importance to the establishment of a legal framework to peruse "the right to a healthy and flourishing environment." It states that the notion of the indivisibility and interdependence of all human rights underpins the links between the right to development and the right to a healthy and safe environment from the claim to the right to sustainable development, which implies a concentration of efforts to combat poverty and underdevelopment.[28] Similarly, the African Charter on Human and Peoples' Rights upholds the right of all peoples "to a general satisfactory environment favourable to their development."

---

25 Myriam Lorenzen, *'Background Paper on the Project Environmental Human Rights' prepared for ANPED, the Northern Alliance for Sustainability*, accessed May 1, 2014, http://www.anped.org/docs/background%20document.doc. This definition is supported by the International Institute for Environment and Development (IIED). See generally, IIED, "Environment and Human Rights: A New Approach to Sustainable Development," Opinion: World Summit on Sustainable Development, IIED, 2001.

26 More popularly referred to as the Aarhus Convention after the Danish city where it was adopted in June 1998.

27 United Nations Economic Commission for Europe (UNECE), *Environmental Rights Not A Luxury,* Press Release, Geneva: October 29, 2001.

28 The Special Rapporteur on Human Rights and the Environment for the UN Sub-commission on the Prevention of Discrimination and Protection of Minorities (E/CN.4/sub.2/1994/9).

What can be pieced together from the existing literature on environmental rights without laboring over them at this stage is that environmental rights include the right to a clean and safe environment as the most basic one. It also includes substantive rights, prominent among which are the right to safe drinking water, clean air, and safe food. The second aspect is the right to act to protect the environment which involves the rights to information, access to justice, and participation in environmental decision-making.

The role of the public in environmental sustenance and sustainable development, particularly in natural resource management, cannot be overstated. The Brundtland Report recognizing the role of public participation in sustainable development observed that progress (towards achieving sustainable development) will also be facilitated by recognition of, for example, the right of individuals to know and have access to current information on the state of the environment and natural resources, the right to be consulted and to participate in decision-making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected. At this juncture it is instructive to note that the judiciary in some jurisdictions has begun to recognize the necessity of public participation in environmental decisions if the sustainable goals are to be attained. For instance, in the Indian case of *Bombay Environment Action Group, Shaym H.K. Chainani Indian Inhabitant, Save Pune Citizen's Committee* v *Pune Cantonment Board*, the court observed that people's participation in the movement for the protection of the environment cannot be over-emphasized and thus gave recognition to the plaintiffs' right to participation.[29]

1.4 *Environmental Rights and the Right to Development in Ethiopia*

In Ethiopia, the environment has received much more attention in the 1995 constitution than its predecessors. Most significantly, the constitution contains specific provisions related to environmental rights and sustainable development. Three provisions of the constitution, Articles 43, 44, and 92, are relevant for environmental rights and sustainable development which may be classified into two groups depending on their respective significance in terms of enforceability. Accordingly, Articles 43 and 44 fall under Chapter 3 which is known as the most important part of the constitution in light of Articles 104 and 105. Particularly, as per Article 105, Chapter 3 requires an extra-ordinary

29 The verdict was given by the High Court of Judicature at Bombay Appellate Side Writ Petition No. 2733 of 1986.

procedure to be amended.[30] Similarly, Article 92 is also an important provision as it falls under Chapter 10 of the constitution dealing with the national policy principles and objectives. Hence, this part serves policy makers as a guideline for any developmental undertaking.

The incorporation of the right to a clean and healthy environment in the constitution can be considered as the result of the 1992 United Nations Conference on Environment and Development.[31] The constitution explicitly provides that all persons have the right to a clean and healthy environment.[32] Similarly, Article 43 under its caption 'the right to development' provides that the peoples of Ethiopia as a whole and each Nation, Nationality, and People in Ethiopia in particular have the right to improved living standards and to sustainable development. Obviously, the right to improved living standards and sustainable development is ensured when the environment we are living in is clean, healthy, and protected. Furthermore, the constitution indicates that any development policies and projects should be formulated and designed in a manner that brings sustainable development.[33]

In order to ensure environmental rights, the peoples of Ethiopia have been provided with "the right to full consultation and to the expression of their views in the planning and implementation of environmental policies and projects that affect them directly."[34] Similarly, the constitution provides that, "nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community."[35] It can be concluded that the recognition of the participation of the public in any developmental undertaking by the constitution is in conformity with the Brundtland Report. Therefore, the participation of the peoples of Ethiopia in the development projects makes the government transparent

30 All rights and freedoms specified in Chapter 3 of the constitution, Article 105 itself, and Article 104 can be amended only if the following procedures are observed: (a) when all State Councils, by a majority vote, approve the proposed amendment; (b) When the House of Peoples' Representatives, by a two-thirds majority vote, approves the proposed amendment; and (c) When the House of Federation, by a two-thirds majority vote, approves the proposed amendment. Hence, as Articles 43 and 44 are part of Chapter 3, its amendment procedure is very stringent and therefore is said to be the most important part of human and democratic rights.

31 Esmail Mohammed, "Environmental Impact Assessment: a Legal Dimension" (LLM Essay, Unpublished, ECSC, Institute of Legal Studies, 2001), 20.

32 Article 44 of the 1995 constitution.

33 Ibid., Article 43.

34 Ibid., Article 92(3).

35 Ibid., Article 43.

and accountable to its peoples in line with the basic constitutional principles dealing with transparency and accountability.[36]

The constitution imposes a duty on the government to ensure environmental rights.[37] Accordingly, both the federal and regional governments are required to ensure that all Ethiopians live in a clean and healthy environment which is one component of environmental rights; and to protect the environment from the development projects, design, and implementation which could affect the environment. The government is also under a duty to ensure that the public has effectively participated while a given project is being planned, designed, and implemented.[38] Hence, it can be argued that all these obligations are imposed on governments to ensure environmental rights.

Moreover, Ethiopia has ratified many international environmental agreements which recognize environmental rights. The constitution has given due recognition to international agreements. Accordingly, it stipulates that all international agreements ratified by Ethiopia are an integral part of the law of the land.[39] Therefore, the government is under the duty to enforce those international agreements. To conclude, the concepts of environmental rights and development are well recognized by the constitution, but there are practical challenges as discussed in the following sections, which demonstrate the missing link between environmental rights and development in Ethiopia.

2 Environmental Impact Assessment (EIA) in Ethiopia

It is possible to anticipate that carrying out a particular activity or operation will have certain inevitable forms of impact on its surroundings. By requiring a statement of such environmental consequences, it is possible to assess their effect and therefore determine whether the project should be permitted, either in its original or a revised form. The virtue of anticipating and as far as practicable, resolving the environmental consequences of harmful activities before they commence is a primary reason for environmental impact assessment (EIA). International environmental instruments require EIA to be conducted before undertaking development projects. For instance, the 1991 EIA Convention imposes a duty on contracting parties to ensure that in accordance with the provisions of the Convention, EIA is undertaken prior to a decision to

36 Ibid., Article 12.

37 Ibid., Article 92(4).

38 Ibid., Article 92(1) cumulatively with Articles 43 and 92(2 and 3).

39 Ibid., Article 9(4).

authorize or undertake a proposed activity that is likely to be the cause of a significant adverse trans-boundary impact.[40]

It is obvious that EIA can play a pivotal role in ensuring environmental rights as projects need to undergo the EIA process. In Ethiopia, however, prior to 2002, there was no explicit provision for ensuring that decision makers incorporate the environmental dimension into the planning of development projects. Furthermore, there have been no established procedures and guidelines for Environmental Assessment (EA). Hence, the country primarily relied on guidelines established by donor agencies for projects. The water sector had developed a practice requiring environmental and health impact assessment of water resources development projects but the unavailability of an adequate comprehensive policy for the integration of EIA into the development planning was a major problem for environmental management and EIA.[41]

The environmental policy shows that Ethiopia is in great danger of environmental degradation.[42] Under the policy, different objectives, guiding principles, and policy goals are stipulated.[43] Furthermore, the policy includes a policy on EIA under its cross-sectoral environmental policies which later appeared as a proclamation/law. The core issue of the policy is that ensuring EIA considers not only physical and biological impacts but also addresses social, socioeconomic, political, and cultural conditions.[44] Later on, the EIA law was enacted as the EIA proclamation No. 299/2002.

Under the EIA proclamation, the Environmental Protection Authority (EPA) is vested with the power to categorize development projects into two groups of which one is likely to have a negative environmental impact while the other is not likely to have a negative impact.[45] Hence, implementation of any project that requires EIA, as determined in an issued directive, can be achieved with authorization from the EPA or from the relevant regional environmental agency. However, when the EPA or the relevant regional environmental agency believes that the impacts of the project are insignificant, it may decide not to require the concerned proponent to conduct EIA.[46] On top of that, any

40 See Article 2(3) of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991 – the Espoo (EIA) Convention).

41 World Bank, *supra* n. 15, 43–44.

42 See for further details, *the Ethiopian Environmental Policy Document, 1997.*

43 Ibid.

44 Ibid.

45 See Article 5(2) of the EIA proclamation.

46 Ibid., Article 3(1 and 2).

licensing agency shall be under a duty to issue licenses to any proponent only after authorization from the appropriate environmental agency.

The EIA study has to take into account certain factors like the size, location, nature, trans-regional effects, duration, reversibility, or irreversibility, or other related effects of the project. The study report prepared by the experts must contain adequate information which enables the concerned authority or relevant environmental agency to determine whether the project is to proceed or not.[47] As per the proclamation the report shall at least contain:[48] a description of the nature of the project; the content and amount of pollutant that will be released; sources and amount of energy required; information on likely trans-regional impacts; characteristics and duration of all the estimated direct or indirect, positive or negative impacts; measures proposed to eliminate, minimize, or mitigate negative impacts; contingency plans in case of accident, and procedures of self-auditing and monitoring during implementation and operation.

When the assessment and the study report reach the concerned authority or relevant regional environmental agency, it has to be evaluated by taking into consideration the opinion of experts and any public comments. The authority or the relevant regional environmental agency is under an obligation to make sure that the public has access to the environmental impact study report and their comments are given due consideration when evaluating the report.[49] After finalizing the evaluation of the study report, the concerned environmental organ must come up with one of the following decisions:[50]

. Approve and authorize the implementation of the project without conditions, provided that it is convinced that the project will not cause any negative impacts; or
. Approve and authorize the implementation of the project with conditions if it is convinced that the negative impact of the project can be countered; or
. Refuse to approve the implementation of the project if it is convinced that the negative impacts cannot be satisfactory avoided.

The EIA proclamation further provides that the authority or the relevant regional environmental agency shall monitor the implementation of an authorized project in order to evaluate compliance with all commitments made by

47 Ibid., Article 8(1).
48 Ibid., Article 8(2).
49 Ibid., Article 14.
50 Ibid., Article 9(2).

and obligations imposed on the proponent during authorization. In addition, the licensing agency has to suspend or cancel the licenses it may have issued if the concerned environmental authority or relevant regional environmental agency decides to suspend or cancel an authorization to implement such project.[51]

The other progress made under the EIA proclamation is that, according to its preamble, it strives to bring about administrative transparency and accountability.[52] Legally speaking, the EIA proclamation makes the EPA and the regional environmental agency transparent and accountable in their activities as it obliges them to secure the comments of the public before approving any development project. Particularly, the obligation imposed on these organs to make accessible the EIA's report to the public and solicit comments on it,[53] shows that the EIA's process is transparent.

3 Environmental Impact Assessment and Public Participation in Ethiopia

It is obvious that one of the recognitions made by the Brundtland Report under environmental rights is public participation. Accordingly, public participation on environmental issues is a pivotal instrument as it ensures sustainable development.

Similarly, the constitution of Ethiopia provides that nationals have the right to be consulted with respect to policies and projects affecting their community,[54] and the right to full consultation and expression of views in the planning and implementation of environmental policies and projects that affect them directly.[55] Moreover, the environmental policy, under its policy on EIA, provides that the public is to be consulted.[56] On top of this, popular sovereignty provided under the constitution[57] is clearly reflected under the EIA proclamation as the public plays an important role in evaluating policies and projects designed for development.

51 Ibid., Article 12(3).

52 Ibid., the preamble.

53 Ibid., Article 15(1).

54 Article 43 of the 1995 constitution.

55 Ibid., Article 44.

56 See for further details, *the Ethiopian Environmental Policy Document, 1997*.

57 See Article 8 of the 1995 constitution.

The EIA proclamation starting from its preamble up to its detailed provisions empowers the public with the right to participate in the EIA process. Particularly, the local communities have a role in the planning of and decision-making on developments which may affect them and their environments. Accordingly, the EPA – or the regional environmental agencies – is obligated to make the EIA report accessible to the public and hear the comments of the public before approving the proposed project.[58] Furthermore, the EIA proclamation obligates the proponent of a project to carry out the EIA of a project that is likely to produce 'a trans-regional impact' in consultation with the communities likely to be affected in any region.[59]

Even though the constitution, the Ethiopian Environmental Policy, and the EIA proclamation clearly empower the public to participate in any development project which could affect its environment, the right is not yet enforced and practiced.[60] There is no institutional and legal platform to ensure citizens have the right to participate and give their opinion on projects affecting their environment. The law fails to adopt detailed methods and criteria for public participation. In other words, there is no clear procedure as to how the local communities participate in development projects which could affect their environment.[61] Generally, enforcement mechanisms are not yet designed. Even if public participation is one of the most important components in ensuring environmental rights and development, it is found that it is a missing element in Ethiopia.

4 Investment Legislation and Environmental Rights in Ethiopia

Since 1991 Ethiopia has come up with different policy changes. Among others, the shifting of the country's economy from a command economy to a market

58 Article 15 of the EIA proclamation.

59 Ibid., Article 6.

60 A focus group discussion with residents of Finfine 'Zuriya' Special Zone, particularly residents of Sebeta District and Dukem Town, the places where investment activities have been widely undertaken, revealed the same fact, i.e., that they have not been consulted while flower investments were put in place. Discussion held in July, 2013. Similarly, the government's policy of integrating/expanding the Addis Ababa City plan which has been opposed by most of the Oromo students in different universities found within the state of Oromia in April and May, 2014, causing hundreds of deaths and injuries as well as destruction of properties, is a clear manifestation of the failure of the government to ensure the participation of the local community in development agendas.

61 Interview with Mr. Wendwesen Sintayehu, Legal Advisor at EPA, July 20, 2013.

economy can be mentioned. To regulate the market economy, investment legislations have been enacted, but the current Investment Proclamation No. 769/2012 has repealed its predecessors.[62] As per the preamble, the proclamation is meant to accelerate the economic development of the country and to improve the living standards of the peoples. The proclamation further provides for the objectives of the investment policy which are designed to improve the living standards of the peoples of Ethiopia through the realization of sustainable economic and social development, the particulars of which are the following:[63]

> to accelerate the country's economic development; to exploit and develop the immense natural resources of the country; to develop the domestic market through the growth of production, productivity and services; to increase foreign exchange earnings by encouraging expansion in volume, variety and quality of the country's export products and services as well as to save foreign exchange through production of import substituting products locally; to encourage balanced development and integrated economic activity among the regions and to strengthen the inter-sectoral linkages of the economy; to enhance the role of the private sector in the acceleration of the country's economic development; to enable foreign investment play its role in the country's economic development; to create ample employment opportunities for Ethiopians and to advance the transfer of technology required for the development of the country.

Pursuant to the policy, three areas of investment are provided by the proclamation. The first area of investment is reserved for the government or for joint investment with the government. As per this proclamation,[64] transmission and distribution of electrical energy through the 'Integrated National Grid System', air transport services using aircraft with a seat capacity of more than 50 passengers, and postal services with the exception of courier services are exclusively reserved for the government. On the other hand, manufacturing of

62 Since 1991 different investment proclamations have been enacted. In 1992 and in 1996, Investment Proclamation No.15/1992 and Investment Proclamation No. 37/1996 were enacted. In 2002 and 2003, Investment Proclamation No. 280/2002 and Investment Amendment Proclamation No. 37/2003 were enacted. In 2012, a new Investment Proclamation No. 769/2012 was enacted repealing the previous proclamations.

63 See article 5 of Investment Proclamation No. 769/2012, *Federal Negarit Gazeta* Year 18, No. 63 (hereinafter referred to as the Investment Proclamation).

64 Ibid., Article 6(1).

weapons and ammunition and telecommunication services are open for investors to invest only in joint ventures with the government.[65] Furthermore, the proclamation clearly provides areas of investment exclusively reserved for Ethiopian nationals and other domestic investors to be specified by regulations to be issued by the Council of Ministers.[66] Moreover, there are also areas of investment, other than those exclusively reserved under the proclamation for the government or joint venture with the government or for Ethiopian nationals or other domestic investors which shall be specified by regulations to be issued by the Council of Ministers and open for foreign investors.[67]

The Proclamation provides for an investment licensing process or investment permit. Accordingly, it provides that an investor has to submit an application for an investment permit to the Investment Agency. Articles 13, 14, and 15 of the proclamation[68] respectively provide for application for an investment permit by a domestic investor, application for an investment permit by a foreign investor, and application for an investment permit for expansion or upgrading. The note on the investment permit application form[69] provides the following:

> Any investor is required to abide by the laws and regulations of the country. An investor who submits an application for investment permit will therefore be automatically taken for unconditional commitment to all laws, regulations, directives and specifically those related to that specific investment area.

If we take the phrase "any investor is required to abide by the laws and regulations of the country" above, it is general as it says "the laws and regulations." Hence, the laws could be the constitution and environmental laws, which include the EIA proclamation and the like. One could therefore argue that the note on the investment permit application form requires the EIA process and authorization of proposed projects for implementation by the authority or the relevant regional environmental agency. Article 16 of the proclamation provides that, when an application is made as per the form provided, the appropriate investment organ is under a duty to examine the intended investment

65 Ibid., Article 6(2).

66 Ibid., Article 6(3).

67 Ibid.

68 Ibid., Articles 13, 14 and 15.

69 Ethiopian Investment Agency, Note on Investment Permit Application Form No. 3.

activity in light of the proclamation, regulations, and directives issued thereunder and therefore:

. Issue the investment permit upon receipt of the appropriate fee, where the application is found acceptable; or
. Notify the investor of its decision and the reason therefore in writing, where the application is found unacceptable.

Even though the appropriate investment organ is under a duty to examine the intended investment activity in light of the law, the actual practice is otherwise. The interviews conducted with the Ethiopian Investment Agency Officers and some domestic and foreign investors reveal that there is no pre-condition for the investor to get a permit.[70] Moreover, the brochure with its title, 'Ethiopia: the Right Destination for Investment', which is used to introduce the country's investment opportunities provides for a 'Client Charter'. For instance, one among the mentioned services under this Client Charter is the issuance of a new investment permit within four hours.[71] Here, what we can observe is that the investor is required to come up with an application for investment permit so that he/she will be issued with the permit within four hours. The Investment Agency does not wait for days to check whether the intended activity is in light of the proclamation, regulation, and directives issued thereunder. Generally, the Investment Organ does not require the proponent of the project to come up with other formalities like the Environmental Impact Assessment (EIA) study report and authorization for the implementation of the proposed activity by the Environmental Protection Authority (EPA) or the relevant regional environmental agency.[72]

Here it can be argued that the laws and practice of the investment licensing process are far apart from each other. The practice of the investment licensing process totally deviates from the environmental protection laws of the country. In particular, there is a clear deviation from the EIA proclamation which requires an environmental impact study to be conducted before authorization for the implementation of the proposed project. The EIA proclamation imposes a duty on the proponent of a project to undertake EIA; identify the likely

70 Interview conducted on July 20, 2013. The names of the interviewees are left confidential.

71 The Brochure, *Ethiopia: the Right Destination for Investment*, 2012.

72 The interviewed Turkish and Chinese investors revealed that they are not required to undertake the EIA before the investment permit. Interview with Chinese and Turkish investors, interview conducted in July, 2013.

adverse impacts of his/her project; incorporate the means of their prevention or containment; and submit to the authority or the relevant regional environmental agency the environmental impact study report together with the documents determined as necessary by the authority or the relevant regional environmental agency.[73] Therefore, there is no way for the proponent of the project to get authorization without conducting EIA for projects requiring EIA. That is why the proclamation[74] clearly indicates the need for the EIA process to be conducted in the following way:

> Without authorization from the authority or from the relevant regional environmental agency, no person shall commence implementation of any project that requires environmental impact assessment as determined in a directive issued.

Even though the EPA has not yet come up with a directive as per article 5(1) of the EIA proclamation, according to the final draft of the EIA guideline prepared by the EPA, there are schedules of activities under appendix 1. This appendix has three schedules. Schedule 1 is about projects which may have adverse and significant environmental impacts, and may, therefore, require full EIA. Schedule 2 is about projects whose type, scale, or other relevant characteristics have the potential to cause some significant environmental impacts not likely to warrant an environmental impact study, whereas schedule 3 is all about projects which would have no impact and do not require EIA. The appendix also provides that all projects in environmentally sensitive areas are required to be treated as equivalent to schedule 1 activities irrespective of the nature of the project. As per the appendix, these sensitive areas are not exhaustively mentioned, but they are illustrative.[75] Furthermore, the EIA proclamation[76] imposes a duty on any licensing agency, which also includes the Investment Agency. Accordingly,

73 Article 7(1) of the EIA proclamation.

74 Ibid., Article 3(1).

75 As per the appendix, the areas that have been said to be sensitive may include: Land prone to erosion; Land prone to desertification; Areas of particular historic or archaeological interest; Areas which harbor protected, threatened, or endangered species; Primary forests; Wetland of national or environmental importance; National park and protected areas; Important landscape; and Religiously important area.

76 Article 3(3) of the EIA proclamation.

> any licensing agency shall, prior to issuing an investment permit or a trade or an operating license of any project, ensure that the authority or the relevant regional environmental agency has authorized its implementation.

Even though the EIA proclamation provides for projects requiring EIA to pass through the EIA process, such a provision is not provided or is not cross-referenced under the existing investment legislation. It is only provided in the repealed Investment Proclamation No. 37/1996 under its Article 14 that the then Investment Organ is under a duty to issue an investment permit to the applicant after ensuring compliance with the environmental protection laws. Similarly, the repealed Investment Proclamation No. 280/2002 under its Article 13 provided that a project file and other relevant information relating to the particulars of the project were to be filed by the proponent of the project. Hence, had Article 13 of the proclamation not been amended, it would have been possible for the Investment Organ to check and know the potential impact of the proposed project. But, there is no way for the Investment Organ to check and know the potential impact of the proposed project as project files and other relevant information relating to the particulars of projects to be filed are not a requirement under the existing Investment Proclamation No. 769/2012. Even though Article 38 of the proclamation puts an investor under an obligation to observe the laws of the country in carrying out his investment activities, this obligation is not a requirement when an application is made for an investment permit and for the issuance of such permit.[77] Hence, the repealed investment proclamations are by far better than the existing proclamation as far as respecting the environmental law is concerned.

The most environmentally unfriendly provision under the Investment Proclamation No. 769/2012 is Article 16 sub-article 2. This sub-article has provided that "the appropriate investment organ shall, after issuing the investment permit, notify the concerned institutions so that the latter could conduct the necessary follow up." Here, what we can understand from this sub-article 2 is that the concerned government institutions, which also include the EPA, can only conduct the necessary follow up after the investment permit is issued to the proponent of the proposed project. This sub-article clearly shows that the concerned governmental institutions are only empowered to conduct the necessary follow up after the project has materialized or implemented. Hence, there is no room for a concerned environmental organ like the EPA or relevant

77 See for further details, Articles 13, 14, 15, and 16 of the Investment Proclamation.

regional environmental agency to test the potential impact of the proposed project before its implementation as the investment permit is already issued by the appropriate investment organ. It is a futile exercise to notify the concerned government institutions, which include the EPA or the relevant regional environmental agency, after the issuance of the investment permit. What we can easily conclude is that the investment legislation has defeated the purpose of the EIA proclamation requiring any licensing agency to ensure the authorization of the implementation of any project by the EPA or the relevant regional environmental agency before issuing an investment permit. Therefore, such a deviation from the EIA process endangers the environmental rights of citizens.

The Criminal Code of Ethiopia[78] has however made acts that are contrary to EIA punishable in the following way:

> Whoever, without obtaining authorization from the competent authority, implements a project on which an environmental impact assessment is required by law, or makes false statements concerning such assessment, is punishable with simple imprisonment not exceeding one year.

What we can infer from the above provision is that EIA is a must to be conducted; failure to observe it is punishable. In addition, the provision requires the EIA process to be checked by the competent authority, which in this case is the EPA or the relevant regional environmental agency, for the authorization of the proposed project to be given. Hence, it is a duty for the proponent of a project to conduct the EIA and obtain authorization for the implementation of the project before obtaining the investment permit as failure to get authorization from the competent authority is punishable.

The fact that the Criminal Code makes non-compliance with the EIA proclamation punishable does not guarantee the better exercise of environmental rights as the provision is simply about notifying the public of the consequence of failure to observe the EIA proclamation. Hence, it is meant to deter the public at large. It only provides for consequences after the fact. In other words, the criminal law punishes the suspect/offender after the crime has been perpetrated. The researcher believes that such a measure could not in any way heal the hurt.

The other problem related to the investment legislation is that the legislation is sectorally biased as it focuses only on economic profits ignoring

78 Article 521 of the Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 414/2004.

environmental concerns. Similarly, the interviewees reveal that the existing investment legislation does not guarantee environmental rights and sustainable development. According to the legal advisor of the EPA, the existing investment legislation overrides environmental rights and sustainable development as EIA concerns are not mainstreamed across such a sectoral law. Its major focus is only bringing about economic or social profits as opposed to ecological benefits.[79] The Head of Impact Assessment in the EPA has also the same concern and argues that the investment permit and operational license should not have been given prior to the authorization of the proposed project for implementation by the EPA or the relevant regional environmental agency. According to the interviewee, it seems that the "cart precedes the horse."[80] Generally, there are no complementarities between the Investment Agency and EPA for the better protection of environmental rights and for bringing sustainable development.

To sum up, the investment legislation and investment licensing process of the Investment Organ off-set the environmental laws of the country. Hence, they are not meant to ensure environmental rights of the citizens which eventually affect the development process of the country.

5 Environmental Rights and Public Interest Litigation in Ethiopia

One of the progresses made in the Brundtland Report is the recognition of the right to legal remedies and redress for those whose health or environment has been or may be seriously affected. In conformity with the Report, the constitution of Ethiopia grants to everyone a right to bring a justiceable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.[81]

In order to further guarantee the constitutional rights of citizens, the Environmental Pollution Control Proclamation No.300/2002 has been proclaimed and has come up with the concept of 'public interest litigation'. The proclamation is a remarkable turning point as far as environmental rights are concerned. As a departure from the traditional 'private petition to law litigation', the proclamation grants to any person the right to lodge a complaint or petition to a concerned authority or to the competent court against any person

79 Interview with Wendwesen, *supra* n. 61.

80 Interview with Mr. Solomon Kebede, Head of Impact Assessment at EPA, July 20, 2013.

81 Article 37 of the 1995 constitution.

allegedly causing actual or potential damage to the environment without the need to demonstrate 'any vested interest'.[82]

Despite the recognition of public interest litigation, this right is not being exercised. The reason is that the proclamation needs further development of subsidiary laws in other matters such as environmental standards to determine pollution; otherwise it will not be applicable as a person who lodges a complaint may not succeed in winning the alleged case in the absence of this environmental standard, which helps the claimant to prove the actual or potential damage to the environment. Furthermore, the concept of the right to a clean and healthy environment is so comprehensive that the right is not properly implemented in Ethiopia. The reason is that the concept needs detailing. However, such details are not yet put in place. In addition, the mechanism to ensure its implementation is also not set. For instance, environmental inspectors needed under Proclamation No. 300/2002 are not trained and dispatched. Such failures therefore affect the environmental rights of citizens.

6 The Floriculture Industry and its Environmental Impacts in Ethiopia: An Example

The recently initiated flower production areas are mainly located around Addis Ababa, the Upper Awash Valley, and Lake Ziway. Addis Ababa, with an elevation of about 2,000 meters, is the most suitable place for the production of high-quality roses. Besides its suitable weather, all the infrastructures like roads, power, telecommunication, and water have been available for the investors in the floriculture sector. It is also practically witnessed that the Ethiopian highlands provide near ideal growing conditions for roses. The farms in the Upper Awash Valley, with an altitude ranging from 1,200 to 1,400 meters, are located along the length of the River Awash, 149–220 km away from the capital. Most of the floriculture farms are confined around the vicinity of Addis Ababa.[83] Most farms are located in Finfinne 'Zuria' Special Zone of the regional state of Oromia, particularly in districts like Holleta, Sebeta, and Addis Alem while the rest are more or less evenly distributed in the Rift Valley and the Awash River Basin Systems.[84] In the area of Lake Ziway, which is located 165 km

82 See Article 11 of the Environmental Pollution Control Proclamation No. 300/2002, *Federal Negarit Gazeta*, Year 9, No. 12.

83 N. Laws, "Ethiopia: the next production hot spot-floriculture," *Floriculture International*, accessed May 5, 2014, www.floraculture intl.com/archive/articles/1858.asp, 2006.

84 Ibid.

from Addis Ababa, the farms are situated between the lake and the main highway with altitudes ranging between 1,600 and 1,700 m above sea level.[85]

Although Ethiopia is still in the beginning stages of its floriculture industry, there are a number of challenges that must be resolved to continue with the development of the sector with its present rapid speed. The challenges include environmental impacts of the sector which can create pressure on the sustainability of flower industries. Accordingly, intensive uses of water as well as soil, the water and air pollution because of floriculture's intensive and toxic chemical usage and waste disposal system are some of the impacts of the industry on the environment and environmental rights. Hence, the following sub-sections are devoted to the discussion of the major environmental impacts of the Ethiopian cut flower industry.

6.1 *Water Resource Utilization*

Most of the studies conducted on floriculture show that a flower farm by its nature consumes a large amount of water. Accordingly, one hectare of a flower farm consumes over 900 cubic meters of water per month. Further studies also indicate that a flower is about 90 percent made up of water. Despite the high use of water by flower farms, investors who are engaged in flower farm activities are very reluctant to use effective irrigation systems.[86] Recent research has revealed that there is a reduction of natural capacity in the Awash River since most farms follow the step of the Awash River valley or its tributaries around the Great Rift Valley System. This matter obviously led to rivers and lakes losing their natural capacity due to high water consumption.[87] In such areas there are a lot of local farmers whose livelihoods are dependent on water for crop cultivation and cattle breeding. The decrease of water volume of those lakes and rivers made them live in poverty. As there are no strict EIA processes in Ethiopia, such a failure obviously leads to the violation of environmental rights of citizens, which eventually affects sustainable development.

6.2 *Water and Soil Pollution*

Flower farms mostly use hazardous chemicals in the form of fertilizers or pesticides which can be easily washed off from the ground and enter into water bodies. Moreover, excessive usage of inorganic chemicals in the farms which later produce nitrate will get into water bodies and can be washed away from

85 Ibid.

86 Mulugeta Getu, "Ethiopian Floriculture and its Impact on the Environment – Regulation, Supervision and Compliance," *Mizan Law Review* 3/2 (2009): 240–269.

87 Ibid.

the farms by rain causing serious health problems for people. It is obvious that water pollution causes a devastating health problem for both humans and animals. Solid wastes and toxic chemicals that contaminate water bodies can develop waterborne diseases.[88]

Water scarcity as well as pollution combined can affect the environment and the development process. Societies that depend on rivers and lakes for their livelihood might become frustrated which may lead them to migrate to another place for a better water resource. To challenge this problem sometimes local farmers confront commercial farms and conflict might arise over where and how to access water. A way of resolving such kind of problem is minimal and there is no clear way how participating stakeholders should manage the water resource.[89]

Another most visible impact of floriculture industries on the environment is the depletion of the soil through the intensive usage of fertilizers and chemicals as well as during the waste disposal of cut flowers. The interviewed experts of the horticulture industry revealed that the different types and amount of chemicals expose the soil to loss of its natural fertility. They have different character and react differently when applied to soil and change its texture, acidic value, and fertility.[90] It is obvious that one of the suggested issues under the Ksentini Report is the protection and preservation of the soil and water from pollution to maintain biological diversity and eco-systems.[91] However, such activities are missing in Ethiopia, particularly in the flower industry. One can therefore argue that such water and soil pollution affect the environment and the environmental rights of citizens.

6.3 *Air Pollution*

Air pollution is another environmental degradation factor which the industry is blamed for. The major contributors are excessive usage of pesticides during flower cultivation. One factor that aggravates the usage of pesticides is that flower shops around the world want to receive their orders in a fresh condition; and pesticides play the main role in maintaining flowers' freshness. A pesticide has a capacity of contaminating organisms, soil, and water. Due to its highly

88 Rakesh Belwal and Meseret Chala, "Catalysts and barriers to cut flower export: A case study of Ethiopian floriculture industry," *International Journal of Emerging Markets* 3/2 (2008): 216–235.

89 Ibid.

90 Interview conducted on July 15, 2013 with experts in the flower industry located at Sebeta District of the State of Oromia. The name of the experts is left confidential.

91 See "the Ksentini Report," *supra* n. 22.

volatile nature, it is estimated that only 0.1 percent of the total applied pesticide attains its intended goal whereas the remaining 99.9 percent is left as an air pollutant.[92] The pesticides applied in the greenhouses travel an average distance of 1,500 miles, adding significantly to global warming and air pollution.[93] It is obvious that freedom from pollution is one of the substantive rights recognized by the Ksentini Report,[94] but the practice of the flower industry of Ethiopia is not in conformity with the Report.

It is alleged that the sector usually uses more pesticides than conventional usages. For instance, the data from the Ethiopian Agricultural Research Institute shows that 18 of the 96 insecticides and nematicides imported by the flower farms were not on the list of pesticides registered in Ethiopia and the same was true for 19 of the 105 fungicides.[95] This indicates that the EIA process is not undertaken as per the EIA proclamation. Hence, in Ethiopia, there is a missing link between the development process and environmental rights.

6.4 *Land Cover Change*

Most of the local communities and previous land holders perceived and explained the issue of land use change in association with the shortages of agricultural products, fuel and construction wood, and price increase as well as the rapid climatic change. They were pointing out that, because most of agricultural lands and eucalyptus plantations have been changed from forest cover and farm lands to floriculture farms, they have faced a shortage of agricultural products and forest products. Most of the people in Ziway vicinity explained that, as a result of their poor livelihood and increased prices of products, they could not afford to purchase agricultural and forest products as per their needs.[96] This finding was confirmed by the ILO report document on Ethiopia which stated that one of the side-effects of floriculture expansion is the problem of conserving the forest resources.[97]

92 Mulugeta Getu, *supra* n. 86.

93 See for further details: http://jas.fass.org/cgi/content/full/82/13_suppl/E196 (accessed March 23, 2014).

94 For further details, see "the Ksentini Report," *supra* n. 22.

95 Tilahun Gudeta, "Environmental impact of floriculture industry in Ethiopia," accessed March 23, 2014, http://www.theecologist.org/green_green_living/behind_the_label/302429/behind the_label_cut_flowers.html.

96 Focus group discussion with residents of Ziway Area of Oromia region, discussion on July 3, 2013.

97 International Labor Organization, (ILO), Summary of the Study Report on Decent Work in Floriculture Ethiopia (Presented on the National Consultative Workshop, 2006).

The EPA explained its stand on this issue referring to the comparative advantage of the current resource utilization due to the floriculture expansion with the previous land use system. The authority has however admitted the need for conducting further studies as to which land use will be more appropriate and useful for the economic, social, and environmental advantage of society at large.[98] To the knowledge of the researcher, such a study has so far not been undertaken seriously. The problem is that the government does not seem to be willing to consider such matters as its concern is promoting investments and ignoring environmental issues. Hence, one can argue that the link between environmental rights and investment is a missing element as the developmental undertakings of Ethiopia are seeking economic profit rather than economic sustainability.

7 Conclusion and the Way Forward

7.1 *Conclusion*

It has been discussed that environmental rights and sustainable development are among the fundamental rights spelt out in the constitution of Ethiopia. The constitution provides that citizens have the right to participate in national development and, in particular, to be consulted with respect to the policies and projects affecting their community. Accordingly, the people of Ethiopia have the legal power to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly. The constitution also puts the government under a duty to promote the participation of the people in the formulation of national development policies and programs, and under a duty to support the initiatives of the people in their development endeavors, which are all meant to ensure environmental rights and sustainable development. Moreover, there is a warning clause that the design and implementation of programs and projects of development shall not damage or destroy the environment.

In conformity with the constitution, the EIA proclamation empowers the public with the right to be consulted, particularly the local communities likely to be affected in any region, in the context of a Trans-Regional Impact Assessment. In spite of this right, the investment law and the practice of the Investment Organ have not given a place for such public participation. In other words, the public do not have a say on development activities owing to the

98 Note the interview, *supra* n. 80.

investment legislation. It is not only the right of the communities to participate in national development that is defeated under the investment legislation, but also popular sovereignty of the peoples of Ethiopia.

It is clear that Ethiopia has committed itself to the principle of sustainable development. That is why the concept is emphasized in the constitution. Accordingly, the constitution endows the people of Ethiopia as a whole with the right to improved living standards and to sustainable development. However, the investment legislation was not drafted by taking into consideration the principle of sustainable development, which includes environmental concerns. Obviously, the environment is an essential component of the Millennium Development Goals. One of the goals is Goal 7, which is designed to ensure environmental sustainability and comprises different targets. The first target is related to integrating the principles of sustainable development into countries' policies and programs and reverses the loss of environmental resources. Even though Ethiopia has committed itself to the Millennium Development Goals, it does not adhere to its commitment as the investment legislation disregards environmental sustainability and merely seeks economic profit. It has been identified that the legislation and practice of the investment licensing process mainly focus on economic development and are ignoring environmental and economic sustainability. It is obvious that environmental rights are achieved when a given project has passed through the EIA process. The investment legislation of Ethiopia is however silent as to this requirement. Hence, the legislation clearly deviates from the EIA proclamation as the proponent of the project is not required to conduct an EIA study and get authorization from the EPA or the relevant regional environmental agency to obtain an investment permit. It has been argued that such a failure affects the environmental rights of the citizens of Ethiopia.

There are also a lot of problems with the environmental laws of the country in ensuring the environmental rights. The problems are related to the lack of strong institutions, rules, and procedures in enforcing these constitutionally guaranteed rights. Hence, the right to a clean and healthy environment is not properly implemented as the concept is so comprehensive and requires further details. However, the details are not yet put in place. Furthermore, the mechanism to achieve its implementation like the environmental inspectors under the Environmental Pollution Control Proclamation is not set. Similarly, the EIA proclamation lacks subsidiary instruments such as directives and regulations. Hence, the activities which need EIA are not identified so far as it is at a draft stage. In addition, there is no instructional and legal platform to ensure to all citizens the right to participate and give their opinion on projects affecting their environment.

Ethiopia has already introduced public interest litigation, which is a remarkable turning point in the history of the country as far as environmental issues are concerned. However, subsidiary laws such as environmental standards to determine pollution are not put in place.

Even though the constitution and the environmental policy accommodate social, socioeconomic, political, and cultural conditions in addition to the physical and biological impacts of a given project, the EIA proclamation considers only the physical and biological impacts. Therefore, the EIA proclamation departs from the constitution and the environmental policy of Ethiopia. As a result, developmental projects are not environmentally friendly.

To conclude, in Ethiopia the link between environmental rights and development is a missing element owing to the aforementioned facts. In order to create a sustainable link between the two concepts the following are recommended.

7.2 *The Way Forward*

i. It is clear that the Investment Proclamation completely rejects the EIA process to be conducted before the investment permit as the permit comes before the EIA process. Hence, the Investment Proclamation should provide a provision requiring the EIA process to be conducted before an investment permit is issued.
ii. The investment policy and law of the country are not environmentally sustainable as they are silent about the environmental rights. In addition, it seems that in Ethiopia the primary focus is only on economic gain by ignoring the ecological concern/environmental rights. Hence, the investment policies and laws need to be re-formulated and re-enacted in a manner such that they are environmentally and economically sustainable.
iii. The investment legislation and Investment Agency are found to be sectorally biased. Institutionally, both the EPA and the Investment Agency need to work together for the better protection of the environment and the promotion of environmental rights. In order to avert the sectoral bias, the government must re-enact the investment law so that the institutions work together for the better protection of the environment and the exercise of environmental rights.
iv. It is obvious that public participation is a crucial mechanism for the protection of the environment and the exercise of environmental rights. The investment law and the practice of the country have however failed to give a place for public participation as the investment permit is issued without any further requirement. Therefore, the government must come

up with strong institutions and a legal platform which includes detailed rules and procedures that practically ensure the right of the public to give its opinion on projects affecting its environment.

v. The EIA proclamation lacks subsidiary instruments for the activities which need the EIA study as they are not so far identified. Therefore, the government must come up with regulations and directives so as to identify the activities which need the EIA study.

vi. The EIA proclamation must be amended so that it accommodates social, socioeconomic, political, and cultural conditions in addition to the physical and biological impacts.

vii. For the better implementation of public interest litigation, environmental standards must be put in place to determine pollution so that a person who lodges a complaint could succeed in proving the alleged fact, and the court is also better equipped to decide the case.

viii. In order to ensure environmental rights, the government must establish a strong institution, come up with detailed rules and procedures, train environmental experts, create awareness in the minds of the people, and design a long-term plan for the better protection of the environment.

ix. In order to strengthen the link between the environmental rights and development, the EIA process should be strictly observed by both the proponent of a project and the government, particularly by licensing agencies.

Bibliography

Addisu Melaku. "The Right to a Clean and Healthy Environment; Environmental Law Practice in Oromia Regional State." LLB Essay, ECSC, Institute of Legal Studies, 1999.

Belwal, Rakesh and Meseret Chala. "Catalysts and barriers to cut flower export: A case study of Ethiopian floriculture industry." *International Journal of Emerging Markets* 3/2 (2008): 216–235.

Environmental Protection Authority. *Institutional Frame work and operational Arrangements. Vol. III.* Addis Ababa: EPA, 1990.

Environmental Protection Authority. *Action Plan for the Federal Policy on Environment. Vol. IV.* Addis Ababa: EPA, 1997a.

Environmental Protection Authority. *The Conservation Strategy of Ethiopia Vol. II.* Addis Ababa: EPA, 1997b.

Environmental Protection Authority. *The Ethiopian Environmental Policy Document.* Addis Ababa: EPA, 1997c.

Environmental Protection Authority. *State of Environmental Report for Ethiopia.* Addis Ababa: EPA, 2003.

Esmail Mohammed. "Environmental Impact Assessment: A legal Dimension." LLM Essay, ECSC, Institute of Legal Studies, 2001.

Ethiopian Horticultural Strategy. "Development of Strategy for Export oriented Horticulture in Ethiopia." Draft paper, 2007.

Fatima Abdulfetah. "Social and Environmental Implication of Floriculture: a Stakeholder Perception Analysis at Holeta Area, *Wolmera* District of Oromia Region." MSC Essay, Addis Ababa University, School of Graduate Studies, 2008.

International Labor Organization. "Summary of the Study Report on Decent Work in Floriculture Ethiopia." Presented on the National Consultative Workshop, 2006.

Mulugeta Getu. "Ethiopian Floriculture and its Impact on the Environment – Regulation, Supervision and Compliance." *Mizan Law Review* 3/2 (2009): 240–269.

Munasinghe, Mohan. *Environmental Economics and Sustainable Development.* Washington, D.C: World Bank, 1993.

Okorodudu-Fubara, M.T. *Law of Environmental Protection.* Nigeria: Caltop Publications, 1998.

Tadesse Gessesse. "Environmental Liability: the Case of Ethiopia." LLM Essay, ECSC, Institute of Legal Studies, 2004.

Terefe Tessema. "Impact of Agro-Investment on Environment in Light of Environmental Law with Special Reference to North Omo Zone." LLB Essay, ECSC, Institute of Legal Studies, 2000.

United Nations. *Report of the United Nations Conference on Environment.* Vol. 1. 1992.

World Bank. *Making Development Sustainable from Concept to Action*. Washington D.C.: World Bank, 1994.

World Bank. *Report on Environmental Assessment*. Washington D.C.: World Bank, 1996.

Zenebe Work Tadesse. *Environment and Development in Ethiopia.* Addis Ababa: Forum for Social Studies, 2001.

PART 4

Human Rights for Development: A Wide Range of Fora

CHAPTER 11

Poverty and Human Rights

A European Perspective

Laurens Lavrysen[1]

Abstract

This paper examines the jurisprudence of the European Court of Human Rights in the field of poverty litigation. Four techniques applied by the Court to provide human rights protection for poor individuals are identified: interpretation of the European Convention on Human Rights (ECHR), procedural protection, non-discrimination, and a poverty-sensitive approach to proportionality analysis. While some important obstacles for the Court remain – in particular overcoming the classical civil and political/social and economic rights and negative/positive obligations dichotomies – it is argued that this jurisprudence clearly illustrates the added value of a civil and political rights instrument such as the European Convention of Human Rights in the field of poverty litigation.

Keywords

poverty – European Convention on Human Rights – European Court of Human Rights – indivisibility – positive obligations

1 Introduction

In 1993, with the adoption of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, poverty was put high on the agenda of the human rights movement. It was held that "[t]he existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights" and that "extreme poverty and social exclusion constitute a

1 The author wishes to thank Eva Brems and Lourdes Peroni for their comments on an earlier draft of this paper.

 | DOI 10.1163/9789004280250_013

violation of human dignity." Some have gone even further and held that "poverty itself is a violation of numerous basic human rights."[2]

Despite the rhetoric, it has proven to be particularly difficult from a theoretical perspective to connect poverty with concrete legal obligations.[3] In line with Doz Costa and Alston, rather than considering poverty as a human rights violation in itself – which oversimplifies the issue and does not bring us any closer to defining concrete human rights obligations or allocating responsibility to concrete duty bearers – I consider that poverty can be both the cause and the consequence of particular human rights violations.[4] This ties well with the conception of poverty I adopt for the sake of this paper, being Sen's conception of poverty as affecting the capabilities of individuals to enjoy their basic freedoms.[5] In Vizard's words, poverty as capability deprivation:

> recognizes that deprivations in basic freedoms [...] are associated not only with shortfalls in income (i.e., with income poverty) but also with systematic deprivations in access to other goods, services, and resources necessary for human survival and development [...] as well as with interpersonal and contextual variables.[6]

According to Doz Costa,

> the 'capability approach' is widely recognized as the conceptual 'bridge' between poverty and human rights, since it incorporates new variables to economics that reflect the intrinsic and instrumental value of fundamental freedoms and human rights.[7]

Similarly, as held by Ely Yamin, this approach "provides us with a way of measuring poverty that reflects what we care about from a rights perspective."[8]

---

2 Quote Mary Robinson, Romanes Lecture, Oxford, 11 November 1997, as referred to by Fernanda Doz Costa, "Poverty and Human Rights: From Rhetoric to Legal Obligations," *Sur – International Journal on Human Rights* 5 (2008): 81.

3 For a discussion of the different conceptual frameworks, see Doz Costa (see n. 2).

4 Doz Costa, 93–96 (see n. 2), and Philip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals," *Human Rights Quarterly* 27 (2005): 784–788.

5 E.g., Amartya Sen, *Inequality Reexamined* (Harvard: Harvard University Press, 1992), 107–112.

6 Polly Vizard, *Poverty and Human Rights* (Oxford: Oxford University Press, 2006), 3.

7 Doz Costa, 85 (see n. 2).

8 Alicia Ely Yamin, "Reflections on Defining, Understanding, and Measuring Poverty in Terms of Violations of Economic Social Rights under International Law," *Georgetown Journal on*

This paper will focus on the potential of human rights law to remedy the suffering of poor individuals in the Council of Europe – a regional organization comprising 47 European states. At the Council of Europe level, Article 30 of the (Revised) European Social Charter (ESC) guarantees the right to protection against poverty and social exclusion. While the case law of the European Committee of Social Rights – the body responsible for monitoring compliance with the ESC – is clearly expanding, it remains a relatively weak mechanism in the sense that as a quasi-judicial body it can only issue non-binding decisions. A second limitation is that the ESC system does not allow for individual applications, but only for collective complaints brought by recognized organizations. For these reasons, litigants often strategically turn to the Committee's bigger and stronger sister, the European Court of Human Rights (the Court), which does deliver binding judgments and allows for individual applications. As a monitoring body of a civil and political rights instrument, the European Convention on Human Rights (ECHR), the Court is formally not competent to deal with complaints about violations of social and economic rights. It will be shown that the Court has nonetheless occasionally seized the opportunity to rule on the civil and political rights dimension of poverty. Indeed, this paper will provide an overview of the substantial body of case law developed by the Court in the field of poverty litigation.

Since the European Court of Human Rights is arguably the world's strongest and best functioning supranational human rights adjudication body, other international, regional, or domestic bodies confronted with similar human rights issues often draw inspiration from its judgments. The lessons that can be drawn from this paper concerning the potential of mobilizing civil and political rights to tackle poverty are therefore also relevant for other jurisdictions. This particularly holds true for other jurisdictions in which civil and political rights generally enjoy stronger protection than social and economic rights, such as Ethiopia. Since the rights guaranteed in the ECHR overlap those guaranteed in the Ethiopian constitution and the African Charter on Human and Peoples' Rights, similar arguments can be made in the Ethiopian context as well.

Fighting Poverty 4 (1997): 288. It should however be noted that "the space of 'capability' (the denial of which constitutes poverty) is much broader than human rights." See Doz Costa, 94 (see n. 2), with reference to the Report on the question of human rights and extreme poverty, UN DOC E/CN.4/2006/43 (Independent Expert Arjuan Sengupta March 2, 2006).

2 The Court's Practice

In this section, I will first map the Court's case law in the field of poverty, with a particular focus on the indirect protection of social and economic rights through civil and political rights. I will not give an exhaustive overview[9]; instead I will focus on some techniques to protect the rights of poor individuals under the ECHR. In the next section, I will discuss the limitations of applying the ECHR to enhance the situation of poor individuals.

2.1 *Techniques of Protection*

Brems has distinguished three techniques that are used by the Court to indirectly protect social rights: interpretation, procedural protection, and non-discrimination.[10] I will apply the same categorization to discuss the overlapping but not identical issue of human rights protection of poor individuals. I will, however, also discuss a fourth technique, being a poverty-sensitive approach to proportionality analysis.

2.1.1 Interpretation

According to O'Cinneide, three 'gateways' exist for poor individuals seeking protection against destitution: Articles 2 (the right to life), 3 (the prohibition of torture and of inhuman or degrading treatment or punishment), and 8 ECHR (the right to respect for private life and home).[11] I will briefly discuss all three, as well as an additional fourth 'gateway': the indirect protection offered by Article 1 Protocol 1 (the right to property).

9 See, e.g., Ida Elisabeth Koch, *Human Rights as Indivisible Rights – The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Leiden: Martinus Nijhoff, 2009); Ellie Palmer, "Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights," *Erasmus Law Review* 2 (2009): 397–425; Eva Brems, "Indirect Protection of Social Rights by the European Court of Human Rights," in *Exploring Social Rights – Between Theory and Practice,* eds. Daphne Barak-Erez and Aeyal Gross (Oxford: Hart Publishing, 2007), 135–167; Luke Clements and Alan Simmons, "European Court of Human Rights – Sympathetic Unease," in *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law,* ed. Malcolm Langford (Cambridge: Cambridge University Press, 2008), 409–427.

10 Brems, 137 (see n. 9).

11 Colm O'Cinneide, "A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights," *European Human Rights Law Review* 5 (2008): 584.

Article 2 ECHR

Contrary to the Inter-American Court of Human Rights, which has interpreted the right to life broadly as encompassing "the right that [a human being] will not be prevented from having access to conditions that guarantee a dignified life,"[12] the Court has interpreted this right more classically as essentially protecting against deprivation of life. The scope of Article 2 ECHR has nonetheless been tested in certain cases concerning health care. In the case of *Cyprus* v. *Turkey* the Court observed that:

> an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally.[13]

In *Nitecki* v. *Poland*, the Court however rejected the complaint from a man who was unable to afford a life-saving drug, in the absence of full payment of the cost by the state. Taking into account the fact that he had access to standard healthcare offered by the state to the public, and the fact that the state already paid for 70 percent of the treatment, the Court considered:

> that the respondent State cannot be said, in the special circumstances of the present case, to have failed to discharge its obligations under Article 2 by not paying the remaining 30% of the drug price.[14]

In the tragic case of *Mehmet Şenturk and Bekir Şenturk* v. *Turkey*, the Court did find a violation of Article 2 ECHR based on the denial of healthcare to a poor person.[15] The case concerned a pregnant woman who died because a public hospital was unwilling to carry out an emergency surgery because she was

12 E.g., Villagrán-Morales et al. v. Guatemala (*Case of the 'Street Children'*), para. 144 (IACtHR November 19, 1999).

13 Cyprus v. Turkey, para. 219 (ECtHR Grand Chamber May 10, 2001).

14 Nitecki v. Poland (ECtHR inadm. March 21, 2002).

15 In two other cases, the Court found a violation of Article 2 on the basis of a denial of healthcare. In Oyal v. Turkey (ECtHR March 23, 2010), the Court found a violation of Article 2 because it considered that a person infected with the HIV virus during a blood transfusion at birth should have been compensated in the form of full and free medical cover for life. In Panaitescu v. Romania (ECtHR April 10, 2012), the Court found a 'procedural' violation of Article 2 because of the failure by the state to comply with a final court order in the applicant's favor, entitling him to the provision of specific anti-cancerous medication for free.

unable to pay a deposit for her hospital admission. In doing so, the hospital staff had failed to comply with their obligation to protect the patients' physical integrity by administrating appropriate medical care.[16] Reading *Mehmet Şenturk and Bekir Şenturk* in the light of *Cyprus* v. *Turkey* and *Nitecki* suggests that financial barriers that deny poor people access to standard healthcare are incompatible with the Convention, at least insofar as this puts their life at risk.

Article 3 ECHR

In a series of inadmissibility decisions, the Court has:

> accepted 'in principle' the possibility that an Article 3 claim could arise in certain circumstances where impoverished individuals suffered degrading treatment due to a failure to provide essential state support.[17]

Article 3 could thus, at least 'in principle', provide protection against destitution in cases of lack of access to healthcare,[18] shelter,[19] or social benefits,[20] insofar as the situation in which the individual finds him- or herself reaches Article 3's high 'minimum level of severity' threshold. In *Budina* v. *Russia*, the Court explained that state responsibility in such cases could arise:

> where an applicant in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.[21]

In some rare cases the Court accepted that the applicant's living circumstances violated Article 3 ECHR. The case of *Moldovan and Others* v. *Romania* (*No. 2*) concerned a pogrom against a group of Roma in a Romanian village, taking place with the involvement of police officers, leaving the survivors homeless. For years they had been forced to live in hen houses, pigsties, windowless cellars, or in extremely cold and over-crowded conditions. The Court found a violation of Article 3, holding that:

16 Mehmet Şenturk and Bekir Şenturk v. Turkey, paras. 89 and 97 (ECtHR April 9, 2013).

17 O'Cinneide, 589 (see n. 11).

18 Pentiacova and 48 Others v. Moldova (ECtHR inadm. January 4, 2005).

19 O'Rourke v. the United Kingdom (ECtHR inadm. June 26, 2001).

20 Larioshina v. Russia (ECtHR inadm. April 23, 2002).

21 Budina v. Russia (ECtHR inadm. June 18, 2009).

> the applicants' living conditions in the last ten years, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement.[22]

The case of *M.S.S.* v. *Belgium and Greece* concerned the poor living circumstances of an Afghani asylum seeker in Greece. According to the Court, he had:

> spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving.[23]

Taking into account the applicant's vulnerability as an asylum seeker, and Greece's obligations under European Union law to provide asylum seekers with accommodation and decent material conditions, the Court found a violation of Article 3 ECHR.[24]

Article 8 ECHR

Because of the high threshold of Article 3 ECHR, many applicants have instead brought their complaints under Article 8 ECHR, the right to respect for private life. The Court considers the concept of 'private life' to be "a broad term not susceptible to exhaustive definition," encompassing *inter alia* aspects of an individual's physical and psychological integrity, the right to establish and develop relationships with other human beings and the outside world, and the notion of personal autonomy.[25] Under the right to respect for private life, many cases have been brought in which vulnerable individuals claimed that states were under a positive obligation to actively assist them to enjoy their human

22 Moldovan and Others v. Romania (No. 2), para. 110 (ECtHR July 12, 2005). The racist attitudes of the state authorities were considered to be an aggravating factor (para. 111).

23 M.S.S.v. Belgium and Greece, para. 254 (ECtHR Grand Chamber January 21, 2011).

24 Ibid., para. 263. Similarly, the Court has also accepted that expelling an individual to a country where he risks ending up living in 'dire humanitarian conditions' would be in violation of Article 3; see Sufi and Elmi v. the United Kingdom, paras. 278–292 (ECtHR June 28, 2011).

25 Pretty v. the United Kingdom, para. 61 (ECtHR April 29, 2002).

rights.[26] The Court has only accepted such positive obligations under Article 8 insofar as there is a "direct and immediate link between the measures sought by an applicant and the latter's private [...] life."[27]

Many of these cases brought under Article 8 ECHR, all unsuccessful, concerned 'reasonable accommodation' claims of persons with a disability.[28] Poor individuals could similarly invoke Article 8 ECHR to complain about lack of assistance to overcome their socio-economic deprivation on the condition that they can establish the existence of such a 'direct and immediate link'. In the case of *Marzari* v. *Italy*, the Court for example accepted 'in principle' that a refusal to provide a man with adequate accommodation could raise an issue under the 'direct and immediate link' test, but nonetheless declared the case manifestly ill-founded because the applicant had rejected alternative accommodation.[29]

Besides the right to respect for private life, Article 8 ECHR also encompasses the right to respect for one's home. While the Court has acknowledged the possibility of examining positive obligations in the field of housing under the right to respect for private life in *Marzari*, it has clearly rejected such an approach under the right to respect for one's home. Article 8 ECHR only protects an 'existing' home. In *Chapman* v. *the United Kingdom*, the Court for example stressed that:

> Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.[30]

The right to respect for one's home, however, does protect against evictions, which is particularly important since vulnerable individuals and groups suffer

26 See Dimitris Xenos, "The Human Rights of the Vulnerable," *International Journal of Human Rights* 13 (2009): 591–614.

27 Botta v. Italy, para. 34 (ECtHR February 24, 1998).

28 Besides *Botta*, see Zenalová and Zehnal v. the Czech Republic (ECtHR inadm. May 14, 2002); Sentges v. the Netherlands (ECtHR inadm. July 8, 2003); Mólka v. Poland (ECtHR inadm. April 11, 2006).

29 Marzari v. Italy (ECtHR inadm. May 4, 1999).

30 Chapman v. the United Kingdom, para. 99 (ECtHR January 18, 2001).

disproportionately from forced evictions.[31] In *Connors* v. *the United Kingdom*, the Court found a violation of Article 8 ECHR due to the lack of procedural protection against eviction. A local authority had evicted the applicant from a gypsy campground after a summary procedure, without having to give reasons liable to be examined as to their merits by an independent tribunal.[32] The most advanced discussion of evictions was doubtlessly the case of *Yordanova and Others* v. *Bulgaria*. The case concerned a decision by the Bulgarian authorities to remove a community of Roma from their homes which had been unlawfully built on municipal land, and which did not meet basic sanitary and building requirements. Again the Court stressed the importance of procedural safeguards, holding that:

> the loss of one's home is a most extreme form of interference with the right under Article 8 to respect for one's home, any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal [...].[33]

The Court found the eviction order to be a disproportionate interference with Article 8 ECHR. The principle of proportionality required that at least the following factors should be taken into account: the fact that a whole community was affected which had lived there over a long period of time; the lack of consideration of alternative methods of dealing with safety and health risks for the inhabitants; the risk of the applicants becoming homeless if removed; the fact that it was not shown that the land was urgently needed in the public interest; and the applicants' situation as an outcast community and a socially disadvantaged group.[34] Interestingly, the Court also stressed that "an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases."[35]

Article 1 Protocol 1

The Court has interpreted the right to property in such a way as to cover different kinds of social benefits. While the Court originally only considered

31 General Comment 7 on the right to adequate housing and forced evictions, para. 10 (Committee on Economic, Social and Cultural Rights May 20, 1997).

32 Connors v. the United Kingdom, para. 94 (ECtHR May 27, 2004).

33 Yordanova and Others v. Bulgaria, para. 118 (ECtHR April 24, 2012).

34 Ibid., paras. 121–129.

35 Ibid., paras. 130 and 132.

contributory benefits to be covered by the notion of 'possession' – interpreted by the Court as an individual interest that has acquired economic value[36] – it has broadened this interpretation to non-contributory benefits, paid for out of general taxation, in the case of *Stec and Others* v. *the United Kingdom*. According to the Court,

> In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. [...] Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.[37]

Subsequent case law has shown that the Court, under Article 1 Protocol 1, "now assumes a broad power of review comprising virtually all benefits-related issues,"[38] including *inter alia* pensions,[39] unemployment benefits,[40] and social housing.[41] The Court's approach under Article 1 Protocol 1 has been to consider refusals and withdrawals of or reductions in social benefits as an interference with the right to peaceful enjoyments of possessions.[42] Such interference is only justified if it is lawful, if it is in the public interest and if it strikes a 'fair balance' – i.e., if the interference is reasonably proportionate to the aim pursued, and if the individual concerned does not have to bear an individual and excessive burden.[43]

While Article 1 Protocol 1 clearly has some potential in benefiting poor individuals who are dependent on social benefits, the protection offered is limited in a couple of ways. First of all, in practice the Court generally is highly deferential – by allowing a wide margin of appreciation – and rarely finds a

36 David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights*, 2nd edn. (Oxford: Oxford University Press, 2009), 657.

37 Stec and Others v. the United Kingdom, para. 51 (ECtHR Grand Chamber adm. July 6, 2005).

38 Ingrid Leijten, "From Stec to Valkov: Possessions and Margins in the Social Security Case Law of the European Court of Human Rights," *Human Rights Law Review* 13 (2013): 314.

39 E.g., Goudswaard-Van Der Lans v. the Netherlands (ECtHR adm. September 22, 2005).

40 E.g., Sali v. Sweden (ECtHR adm. January 10, 2006).

41 E.g., Teteriny v. Russia (ECtHR June 30, 2005).

42 E.g., Sali v. Sweden (ECtHR adm. January 10, 2006) (refusal); Moskal v. Poland (ECtHR September 15, 2009) (withdrawal); and Maggio and Others v. Italy (ECtHR May 31, 2011) (reduction).

43 E.g., Valkov and Others v. Bulgaria, paras. 89–91 (ECtHR October 25, 2011).

violation of Article 1 Protocol 1.[44] Secondly, social benefits protection under this article is restricted to protection against interference with 'existing' social benefits. As the Court explained in *Stec*,

> the Article does not create a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme.[45]

Thirdly, protection under Article 1 Protocol 1 centers around the concept of 'possessions' rather than the concept of 'needs'. Therefore it is not particularly adapted to providing social protection of poor individuals, since their needs are only secondarily taken into account,[46] instead of being the essential focus of the inquiry.

2.1.2 Procedural Protection

A second technique of protecting the human rights of poor individuals is by providing them with procedural protection when their rights are at stake. The case of *Airey* v. *Ireland*, for example, concerned a woman who wished to obtain a decree of judicial separation from her abusive husband. In the absence of legal aid and because she was not in the financial position to pay the costs involved herself, she was unable to find a solicitor willing to act for her. The Convention only recognizes a right to legal aid in criminal matters,[47] but not in civil matters. Nonetheless, as the right to a fair trial (Article 6 ECHR) encompasses a right of access to courts,[48] the Court held that legal aid may be required to enable a person to 'effectively' enjoy that right.[49] The right to 'effective' access to courts thus requires states to facilitate access to justice for poor individuals. This is particularly relevant since poor individuals often face serious barriers in claiming their human rights.

Another important development has been the widening of the scope of Article 6 ECHR. The right to a fair trial applies only to disputes over 'civil and political rights' and over 'criminal charges'. The Court has gradually widened the scope of the concept of 'civil rights and obligations' "to encompass a right

44 Leijten, 341 (see n. 38).

45 Stec and Others v. the United Kingdom, para. 54 (Grand Chamber adm. July 6, 2005).

46 See sect. II.1.D.

47 Art. 6, para. 3 c) ECHR.

48 Golder v. the United Kingdom, paras. 28–36 (ECtHR Grand Chamber, February 21, 1975).

49 Airey v. Ireland, paras. 24–28 (ECtHR October 9, 1979).

of access to courts or tribunals in public law disputes over most discretionary socio-economic entitlements."[50] It has been held that the right to administrative due process in the field of social benefits can be regarded "as one of the most important avenues for the protection of socio-economic rights of the vulnerable and the marginalised."[51]

Another important avenue of procedural protection is the Court's practice of reading implicit procedural guarantees into explicit substantive rights.[52] As illustrated above by the right to respect for one's home cases of *Connors* v. *the United Kingdom* and *Yordanova and Others* v. *Bulgaria*, poor individuals are entitled to some degree of procedural protection in cases in which authorities interfere with their human rights. In *Connors* the Court for example held that:

> The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.[53]

2.1.3 Non-Discrimination

A third technique to protect the human rights of poor individuals is the principle of non-discrimination. Article 14 ECHR guarantees the right not to be discriminated against in the enjoyment of one's human rights. This article does not have an independent existence, but can only be invoked together with another Convention article. Human rights protection of poor individuals through the principle of non-discrimination has mainly taken place in the field of social benefits, in which the Court has considered complaints under Article 14 in conjunction with Article 1 Protocol 1. Other complaints have been brought in conjunction with Article 8, if the benefits in question relate to 'family life', such as parental leave allowances or child benefits.

---

50 Palmer, 420 (see n. 9). E.g., Feldbrugge v. the Netherlands (ECtHR Grand Chamber May 29, 1986).

51 Palmer,421 (see n. 9).

52 See Eva Brems, "Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights," in *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights,* eds. Eva Brems and Janneke Gerards (Cambridge: Cambridge University Press, 2013), 137–161.

53 Connors v. the United Kingdom, para. 83 (ECtHR May 27, 2004).

Mostly this protection has been 'indirect', through a formal equality approach that tackles underinclusiveness of social benefits, excluding certain categories of individuals, often members of groups that are disadvantaged or that are particularly vulnerable to end up living in poverty. When considering the question of formal equality, the Court examines whether a difference of treatment has an objective and reasonable justification, i.e., whether it pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized.[54] The Court has for example found such an objective and reasonable justification lacking in cases concerning the exclusion of a non-national from a disability allowance,[55] the exclusion of aliens lacking a permanent residence title from child benefits,[56] and the exclusion of male servicemen from parental leave and parental leave allowances.[57] I call this formal equality approach 'indirect', since the fact that members of excluded groups can gain access to social benefits under Article 14 ECHR is dependent on whether the state chooses to create these benefits in the first place and therefore does not create a 'direct' entitlement to them. In principle, abolishing such benefits altogether would not violate Article 14, because everyone would then be 'equally' badly off.[58]

The application of Article 14 is further limited by the fact that it is not a free-standing right, since it can only be applied insofar as the discrimination takes place within the 'ambit' of one of the Convention rights.[59] A link with one of the rights guaranteed by the Convention – i.e., in principle a civil or political right[60] – thus always needs to be established. This situation might change when more and more member states ratify Protocol 12 to the ECHR, of which Article 1 does contain a free-standing, 'general' prohibition of discrimination. It has been argued that Article 1 Protocol 12 "may result in large numbers of claims being brought before the Court in many 'new' areas, including the entire field of social rights."[61]

54 Rasmussen v. Denmark, para. 38 (ECtHR November 28, 1984).

55 Koua Poirrez v. France (ECtHR September 30, 2003).

56 Niedzwiecki v. Germany (ECtHR October 25, 2005).

57 Konstantin Markin v. Russia (ECtHR Grand Chamber, March 22, 2012).

58 Sandra Fredman, *Human Rights Transformed – Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008), 208.

59 See Oddný Mjöll Arnardóttir, "Discrimination as a magnifying lens: Scope and ambit under Article 14 and Protocol No. 12," in Brems and Gerards (see n. 52), 330–349.

60 With the notable exception of the right to education, guaranteed by Article 2 of Protocol 1 to the ECHR.

61 Brems, 162 (see n. 9).

2.1.4 Poverty Sensitive Proportionality

The fourth and final technique used by the Court to do justice to poor individuals in its jurisprudence, is to take into account the applicant's poverty in the proportionality analysis, particularly in cases concerning negative obligations. The principle of proportionality – sometimes called the fair balance test – is the main legal tool used by the Court to define the extent of human rights protection in cases concerning non-absolute rights. This principle allows non-absolute human rights to be limited insofar as these limitations are proportionate in the light of countervailing public or private interests. According to the Court:

> inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[62]

A good example is the above discussed case of *Yordanova and Others* v. *Bulgaria*, in which the Court took into account the applicants' status as members of an underprivileged group and the risk of them becoming homeless as a consequence of their eviction. Another example is the case of *Wallová and Walla* v. *the Czech Republic*, concerning the taking into care of the applicants' children solely on the basis of the family's housing situation being inadequate, as a result of the applicant's material difficulties. The Court found a violation of the right to respect for family life (Article 8 ECHR), particularly because the principle of proportionality required the authorities to consider less restrictive means than family separation, such as assisting the applicants in overcoming their material difficulties by facilitating their access to social benefits or social housing.[63] The Court also takes into account the applicant's material hardship when examining social benefit claims under Article 1 Protocol 1.[64] In *Moskal* v. *Poland*, the Court for example found that the applicant had to bear an excessive burden, since the revocation of an erroneously awarded early-retirement pension resulted in the applicant being faced, practically from one day to the next, with the total loss of her sole source of income.[65]

In cases of conflicting rights or interests, the rights and interests of poor individuals can also be taken into account when examining the proportionality of state action in the fight against poverty. An example would be the case of

62 N.v. the United Kingdom, para. 44 (ECtHR Grand Chamber May 27, 2008).

63 Wallová and Walla v. Czech Republic, paras. 73–74 (ECtHR October 26, 2006).

64 Leijten, 340 and 342 (see n. 38).

65 Moskal v. Poland, para. 74 (ECtHR September 15, 2009).

Spadea and Scalabrino v. *Italy*, in which the landlords complained about Italian rent control legislation preventing the eviction of the tenants living in the applicants' apartment. According to the Court, this interference with their right to property was proportionate to the legitimate aim of 'protecting the interests of tenants on low incomes'.[66] While it is unlikely that the tenants would have been in the position to independently claim such strong state protection of their right to respect for one's home, they did enjoy 'derivative protection'[67] since their rights were taken into account in the proportionality analysis under the conflicting right.

3 Limitations

The protection of the human rights of poor individuals is traditionally limited by the classic dichotomies in international human rights law: the civil and political/social and economic rights and the negative/positive obligations dichotomies, both favoring the former over the latter. In this section, I will examine to what extent the Court reifies these dichotomies and how this impacts the protection of the human rights of the poor.

3.1 *Civil and Political/Social and Economic Rights*

In the above-discussed case of *Airey* v. *Ireland*, the state argued that a right to legal aid in civil matters belonged to the sphere of social and economic rather than the one of civil and political rights, and that it therefore did not come within the scope of the ECHR. The Court however rejected such a restrictive reading:

> Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers [...] that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[68]

66 Spadea and Scalabrino v. Italy, para. 38 (ECtHR September 28, 1995).

67 Koch, 138–139 (see n. 9).

68 Airey v. Ireland, para. 26 (ECtHR October 9, 1979).

The Court proceeded to find a violation of Article 6 ECHR, the right to a fair trial, since the applicant had been denied 'effective' access to court.

The Court's approach has ever since been to refrain from recognizing a socio-economic right in the abstract, but nonetheless recognizing that aspects of such a right can in exceptional circumstances be indirectly protected through civil and political rights. In the case of *Pančenko* v. *Latvia*, the Court for example held that:

> the Convention does not guarantee, as such, socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living.[69]

The Court nonetheless continued to examine whether the hardship complained of by the applicant – socio-economic problems related to her being deprived from her permanent resident status – could be regarded as inhuman or degrading in the sense of Article 3 ECHR. Since the minimum level of severity to amount to inhuman or degrading treatment was not attained, the Court declared the case manifestly ill-founded. Similarly, in *Marzari* v. *Italy* the Court held that although the Convention does not guarantee a 'right to have one's housing problem solved',[70] it did not exclude that:

> a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual.[71]

With respect to the right to healthcare the Court has held that:

> While it is clearly desirable that everyone should have access to a full range of medical treatment, including life-saving medical procedures and drugs, the lack of resources means that there are, unfortunately, in the Contracting States many individuals who do not enjoy them, especially in cases of permanent and expensive treatment.[72]

69 Pančenko v. Latvia (ECtHR inadm. October 28, 1999).

70 Similarly, Chapman v. the United Kingdom, para. 99 (ECtHR January 18, 2001).

71 Marzari v. Italy (ECtHR inadm. May 4, 1999).

72 Pentiacova and 48 Others v. Moldova (ECtHR inadm. January 4, 2005).

Again this did not prevent the Court from examining the case – concerning the lack of provision at public expense of hemodialysis to chronic renal failure patients – under Article 8 ECHR, the right to respect for private life, nonetheless again resulting in the rejection of the complaint for being manifestly ill-founded.

These cases illustrate that the Court has principally rejected the relevance of the so-called 'ceiling effect' in interpreting the ECHR.[73] According to Scott, the 'ceiling effect' occurs when an institution refers to human rights commitments found in a legal instrument other than its own to limit the scope of protection of a right in that institution's own instrument.[74] While the rejection of the 'ceiling effect' is a prerequisite for an indivisible approach,[75] the Court nonetheless seems to be reluctant to truly live up to the aspiration of indivisibility. This is illustrated by the vast amount of decisions in which complaints were rejected as being manifestly ill-founded, without giving any guidance as to what level of socio-economic deprivation does give rise to a violation of the Convention.

3.2 *Negative/Positive Obligations*

Like the civil and political/social and economic rights dichotomy, the negative/positive obligations dichotomy similarly marginalizes the human rights concerns of poor individuals from the mainstream of human rights law. In the classic liberal model, human rights have been considered to be essentially concerned with protecting individuals against state action interfering with their rights. Positive obligations, requiring active state intervention to ensure human rights to individuals have only gradually been recognized.[76]

---

73 The Airey principle has been reaffirmed by the Grand Chamber in Stec and Others v. the United Kingdom, para. 52 (ECtHR Grand Chamber adm. July 6, 2005). *Contra* Zehnalová and Zehnal v. the Czech Republic (ECtHR inadm. May 14, 2002), the Court held that it was its task "to determine the limits to the applicability of Article 8 and the boundary between the rights set forth in the Convention and the social rights guaranteed by the European Social Charter."

74 Craig Scott, "Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights'," *Human Rights Quarterly* 21 (1999): 636.

75 The *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25 June 1993 stressed that "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

76 With respect to the Court, see Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).

While not underestimating the ways in which states actively harm poor individuals, it is clear that in order to effectively uphold their rights state action is required. As explained by Shue when discussing the right to subsistence, such a right not only requires negative duties to avoid deprivation, but necessarily also positive duties to protect against deprivation and to aid the deprived.[77] In modern human rights terminology, human rights give rise to a negative obligation to respect and to positive obligations to protect (vis-à-vis private parties) and fulfill (encompassing obligations to facilitate and obligations to provide).[78]

Ensuring the human rights of poor individuals thus requires more than simple protection against state interference, and prioritizing negative obligations over positive obligations denies justice to poor individuals in two ways. Firstly, it denies them the possibility to use language of human rights to claim their rights in a way that may be the most relevant for the improvement of their situation. Secondly, negative obligations are particularly apt to deal with the protection of the *status quo* – for example with protecting 'existing' properties or homes – which could in certain circumstances undermine the transformative potential of human rights. An example of how this can harm the poor is the so-called Lochner era,[79] in which the U.S. Supreme Court systematically struck down laws regulating *inter alia* minimum wage, based on an absolutist conception of the negative obligation to respect economic liberty and private contract rights. Fineman has held that the classic liberal conception of autonomy, which underlies the 'negativist' position:

> places any suggestions for government programs designed to enhance social welfare or provide remedial action to disadvantaged groups on a path of direct conflict with the policy of restraint and non-intervention that autonomy demands.[80]

The Court's record in requiring states to take positive obligations as serious as negative ones is mixed. At the theoretical level, the Court has shown a great openness towards positive obligations. In the pivotal case of *Marckx* v. *Belgium*,

77 Henry Shue, *Basic Rights – Subsistence, Affluence and U.S. Foreign Policy*, 2nd edn. (Princeton: Princeton University Press, 1996), 52–53.

78 E.g., General Comment 12 on the right to adequate food (Committee on Economic, Social and Cultural Rights May 12, 1999).

79 Starting from Lochner v. New York, 198 U.S. 45 (1905).

80 Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State," *Emory Law Journal* 60 (2010): 259.

concerning the right to respect for family life (Article 8 ECHR), the Court held that:

> the object of the Article is 'essentially' that of protecting the individual against arbitrary interference by the public authorities [...]. Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life.[81]

The Court has thus rejected a strictly 'negativist' approach to the Convention, and has subsequently accepted positive obligations under basically every Convention article.[82] The Court also does not seem to categorically favor negative over positive obligations; in cases of conflict the Court rather attempts to find a fair balance in which neither of the obligations is granted absolute priority.[83] For example, in the case of *Von Hannover* (*No. 2*) v. *Germany*, concerning the conflict between the positive obligation to protect the right to privacy (Article 8 ECHR) of a celebrity and the negative obligation not to interfere with the press freedom (Article 10 ECHR) of a magazine, the Court ruled that "as a matter of principle these rights deserve equal respect."[84] Furthermore, the Court has also repeatedly placed negative and positive obligations on the same footing at the methodological level, by holding that:

> The boundary between the State's positive and negative obligations [...] does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.[85]

In practice, the Court's record in overcoming the dichotomy however seems less impressive. Firstly, methodological differences remain, since the Court applies a strict and decisive legality test in cases of negative obligations,

81 Marckx v. Belgium, para. 31 (ECtHR Grand Chamber June 13, 1979).

82 See Mowbray (see n. 76).

83 See, concerning the conflict between Article 8 ECHR and Article 10 ECHR, Stijn Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict," *American University International Law Review* 26 (2011): 183–236.

84 Von Hannover v. Germany, para. 106 (ECtHR Grand Chamber February 7, 2012).

85 E.g., Aksu v. Turkey, para. 62 (ECtHR Grand Chamber March 15, 2012).

encompassing both formal (is there a legal basis?) and substantive elements (is that legal basis of sufficient 'quality'[86]?), while in cases of positive obligations legality is often ignored or only considered to be of secondary importance.[87]

Secondly, the margin of appreciation of the states – i.e., a principle of judicial deference to the decisions of domestic authorities – seems to be wider in positive than in negative obligations cases. This has been acknowledged explicitly by the Court in the case of *Women on Waves and Others* v. *Portugal*, in which the Court stressed that, while the state enjoys a certain margin of appreciation both in cases of positive and negative obligations, that margin is more narrow with respect to negative obligations.[88] More often, the choice to apply lighter scrutiny in cases involving positive obligations is made implicitly. This may be explained by a tendency of the Court to systematically link discharging positive obligations with the margin of appreciation. In *Budayeva* v. *Russia*, the Court for example held that:

> where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation.[89]

While it is clearly true that positive obligations can often be discharged in different ways, the same applies to negative obligations under non-absolute rights, where the state can equally fulfill its objectives by choosing between non-interference and different options of justifiable interferences. In cases of negative obligations the choice of means however does not seem to influence the extent of the margin of appreciation. The prioritization of negative over positive obligations through the margin of appreciation doctrine is particularly evident in cases involving resource considerations, which results in a

86 I.e., it has to be 'accessible' and 'foreseeable'; it may not grant the executive 'unfettered' power and there must be some degree of procedural protection, see e.g., Al-Nashif v. Bulgaria, paras. 119 and 123 (ECtHR June 20, 2002).

87 E.g., Fadeyeva v. Russia, para. 98 (ECtHR June 9, 2005): "in cases where an applicant complains about the State's failure to protect his or her Convention rights, domestic legality should be approached not as a separate and conclusive test, but rather as one of many aspects which should be taken into account in assessing whether the State has struck a 'fair balance' […]."

88 Women on Waves and Others v. Portugal, para. 40 (ECtHR February 3, 2009): "s'il est vrai que, dans les deux hypothèses – obligations positives et négatives – l'Etat jouit d'une certaine marge d'appréciation […], la Cour estime que cette marge d'appréciation est plus étroite s'agissant des obligations négatives découlant de la Convention."

89 Budayeva and Others v. Russia, para. 134 (ECtHR March 20, 2008).

particularly wide margin of appreciation if the cases concern positive obligations, whereas these considerations are not as such taken into account when verifying the margin of appreciation when negative obligations are concerned.[90] In the positive obligations case of *Sentges* v. *the Netherlands*, the Court for example held that:

> This margin of appreciation is even wider when, as in the present case, the issues involve an assessment of the priorities in the context of the allocation of limited State resources.[91]

Thirdly, it is obvious from the discussion of the right to respect for one's home (Article 8) and the right to property (Article 1 Protocol 1) above that, despite the rhetoric of overcoming the dichotomy, certain areas of the case law remain predominantly 'negativist', focusing on 'existing' homes and possessions. In the context of the former right, Palmer regretted that:

> Despite the potential of the positive obligation in Article 8 to protect vulnerable individuals even in respect of housing needs, strategic case law has continued to reflect a bias towards claims involving negative interference with the enjoyment of an existing home. [...] Here, perhaps more than in any other area of social need, we see the jurisprudential limits of a judicial approach that is defensively rooted in the negative positive dichotomy of rights [...].[92]

The distinction between negative and positive obligations has been challenged on a number of grounds, one of them being the impossibility to clearly distinguish between both.[93] In this respect, it has been argued that:

90 The Court has explicitly linked considerations as to the allocation of limited state resources to a wide margin of appreciation in five cases, none of them involving negative obligations. See O'Reilly and Others v. Ireland (ECtHR inadm. February 28, 2002); Sentges v. the Netherlands (ECtHR inadm. July 8, 2003); Pentiacova and 48 Others v. Moldova (ECtHR inadm. January 4, 2005); Mólka v. Poland (ECtHR inadm. April 11, 2006); Costache v. Romania (ECtHR inadm. March 27, 2012).

91 Sentges v. the Netherlands (ECtHR inadm. July 8, 2003).

92 Palmer, 418 (see n. 9).

93 E.g., Laurens Lavrysen, "Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights," in *Human Rights & Civil Rights in the 21st Century*, eds. Yves Haeck and Eva Brems (Dordrecht: Springer, 2014), 72–76.

> it is possible to restate most actions as corresponding inactions with the same effect, and to show that inaction may have the same effects as a forbidden action.[94]

For this reason, and based upon the Court's prioritization of negative obligations in practice, one could therefore assume that applicants have a better chance to win their case if they are able to frame their complaint as involving negative rather than positive obligations.

It indeed seems that the Court has been most successful in protecting the rights of poor individuals in 'hybrid' cases, in which the Court is willing to integrate aspects of positive obligations into the examination of negative obligations and *vice versa*. A first example would be the above-discussed case of *Moldovan*, in which the Court held that the:

> hindrance and the repeated failure of the authorities to put a stop to breaches of the applicants' rights, amount to a serious violation of Article 8 of the Convention.[95]

While the case can essentially be considered as involving negative obligations – since state actors were involved in the destruction of the applicants' homes – the Court thereby acknowledged that the state was under a positive obligation to provide housing.[96] In *Yordanova*, the Court required the state to take the risk of the applicants becoming homeless into account, only barely falling short of recognizing a self-standing right to be re-housed.[97] In *Wallová and Walla*, the Court took the possibility to provide the applicant with social benefits or housing into account as a less restrictive means in the proportionality analysis. A final example is the case of *Airey*, which concerns both positive – the obligation to facilitate access to justice – and negative obligations – the obligation not to hinder access to justice. This is reflected in the Court recognizing that the state can choose between adopting a positive or negative perspective when remedying the situation. According to the Court:

---

94 Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988), as referred to by Susan Bandes, "The Negative Constitution: A Critique," *Michigan Law Review* 88 (1989–90): 2281.

95 Moldovan and Others v. Romania (No. 2), para. 109 (ECtHR July 12, 2005).

96 Clements and Simmons, 413 (see n. 9), characterize this positive obligation to be remedial – i.e., to compensate for a deprivation from housing.

97 Adélaïde Remiche, "Yordanova and Others v. Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One's Home," *Human Rights Law Review* 12 (2012): 798.

> The institution of a legal aid scheme [...] constitutes one of those means [to guarantee an effective right of access to court] but there are others such as, for example, a simplification of procedure.[98]

4 Conclusion

In this paper, I have identified four techniques by which the European Court of Human Rights has protected the human rights of poor individuals: interpretation, procedural protection, non-discrimination, and a poverty-sensitive approach to proportionality. All in all, the Court's record in the field of poverty remains relatively modest. While the Court has gone some way in overcoming the civil and political/social and economic rights and the negative/positive obligations dichotomies, particularly the latter remain problematic. This is illustrated by the fact that the Court has gone the furthest in providing 'positivist' protection in 'hybrid' cases, in which the positive obligation is linked to a negative one. Nonetheless, the Court's case law clearly illustrates the potential to apply a civil and political rights document in the field of poverty, an area which traditionally was considered to rather give rise to questions of social and economic rights. Thereby the Court recognizes the reality of the indivisibility and interdependence of, on the one hand, civil and political and, on the other hand, social and economic rights: poverty affects individuals in the enjoyment of both sets of rights.

Clearly economic circumstances affect the capacity of states to protect human rights. This is exactly the reason why, in the field of social and economic rights, states are granted the flexibility to progressively rather than immediately realize human rights, taking into account the availability of resources.[99] Transposing the European Court of Human Rights' approach of applying civil and political rights to tackle poverty to the Ethiopian context – as an alternative or complementary strategy to invoking social and economic rights – would raise similar questions of resource availability. Nonetheless, as stressed by the Committee on Economic, Social and Cultural Rights, even where a state faces severe resource constraints, it is important to give priority to the protection of the human rights of vulnerable groups and individuals.[100] In this respect, Ethiopia's most disadvantaged are entitled to be the prioritized beneficiaries of the country's continuing economic growth rates, if necessary

98 Airey v. Ireland, para. 26 (ECtHR October 9, 1979).

99 Article 2 para. 1 International Covenant of Economic, Social and Cultural Rights.

100 E.g., Committee on Economic, Social and Cultural Rights, para. 28 (see n. 78).

through civil and political rights litigation. Successful poverty litigation does not, however, only depend on overcoming resource constraints; access to justice, independence of courts and human rights institutions,[101] and a climate of freedom of expression and association facilitating the work of civil society are equally prerequisite. With respect to the latter, it is clear that many of the above-discussed cases would never have been brought before the European Court without NGO support. Similarly, poverty litigation in Ethiopia would clearly benefit from enabling NGOs to take up a more active role in the field of human rights.[102] More generally, as Sen has convincingly argued, political and civil rights are crucial for the prevention of economic and social disasters, since they "give people the opportunity to draw attention forcefully to general needs and to demand appropriate public action."[103] Indeed, poverty may be the field *per se* in which a truly indivisible approach to human rights is necessary.

Bibliography

Alston, Philip. "Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals." *Human Rights Quarterly* 27 (2005): 755–829.

Arnardóttir, Oddný Mjöll. "Discrimination as a magnifying lens: Scope and ambit under Article 14 and Protocol No. 12." In *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, edited by Eva Brems and Janneke Gerards, 330–349. Cambridge: Cambridge University Press, 2013.

Bandes, Susan. "The Negative Constitution: A Critique." *Michigan Law Review* 88 (1989–90): 2271–2347.

Brems, Eva. "Indirect Protection of Social Rights by the European Court of Human Rights." In *Exploring Social Rights – Between Theory and Practice*, edited by Daphne Barak-Erez and Aeyal Gross, 135–167. Oxford: Hart Publishing, 2007.

Brems, Eva. "Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights." In *Shaping Rights in the ECHR – The Role of the*

101 See Mohammed Abdo's paper on the Ethiopian Human Rights Commission in this volume.

102 *Inter alia* the Human Rights Committee issued its concerns in this respect; see Concluding Observations on Ethiopia, UN Doc. CCPR/C/ETH/CO/1, para. 25 (Human Rights Committee August 19, 2011).

103 Amartya Sen, "Democracy as a Universal Value," *Journal of Democracy* 10 (1999): 7–8.

European Court of Human Rights in Determining the Scope of Human Rights, edited by Eva Brems and Janneke Gerards, 137–161. Cambridge: Cambridge University Press, 2013.

Clements, Luke and Alan Simmons. "European Court of Human Rights – Sympathetic Unease." In *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law*, edited by Malcolm Langford, 409–427. Cambridge: Cambridge University Press, 2008.

Doz Costa, Fernanda. "Poverty and Human Rights: From Rhetoric to Legal Obligations." *Sur – International Journal on Human Rights* 5 (2008): 81–107.

Fineman, Martha Albertson. "The Vulnerable Subject and the Responsive State." *Emory Law Journal* 60 (2010): 251–275.

Fredman, Sandra. *Human Rights Transformed – Positive Rights and Positive Duties*. Oxford: Oxford University Press, 2008.

Harris, David, Michael O'Boyle, Ed Bates, and Carla Buckley, *Law of the European Convention on Human Rights*, 2nd edn. Oxford: Oxford University Press, 2009.

Koch, Ida Elisabeth. *Human Rights as Indivisible Rights – The Protection of Socio-Economic Demands under the European Convention on Human Rights*. Leiden: Martinus Nijhoff, 2009.

Lavrysen, Laurens. "Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights." In *Human Rights & Civil Rights in the 21st Century*, edited by Yves Haeck and Eva Brems, 69–129. Dordrecht: Springer, 2014.

Leijten, Ingrid. "From Stec to Valkov: Possessions and Margins in the Social Security Case Law of the European Court of Human Rights." *Human Rights Law Review* 13 (2013): 309–349.

Mowbray, Alastair. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*. Oxford: Hart Publishing, 2004.

O'Cinneide, Colm. "A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights." *European Human Rights Law Review* 5 (2008): 583–605.

Palmer, Ellie. "Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights." *Erasmus Law Review* 2 (2009): 397–425.

Remiche, Adélaïde. "Yordanova and Others v. Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One's Home." *Human Rights Law Review* 12 (2012): 787–800.

Scott, Craig. "Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights'." *Human Rights Quarterly* 21 (1999): 633–660.

Sen, Amartya. "Democracy as a Universal Value." *Journal of Democracy* 10 (1999): 3–17.

Sen, Amartya. *Inequality Reexamined*. Harvard: Harvard University Press, 1992.

Shue, Henry. *Basic Rights – Subsistence, Affluence and U.S. Foreign Policy*, 2nd edn. Princeton: Princeton University Press, 1996.

Smet, Stijn. "Freedom of Expression and the Right to Reputation: Human Rights in Conflict." *American University International Law Review* 26 (2011): 183–236.

Vizard, Polly. *Poverty and Human Rights*. Oxford: Oxford University Press, 2006.

Xenos, Dimitris. "The Human Rights of the Vulnerable." *International Journal of Human Rights* 13 (2009): 591–614.

Yamin, Alicia Ely. "Reflections on Defining, Understanding, and Measuring Poverty in Terms of Violations of Economic Social Rights under International Law." *Georgetown Journal on Fighting Poverty* 4 (1997): 273–310.

CHAPTER 12

The Human Rights Commission of Ethiopia and Issues of Forced Evictions

A Case-oriented Study of its Practice

Mohammed Abdo Mohammed

Abstract

The right to adequate housing, including prohibition of forced eviction, has increasingly been the subject of judicial and quasi-judicial review at both the international and national levels. The emerging body of jurisprudence on housing rights along with issues of forced evictions underscores that they are indeed legally justiciable human rights. Judicial and quasi-judicial bodies should thus not shy away from dealing with cases involving such matters. Mandated to promote and protect human rights, the Human Rights Commission of Ethiopia was set up in 2000 as part of the democratic institutions stipulated under the Ethiopian constitution.[1] Since its inception, the Commission has been receiving a growing number of complaints every year. Among them, a considerable number of complaints involve issues of housing rights and forced evictions. In most instances, it has rejected such complaints. Investigation of complaints of forced eviction is an exception rather than the norm. Although the reasons for the rejection of the bulk of complaints are varied, the Commission seems to avoid politically sensitive issues, such as the ones relating to forced eviction. This negates the very underpinning of the Commission. The Commission was set up as a reaction to the human rights abuses of the past and is meant to ensure that human rights and freedoms are the center of all development initiatives. This paper, after presenting background information on the Commission and the normative framework of forced evictions, examines the handling by the Commission of complaints relating to forced evictions carried out in rural and urban areas. It reviews some of the typical complaints rejected by the Commission to explore the rationale for the Commission's action. Finally, it recommends measures to be adopted to help the Commission deal with human rights complaints involving government policies and action.

1 Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, *Federal Negarit Gazeta*, Year 1, No. 1 Addis Ababa, August 21, 1995 (hereinafter referred to as the 1995 constitution).

 | DOI 10.1163/9789004280250_014

Keywords

government policy – human rights – development rights – right to adequate housing – forced eviction – protection of human rights – investigation of complaints – Human Rights Commission

1 Introduction

In addition to the past endeavor to meet the Millennium Development Goals (MDGs), the Ethiopian government launched an ambitious program, 'Growth and Transformative Plan (2011–2015)' in 2011 to transform the country's economic growth and development. As a core part of the Plan, the economic and infrastructure sections envisage massive investment and infrastructure development. While the ultimate target is to improve socio-economic conditions and fulfill basic needs, the Plan will likely heighten massive eviction of people from their ancestral lands and thousands from their houses, and deprive many more of their traditional means of livelihood. Both the past and present development endeavors paid little attention to a human rights-based approach to development. The discourse on economic growth and development tends to focus more on mere economic improvement, implying a needs-based approach. This will reinforce the notion that the fulfillment of economic, social, and cultural rights is an aspiration realized by the government program, with no obligation on the part of the government.

One of the core functions of national human rights institutions (NHRIS) is to investigate complaints. The Human Rights Commission of Ethiopia (Commission) has received complaints on a wide range of issues since it started rendering its quasi-judicial functions, including many complaints relating to forced evictions. The Commission has rejected the bulk of the complaints or referred them to either courts of law and/or the Ombudsman Institute on the ground that they do not involve human rights issues (i.e., they are mere administrative matters that do not qualify for its inquiry). By the same token, investigation of complaints of forced eviction is an exception rather than the norm. Disclaiming jurisdiction might shed light on the underlining issues – it might mark fear on the part of the Commission not to confront the economic and development policies of the government, the adoption of a pre-conceived approach to issues of economic, social, and cultural rights, or an erroneous interpretation of its mandate, or incapacity to deal with such issues. This paper will deal with the Commission's handling of complaints pertaining to the right to housing in general and forced eviction in particular.

Some of the interesting complaints handled by the Commission will be reviewed to see the underlining reasons hampering the Commission from examining the essence of specific cases. Some measures to be adopted so that the Commission can probe complaints of all sorts in general and of forced evictions in particular are hinted at. The source of information for the study is the records of the Commission, legal instruments, both national and international, and literature.

2 Political Context and Process of Setting up the Commission

NHRIs are usually set up following constitutional reform and/or chaotic situations ending with a peace accord.[2] Regarding their mode of setting up, they can be established in three ways: by constitution (or amendment of the constitution), by act of parliament, and by presidential decree.[3] The setting up of NHRIs stipulated in a constitutional text, which represents the most powerful option as it guarantees the permanence of the institutions, is found in countries that have recently undergone constitutional reforms and that were marked by grave human rights violations in the past.[4]

Coming to Ethiopia, the evolution of the discourse on democracy, human rights, and democratic institutions in the country took place at a time of significant legal and political change. The current ruling party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) staged a successful armed struggle against the former military regime, ousting it from power in 1991. Issues of democratic governance, human rights, rule of law, and decentralization emerged as central ones after the demise of the military regime.[5] The then transitional government undertook major transformative measures overhauling the political landscape and orientation, the civil service, and the economic

2 Birgit Lindsnaes and Lone Lindholt, "National Human Rights Institutions-Standard Setting and Achievements," in *National Human Rights Institutions: Articles and Working Papers*, eds. Birgit Lindsnaes, Lone Lindholt and Kristine Yigen (The Danish Centre for Human Rights, 2001), 14–15; see Rachel Murray, "The Role of NHRIs at the International and Regional Levels: The Experience of Africa," *Human Rights Law in Perspective* 11 (2007): 3; see also International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions* (Versoix: Switzerland, 2000), 58–62 (hereinafter referred to as 'International Council on Human Rights Policy').

3 Lindsnaes and Lindholt, *supra* n. 2.

4 Ibid. at 14–15.

5 Mohammed Abdo, "The Ethiopian Human Rights Commission: Challenges Confronting Its Effective Functioning," *Chinese Year Book of Human Rights* 4 (2006): 27–28.

policy of the nation aimed at redressing past injustices, atrocities, and dire economic conditions amid high public expectations that these would usher in a new era.[6]

Faced with the lofty task of creating a foundation for a democratic system, those involved in crafting a new constitution intended to provide a rights-based constitution anchored on the rule of law and limited government. A set of provisions with a human rights orientation was believed to play a central role in this regard. This explicates the due regard the Ethiopian constitution bestows to fundamental rights and freedoms.[7]

Appreciating that the existing courts (or other institutions, such as the House of Federation) cannot alone shoulder the protection of human rights, the framers of the Ethiopian constitution agreed on the need for democratic institutions that would advance democratic governance.[8] The Commission was thus created as one of the rights-protective mechanisms as a response to a history of authoritarian rule in general and a notorious military dictatorship in particular that caused immense carnage.[9] Its root in the constitution lends it public legitimacy as the constitution was drafted and adopted following wide public participation. While a constitutional foundation does not *ipso facto* guarantee its better functioning, it provides a more secure basis than an executive decree or order, which is prone to easy change.

It was largely domestic impulse that sparked off the need for democratic institutions during the transition period. Increased international factors also opened up room for conditions favoring a human rights regime in general and

6 The measures undertaken include, *inter alia*, political pluralism as opposed to a one-party system, the framing of a new constitution with liberal features, inception of federal arrangement and decentralization based on ethno-linguistic factors, structural adjustment, and adoption of market-oriented economic policy.

7 The preamble of the 1995 constitution declares that its objective is to build a political community based on the rule of law for the purpose of ensuring lasting peace and guaranteeing a democratic order. Protection of human rights and fundamental freedoms is key to achieving this commitment. At least a third of the 106 provisions of the constitution are on human rights. Its Chapter 3 contains a Bill of Rights. Article 13(1) makes it incumbent on all government organs at all levels to respect and enforce the constitution.

8 Sub-articles 14 and 15 of Article 55 of the 1995 constitution stipulate the establishment of the Human Rights Commission and the Ombudsman Institute respectively. The setting up of the Auditor General and the National Election Board are envisaged under Articles 101 and 102 of the constitution, respectively.

9 This is implicit from and reflected in the document prepared, in Amharic, by the Legal Standing Committee of the House of Peoples' Representatives to elaborate draft laws to establish the Commission and the Ombudsman, unpublished 1999, 1.

democratic institutions in particular in the new democratic process set in motion in the same period. Arguably, the global upsurge in the number of NHRIs, dating back to the early 1990s, has thus affected Ethiopia as well.[10] Because issues of human rights entered the Ethiopian political vocabulary in part through external influences at the time of transition.[11] It suffices to mention the policy impact of the USA, which emerged as a major supporter and donor of the incumbent party following the collapse of the former regime. In mid-1991, the Bush (Sr.) Administration adopted a new policy toward Africa, which judged governments by their stability and effective governance in order to secure USA economic assistance.[12] This American policy, which centered on democracy and human rights, found one of its first applications in Ethiopia.[13]

Compared to other legislation, the process of enacting the enabling statute of the Commission and the Ombudsman Institute is unprecedented, considering a wide range of public and expert participation amid heightened public expectations.[14] Specifically, it involved an input of international experts and practitioners of NHRIs, public discussion throughout the country on draft legislation, and a workshop of local experts on it.[15] Drawing on this, parliament

10 Mohammed Abdo, *supra* n. 5, 24.

11 The post-Cold War attachment of the provision of financial and technical support of donor governments to human rights issues, the active role of the UN in promoting the idea of establishment of NHRIs, and the wave of democratization engulfing countries in transition following the collapse of the former USSR in the early 1990s have also contributed, to some extent, towards considering the establishment of the democratic institutions in the new political and constitutional order set in motion in Ethiopia in the early 1990s. See Claude E. Welch, *Protecting Human Rights in Africa: Strategies and Roles of Non-Governmental Organizations* (University of Pennsylvania Press, 1995), 11.

12 Ibid. at 12.

13 Ibid.

14 Ethiopia chose to have two separate institutions – one for administrative oversight and the other for human rights issues. The gravity of both human rights abuses and administrative malpractices along with the sheer size of the country are among the major rationales for setting up two distinct institutions. This is inferred from the document prepared by parliament to elaborate the enabling statutes of the two institutions. See *supra* n. 9, 1.

15 The government arranged an international conference in 1997 that managed to bring together about sixty eight well-known experts, jurists, activists, officials of national human rights institutions of many states, and other officials and representatives. The conference was organized with a view to drawing on experience elsewhere as the national democratic institutions were a new phenomenon in Ethiopia. The conference and the deliberations on papers presented therein contributed significantly to the concept paper

eventually enacted the enabling legislation of the Commission, Proclamation No. 210/2000, in 2000. However, the nomination of the Chief Commissioner took place only in July 2004 and of the other two Commissioners a year later. The delay in the enactment of the legislation and appointment of officials was attributed to the Ethio-Eritrean War (1998–2000) that diverted the attention of the government to issues of maintaining national security.[16] On top of the war, the process was stalled by political and bureaucratic procedures.[17]

Although the Commission's enabling legislation was based on a broad-based consultation of the general public and experts, both local and international human rights NGOs were excluded from the consultation, triggering criticism.[18] Despite this, the setting up of the Commission can be regarded as willingness on the part of the government to change the complex human rights situation in the country.[19]

Upon its establishment, there was high expectation of what the Commission would offer. This is unsurprising in a nation where the immense violation of dignity of citizens at the hands of the brutal military junta was still fresh in the memory of millions of people.

---

developed by parliament for the public discussions in order to eventually adopt draft legislation for the two institutions. The concept paper contains options to be chosen by the public after public discussion regarding issues such as the structure, mandate, operational powers, leadership, and accessibility of the Commission. National discussions on the concept paper were held in the capital cities of the nine units of the Federation, as well as in Addis Ababa and Ambo. Ethiopian experts made deliberations on the outcome of the discussion held on the concept paper and the choice made by the public regarding the would-be normative content of the legislation. They submitted their findings to parliament. Building on this, parliament formulated a *draft Act* and presented it to the public for consideration. See Mohammed Abdo, *supra* n. 5, 27; see also Mohammed Abdo, "Challenges Facing the New Ethiopian Ombudsman Institution," *International Ombudsman Yearbook* 6 (2002): 78; see also *supra* n. 9, 1–2.

16 Ethiopian Human Rights Commission, *Strategic Plan for the Ethiopian Human Rights Commission 2006–2011* (The Office of the Team of International Consultants and the Justice for All and Prison Fellowship Ethiopia, 2006), 47.

17 World Bank, *Ethiopia: Legal and Judicial Sector Assessment* (2004), 32.

18 Human Rights Watch criticized the exclusion of local and international NGOs from the whole process and described the act as a worrying matter from the early inception of the Commission. See Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001), 60.

19 Sarah Vaughan and Kjetil Tronvoll, *The Culture of Power in Contemporary Ethiopian Political Life* (SIDA Studies No. 10, 2005), 57.

3 Structure and Composition of the Commission

Both a statutory and constitutional body, the Commission is an independent autonomous institution accountable to parliament (The House of Peoples' Representatives). Compared to NHRIS elsewhere, it is a relatively small Commission, composed of a Chief Commissioner, a Deputy Chief Commissioner, a Commissioner for Children and Women, other commissioners as may be deemed necessary, and the necessary personnel.[20] Given the large number of ethno-linguistic groups in the country, coupled with limited posts for officials, one may not obviously expect the Commission to replicate such diversity.

Increasing its outreach, the Commission, in 2011, set up branch offices in different parts of the country, with most of them in the capital cities of different regional states.[21] Apart from advancing the promotion and protection of human rights at the local level, the decentralization has enhanced the Commission's staff diversity and pluralism as local staff and local vernaculars are used to conducting their respective activities.[22] While regional offices mean better access, physical access remains a barrier for much of the rural population.

The Proclamation provides a number of rules guaranteeing the institutional independence of the Commission in terms of allocation of funding, appointment, and dismissal of and immunity of its officials.[23] Other guarantees of independence in the form of its authority to recruit, employ staff, and adopt working rules and procedures are provided under the legislation.[24] Generally,

20 The Australian Human Rights Commission has six commissioners, including the President. The South African Human Rights Commission has at least five Commissioners.

21 Hawassa, Bahr Dar, Mekele, Gambella, Jijiga, and another regional town, Jimma, are where the branch offices were set up in 2011. Parliament approved the proposed establishment of these branch offices in December 2010. Seven more branch offices will be established in the fiscal year 2011/2012. See Ethiopian Human Rights Commission, *Bulletin* 1/5 (2011): 2.

22 Training activities used to be handled by the Head Office are nowadays run by the branch offices and complaints are also entertained by the same. See the UNDP, Democratic Institutions Program, Annual Report (2011), 18.

23 It provides that the budget of the Commission is to be drawn and submitted to parliament by itself (Article 19.2). The executive agencies do not have a say in this regard, which helps to avoid financial manipulation by them and secures the independence of the institution. To ensure the independent appointment of officials, the law set up an independent committee, the 'Nomination Committee' (Article 11 of the Proclamation).

24 Article 35 of the enabling act of the Commission provides that the Commissioners may not be held civilly or criminally liable for any act done or omitted, observations made or

the Proclamation meets, at least theoretically, the requirement of the Paris Principles regarding the independence of NHRIs. The issue is, however, whether the officials appointed to run the institution are, in practice, truly independent of party politics and the executive while discharging their functions. This is significant given the fact that the country did not, to a large extent, have institutions that were and are capable of functioning independently of the government of the day.[25] That apparently is why skepticism was raised, at the very inception of the Commission, as regards the independence of the first officials that assumed office.[26] Taking the existing procedure and practice as the backdrop, the appointment of party members or affiliates is inevitable in a country where the government of the day controls all the institutions. Especially, the appointment of the Chief Commissioner, who usually leads the Commission, may ultimately depend on the will of the political party in power.[27]

Although apparently in full compliance with the Paris Principles, the Commission is not accredited as yet. Its attempt to be accredited commenced in 2010. It was supposed to submit its application along with the requisite documents for accreditation purposes but failed to act within a schedule fixed by the International Coordination Committee of National Human Rights

---

opinions issued, in good faith and in the exercise of their functions. This immunity protects the independence of the members to carry out their functions without fear of prosecution. Article 19 of the legislation also indicates that the institution is entitled to hire its staff and come up with its operational rules and procedures.

25 Mohammed Abdo, *supra* n. 5, 34.

26 The Observatory for the Protection of Human Rights, *Ethiopia: Human Rights Defenders under Pressure*. Report: International Fact-Finding Mission (2005), 18.

27 Two of the incumbent officials were actually members of the ruling party comprising a coalition of four parties – one is from the Tigray People's Liberation Front (Berhane Woldekiros, Deputy Chief Commissioner) and the other from Amhara People's Democratic Party (Asmaru Berhanu, Commissioner for Women and Children), enough to doubt the true independence of the Commission. Once they assume office, they are normally supposed to resign from the party. No information is available on their relation with the party since they assumed office. Although not clearly identified as a party member, the Chief Commissioner, Tiruneh Zena, is thought to be affiliated to the ruling party. Interviews with many experts of the Commission underscore this fact. It is important to note that although all the Commissioners are appointed by parliament, it is only the Chief Commissioner who is directly accountable to parliament. The other Commissioners are accountable to the Chief Commissioner. See Article 13(2) of the Proclamation. All commissioners are to be appointed for a fixed term of five years of office, with the possibility of one reappointment. See Article 14(2) of the Proclamation.

Institutions (ICC).[28] Upon its second application, the Commission was accredited with 'B' status.[29]

4 Mandate and Power of the Commission

As provided under Article 6 of the Proclamation, the Commission has a very broad mandate to promote and protect human rights.[30] Apart from

28 The ICC was set up by NHRIs themselves for the purpose of accreditation. To facilitate the accreditation process, it set up a sub-committee entirely devoted to this process. The ICC is not a UN agency; it is rather a global association of NHRIs that coordinates the relationship between NHRIs and the UN human rights system. It is composed of 16 members from each of four regions, America, Africa, Asia Pacific, and Europe, in order to ensure fair representation of each region. The ICC liaises with the UN human rights bodies and encourages coordination among institutions. The National Institution Unit under the Office of the UN Office of the High Commissioner for Human Rights acts as a permanent secretariat to the ICC and assists it in, among others, organizing its meetings and its accreditation process. The ICC generally meets during the annual sessions of the Human Rights Council and holds biennial international conferences. The accreditation status is reviewed at least every five years. Accreditation increases NHRIs' national and international legitimacy and also entitles participation rights in diverse UN forums depending on their ranking. The Commission's application for accreditation was supposed to be reviewed by the Sub-Committee on the Accreditation in a schedule fixed for accreditation purposes, which was October 11–15, 2010. See the schedule of the Sub-Committee on Accreditation of the International Coordination Committee of National Human Rights Institutions, 2009 (available at: http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx).

29 Its second application for accreditation was scheduled for scrutiny by the ICC in November 2012 but was deferred for a year, set for November 18–22, 2013. See the website of the ICC Sub-committee on Accreditation (SAC): nhri.ohchr.org/EN/AboutUS/ICCAccreditation/Page/NextSession.aspx. See also: nhri.ohchr.org/EN/AboutAccreditation/Documentss/SCA%20Report%20November%202012%20%28English%29.pdf. The Commission was given 'B' status after review of its application for first accreditation in the schedule fixed (November 2013). See ohchr.org/Documents/Countries/NHRI/Chart_Status_Nis.pdf (accessed March 20, 2014). It means that the Commission is not fully in compliance with the Paris Principles or has not yet submitted sufficient documents to make that determination.

30 It is mandated to educate the public about human rights with a view to raising awareness and fostering the tradition of respect for human rights, to provide consultancy service on human rights, and to provide opinion on government reports submitted to international human rights bodies. Sub-articles 3, 6, and 7 of Article 6 and Article 19(2.d) of the Proclamation. It is also authorized to investigate, upon complaint or *suo moto*, human rights violations and to propose revision, enactment of laws, and formulation of policies

government authorities, the Commission's reach extends to individuals and non-state entities. Accompanied by an umbrella clause, which entitles it to perform such other functions as it may consider necessary for achieving its functions, the Commission thus not only has all the functions the Paris Principles prescribe but also a potentially wider mandate.[31] The fact that the Ombudsman's mandate is confined to maladministration issues only, making it a prototype of a classical ombudsman, signifies the inclusiveness of the Commission's mandate on human rights issues.[32] Such inclusive mandate is advantageous. On top of giving due consideration to the scarcity of resources, it allows for the application of an integrated and consistent human rights approach to different human rights issues. In other words, it is more cost-effective than dispersing the fiscal resources across several new human rights bodies, especially for a poor country like Ethiopia. The Commission's reach is not without limitation however. It does not have the power to scrutinize alleged human rights violations pending before the House of Peoples' Representatives, the House of Federation, or courts of law at any level.[33] In this regard it is remarkable that the statute subjected the military, security, and police forces that were closely associated with human rights abuses in the past to its power.[34]

5 Investigation and Enforcement Power

The Commission is empowered to investigate complaints, with regard to individual complaints or *suo moto*.[35] The rules on filing a complaint to the

relating to human rights (Articles 6.4 and 6.5). In addition, it is empowered to ensure that laws, decisions, and practices of the government are in harmony with human rights enshrined under the constitution and to also make sure that human rights are respected by government as well as other entities (Articles 6.1 and 6.2).

31 Article 6(11) of the Proclamation.

32 It is implicit from Article 6 of the enabling legislation of the Ombudsman Institute that it is a classical Ombudsman. See The Ombudsman Institute Establishment Proclamation No. 211/2000.

33 Article 7 of the Proclamation.

34 Mohammed Abdo, *supra* n. 5, 37. The Commission is different from the Ombudsman in that the latter does not have the power to investigate matters related to national security and defense forces. See Article 7 of the Proclamation that set up the Ombudsman Institute, Proclamation No. 211/2000. However, in reporting on matters related to national security, the Commission is obliged to take caution with a view not to endanger national security and the same applies to secret matters related to wellbeing or to protecting individual lives (Article 39.3).

35 See Articles 6 and 24 of the Proclamation.

Commission make it easy for complainants to access it as the Commission can be moved to take action by a complainant in person or by someone on his/her behalf in any language and format.[36]

The Commission is given a range of powers to investigate a complaint submitted to it, including the investigative power of subpoena, giving it theoretically adequate powers necessary for the examination of a complaint.[37] Any person asked to appear for the purpose of furnishing information or production of a document or record should cooperate with the Commission. Failure to do so is punishable by sentence and/or fine.[38]

The Commission, as a matter of general rule, is supposed to settle complaints through amicable means, seeking an agreement between the parties (Article 26.1). Emphasis on amicable means of settlement reflects the reality regarding dispute resolution in the country. The fact that more than 84 percent of the population lives in rural areas where the traditional system has a strong authority on individual as well as communal matters makes the reflection of such system in the Commission's power significant.

Made in an advisor capacity, the Commission's recommendations are not legally binding. It is not explicitly authorized to initiate court proceedings either in its own name or on behalf of an aggrieved party.[39] However, it is under obligation to notify the concerned organs of the crimes or administrative faults committed, if it believes that such occurred in due course of or after its investigation.[40]

The enforcement mechanisms it uses to ensure compliance are to publicize, be it in annual or in a special report as may be necessary, and to finally report to parliament on its recommendations in particular and on its overall activities in general.[41] Another instrument of enforcement is criminal sanction.[42]

---

36 A complaint may be instituted by a person who alleges that his/her right has been violated or by his/her spouse, or family member or representative or a third party (Article 22.1). The Commission may also receive anonymous complaints (Article 22.3). A complaint may be lodged, free of charge, in writing, orally, or in any other means and may be in the working language of the Commission, which is Amharic, or in any other language. See Articles 23(1 and 3).

37 The Commission is empowered to compel the attendance of witnesses to give testimony, or force the production of evidence by those in possession of it (Article 25 of the Proclamation).

38 See Article 41 of the establishment Proclamation.

39 Ibid.

40 Article 28 of the Proclamation.

41 Article 39 of the Proclamation.

42 If a person without good cause fails to comply with a recommendation issued by the Commission or fails to offer a reasoned justification for not doing so within three months

Serving to strengthen its enforcement powers, such sanction is an incentive to the Commission's autonomy. In addition, it may collaborate with other organs, for instance, the media and NGOs, to mount pressure on government authorities to heed its opinions.

The Commission possesses only persuasive powers to issue a recommendation or initiate a negotiation or mediation in order to resolve grievances. While this may, at first glance, appear to relegate the Commission to a back-seat role in promoting and protecting human rights abuses, it might bring with it freedom of movement and action in the investigation of complaints and promotion of human rights.

6 NHRIs and Forced Evictions

Before reviewing the practice of the Commission when handling forced evictions, it is appropriate to make a few quick remarks on forced evictions under international human rights law.

As far as international human rights instruments are concerned, the most important document for discussing issues related to the right to adequate housing and forced evictions is the ICESCR. The right to an adequate standard of living, including adequate housing, serves as affirmative provision of the ICESCR prohibiting the violation of this right in the case of forced evictions.[43]

Forced evictions can be broadly defined as the permanent or temporary removal against their will of individuals, families, and/or communities from homes and/or land which they occupy or depend on, without the provision of, and access to, appropriate forms of legal or other protection.[44] Forced evictions occur in both urban and rural areas, each with varying justifications. Urban renewal, demolition of slums, preparation for mega-events (such as major sport events), and other 'for public interest' reasons are often used to

from receipt of the recommendation, he/she commits a criminal offense and is liable to punishment if found guilty. The person could face imprisonment from three to five years or a fine from 6,000–10,000 Ethiopian Birr or both. See Article 41(2) of the Proclamation.

43 See Article 11(1) of the ICESCR.

44 See UN, "Basic Principles and Guidelines on Development-based Evictions and Displacement," presented in the report of the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 2007, paragraph 4 (hereinafter referred to as 'UN Basic Principles and Guidelines'); see also Office of the High Commissioner for Human Rights, "The Right to Adequate Housing (Art. 11.1): Forced Evictions – General Comment 7, 05/20/1997," Committee on Economic, Social and Cultural Rights, 1997, paragraph 3 (hereinafter referred to as 'General Comment 7').

justify forced eviction in urban areas.[45] In rural and remote areas, forced evictions could take place owing to, among others, large-scale development projects (infrastructures, dams, and roads), mining, extractive, and other industrial activities.[46] Forced eviction can also happen in connection with forced population transfers, internal displacement, and forced relocations in the context of armed conflict.[47] In all of these contexts, the right to adequate housing and not to be subjected to forced eviction may be violated through a wide range of acts or omissions attributable to State Parties.[48]

The UN Committee on Economic, Social and Cultural Rights clarified the normative and legal content of the right to adequate housing and forced evictions. One of the key aspects of the requirements of adequacy is legal security of tenure. In unequivocal terms, the Committee made it clear that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment, and other threats.[49] It has argued that forced evictions are prima facie incompatible with the requirements of the ICESCR.[50] Reinforcing this stance, the former UN Commission on Human Rights declared that the practice of forced evictions constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing.[51] Not all evictions are prohibited under international human rights law, however. They can be justified in the most exceptional circumstances, and in accordance with the relevant principles.

Given the interdependence of all human rights, forced evictions frequently violate other human rights, including both civil and political rights.[52] The violations may occur when two conditions, one substantive and the other

45 General Comment 7, *supra*, para. 7.

46 Ibid.

47 Ibid., para. 5.

48 Ibid.

49 Office of the High Commissioner for Human Rights, "The Right to Adequate Housing (Art. 11.1) of the Covenant – General Comment 4, E/1992/23," Committee on Economic, Social and Cultural Rights, 1991, paragraph 8.

50 Ibid., para. 18.

51 UN Commission on Human Rights, "Prohibition of Forced Evictions: Resolution 28/2004," E/CN.4/RES/2004/28, 2004, paragraph 1; see also UN Commission on Human Rights, "Forced Evictions: Resolution 77/1993," E/CN.4/RES/1993/77, 1993, paragraph 1.

52 While manifestly breaching the rights enshrined in the ICESCR, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family, and home, and the right to the peaceful enjoyment of possessions. See UN Basic Principles and Guidelines, *supra* n. 44, para. 6; see also General Comment 7, *supra* n. 44, para. 4.

procedural, are met. They may occur because of the absence of justification/legality for the eviction, and the way the eviction is carried out, i.e., the way the evictions are carried out is not compatible with the relevant human rights standards.[53] Forced evictions of individuals and communities from their homes and habitats destroy lives and livelihoods. While forced evictions adversely impact all segments of society, groups of people that suffer disproportionately from the practice of forced evictions include women, children, youth, older persons, indigenous people, and ethnic and other minorities.[54] The principles of non-discrimination and substantive equality are of particular importance in ensuring that the rights of these vulnerable groups are protected.

The practice of forced evictions can be countered through, among others, a strong political will of the national government to carefully implement development endeavors, a concerted action of human rights defenders, the use of international as well as national human rights norms, and the effective monitoring role of judicial and quasi-judicial bodies. As entities empowered to enforce human rights and to ensure that laws, policies, and practices of the government adhere to human rights standards, judicial and quasi judicial bodies are competent to deal with complaints arising from forced evictions. However, a preventive approach to forced evictions is more efficient than trying to resolve cases once the process commences. In other words, addressing the legal and structural problems that could prevent the recurrence of forced evictions in the first place is more important that handling individual complaints. Endowed with the power to launch an investigation on their own initiative and to conduct a public inquiry, NHRIs are ideally best-positioned to recommend legal and policy measures to be adopted in the medium and long run to avert forced evictions. Their opinions could serve as a basis for a dialog with various stakeholders. Furthermore, using their promotional mandate, NHRIs could sensitize the general public and government authorities of the

53 See General Comment 7, *supra* n. 44, paragraphs 13–15. The UN Basic Principles and Guidelines provide basic principles governing forced evictions and only sanction them under 'exceptional circumstances'. Some basic principles that need to be met include: (i) valid justification for the project and no other possible alternatives to the eviction; (ii) consultation and participation of affected people and communities; (iii) adequate notification, due process, and effective and legal recourse; (iv) prohibition of actions resulting in homelessness or deterioration of the housing and living conditions, and (v) provisions of adequate relocation and/or adequate compensation before evictions are carried out. See the UN Basic Principles and Guidelines, para. 6.

54 See General Comment 7, *supra* n. 44, para. 10.

need to attend to the right to adequate housing in general and the protection against forced evictions specifically.

7 The Commission and Forced Evictions

While the Commission is said to have been fully operational since 2005, it started exercising its quasi-judicial function of investigating complaints in 2006. There has been a steady growth in the number of cases submitted to the Commission over the years following the Commission's promotion campaigns to raise awareness about itself and human rights.[55] However, the total number of complaints submitted to the Commission since its inception, which is a little over 6,000, has been rather small given the sheer size of the country and its poor human rights record.[56] At the outset, it is important to note that the exact number of complaints submitted to the Commission in general is difficult to come by. This is largely attributable to the poor file management and recording of cases prior to 2010, before the Commission reformed its business process. The reform, launched in 2009 and completed in 2010, culminated in changing its organizational structure. It resulted in, among others, rearranging the original departments and also created new sections and posts, one of which is the Registrar at the Investigation Directorate.[57] One can observe an improvement in the delivery of services in general and file management in particular after

55 The Ethiopian Human Rights Commission, Inaugural Report (2011), 91 (hereinafter referred to as 'Inaugural Report'); see also The Ethiopian Human Rights Commission, Annual Report (2009/2010), 14–15 (hereinafter referred to as 'Annual Report 2009/2010').

56 Ethiopia is a vast country with over 85 million people. The poor human rights record of the country is well-documented by human rights NGOs, both local and international. Reports issued by, among others, the US State Department, Amnesty International, Human Rights Watch and the Ethiopian Human Rights Council attest to this fact. Based on its own documents, the Commission has received a little over 6,000 complaints since its inception. The rather low number of complaints has to do with the sheer size of the country accompanied by a lack of branch offices until recently or the inadequacy of promotion work by the Commission and/or a lack of awareness regarding the Commission's function or lack of interest in the Commission as it lacks executive powers. Among others, a sustained promotion by the Commission of itself, the newly opened branch offices, and the likely increase in the number of such offices in the near future will possibly increase the number of complaints to the Commission.

57 Owing to the lack of a Registrar, prior to April 2010 cases ended up in the hands of individual investigators as there was no centralized system of recording and admitting cases. See Inaugural Report, *supra* n. 55, 55–56.

the Registrar went operational.[58] The recent statistical data indicates a marked increase in the number of cases submitted to the Commission. The more than 1,427 complaints submitted to the Commission in 2012/2013 represent an even greater increase over the 65 cases received in its first year of operation.[59]

Broadly cataloged, the types of cases submitted to the Commission since it commenced discharging its functions pertain to employment-related matters, interpersonal land disputes, property, security of person, freedom of movement, equality and non-discrimination, condition of detention in prisons and police stations, inter-ethnic conflicts, election-related issues, and forced eviction from land and housing.[60]

In terms of their number, forced eviction-related complaints feature high among complaints that keep on appearing before the Commission annually. Broadly put, they relate to arbitrary eviction from housing and/or land without prior notice and consultation, or without prior arrangement to relocate or provide them with compensation. Most of the forced evictions were carried out for the purpose of making way to undertake infrastructure development (road construction and real estate) and for commercial farming. The complaints were mostly made against government authorities. In a few cases, they were related to rental terms and conditions, and complaints were lodged against private individuals or entities. For instance, a tenant who could not afford the rent increment imposed by his landlord was forced out of his house. He filed a complaint arguing that the action of the landlord leading to the loss of shelter constitutes violation of the right to housing. He was directed to the Ombudsman.

The investigation of complaints on forced eviction is an exception rather than the norm. The Commission managed to investigate a few complaints of forced eviction, referring the greater part of them to the Ombudsman and a few to courts of law. Those investigated relate to the ones in the context of civil strife involving communal or ethnic violence.

7.1 *Investigation of Individual and Group Complaints of Forced Evictions in Urban Areas*

The Commission receives complaints involving the right to adequate housing and issues of forced eviction. One important case filed with the Commission

58 See The Ethiopian Human Rights Commission, Annual Report (2010/2011), 8 (hereinafter referred to as 'Annual Report 2010/2011').

59 See The Ethiopian Human Rights Commission, Annual Report (2012/2013) (hereinafter referred to as 'Annual Report 2012/2013').

60 Inaugural Report, *supra* n. 55, 89–96; Ethiopian Human Rights Commission, Annual Report 2011/2012, 22 (hereinafter referred to as 'Annual Report 2011/2012'); see also Ethiopian Human Rights Commission, A Consolidated Five Year Report, 2011, 36 (hereinafter referred to as 'Consolidated Five Year Report').

that could have given rise to important human rights issues in general and government policy on housing matters in particular is worth mentioning. The case regarded the forced eviction from and final demolition of houses built without a permit. Sadly, the Commission rejected the case on the ground that it lacked jurisdiction over such matter. It is good to have some background on the case to shed light on how it could have given rise to human rights issues related to the right to housing in general and forced evictions in particular, and the obligation of the state in this regard.

Land is a scarce resource in urban areas, especially around Addis Ababa, owing to the rapid urbanization. Problems of land management and bureaucratic hurdles making the provision of land to ordinary citizens difficult, the cost of renting, the unbearable cost of the available land along with the failure of successive governments to address the longstanding housing problems in urban areas have forced citizens to ensure that they have a roof over their head by means at their disposal.[61] It thus forced citizens to engage in the construction of houses without a permit, known locally as 'Chereka Bet', which has become a recurrent problem in big cities, especially Addis Ababa. The government has been cracking down on such activities, which crackdown gained momentum following its ambitious quest to make land available for, *inter alia*, industries, real estate, and the construction of government-financed houses.

Mindful of the cause of construction without a permit and housing problems in urban areas, the government has recently tried to address the predicament through, among others, engaging in the mass construction of houses, especially for low-income citizens, to alleviate the chronic shortage. Despite this, the problem still persists.

Forced eviction has been aggravated following a policy change by the incumbent ruling party (EPRDF). Putting rural development as its core economic development policy, the Party did not have an urban development policy for more than a decade after it assumed power in 1991. The adoption of its Urban Policy in 2003 followed by sustained economic growth led to a face-lift of many big cities in the country, especially Addis Ababa. The expansion of different business activities led to a scramble for land acquisition, spurring a massive increase of its price and exacerbating the pending availability problem.

One of the means to alleviate the chronic shortage of housing is the introduction of urban renewal, which calls for demolition of slums in different

61 Tegegne Gebre-Egziabher, *Livelihood and Urban Poverty Reduction in Ethiopia: Perspectives from Small and Big Towns* (Organization for Social Science Research in Eastern and Southern Africa (OSSREA), 2010), 14.

parts of Addis Ababa, affecting many poor communities living in them. Of course many of the poor communities were relocated to low-cost houses (locally called 'Condominiums'). The transfer has not only affected their livelihoods but also their social bonds. It affected the petty commerce they used to engage in, subjected them to transportation difficulties and impinged on their long-established social schemes such as *Idir* and *Iqub*. The eviction thus puts not only the right to housing at stake but also the right to protection of property, livelihood, and social and cultural issues.

The case could have given the Commission a chance to see the obligation of the state in relation to housing rights and forced evictions, and policy and administrative measures undertaken by it to address the problem. The 1995 Ethiopian constitution does not guarantee the right to housing *per se* in explicit terms. However, it is incumbent upon the government to allocate resources to provide social services including education and health (Article 41.3). The social service referred to here could include housing as the provision is not meant to be exhaustive. One of the 'National Policy Principles' included in the constitution obliges the state to adopt policies and measures so long as resources permit, to provide social services to citizens, including housing (Article 90.1). Furthermore, as Ethiopia is a State Party to the ICESCR, the Commission could have ample justification to look at the case and its policy and administrative implications regarding the obligations of the state in this regard. At least, it would, as a face-saving measure, have been better for the Commission to refer the matter to the Ombudsman than to reject it since an administrative decision was involved in carrying out the action. Admittedly, while forced eviction from land occupied and constructed carried out without a permit is justifiable, subject to conditions, the Commission failed to examine whether the case at hand fell within such instances.

In connection with forced eviction some complaints could also have provoked issues of an adequate standard of living and the right to adequate housing. A complaint, filed by a group of 19 complainants, was over houses given to them as replacements for their demolished ones. They alleged that the new houses did not have basic amenities, such as toilets and water, falling short of the standard of the ones they used to live in. In another more or less similar complaint, applicants alleged that new houses given to them did not meet the necessary standards, and were smaller in size than the ones they used to live in and far from shopping areas, forcing them to incur unexpected and unbearable expenses. The Commission preferred to provide advice in both cases instead of investigating the matter while these cases essentially concerned the right to an adequate standard of living and to adequate housing.

7.2 *Investigation of Communal or Ethnic Violence Causing Forced Evictions*

Many instances of forced evictions are associated with violence, such as evictions resulting from international armed conflicts, internal strife, and communal or ethnic violence.[62] The Commission has investigated alleged human rights abuses arising from communal violence in different parts of the country. Investigation of such issues is the hallmark of the Commission's quasi-judicial function. The Commission is quick to dispatch its ad hoc committee to deal with such matters and issue recommendations. This is probably because abuses arising from violent communal conflict may not directly implicate government authorities and its agents. The Commission has invested its energy in investigating private matters and non-state entities in areas such as labor and conflict rather than abuses attributable to government authorities and their agents.[63]

In an ethnic conflict that flared up in the southern part of the country, the Commission launched an investigation, following the submission to it of a complaint, to determine whether human rights violations had actually occurred and to recommend an appropriate legal and professional advice to resolve the problem.[64] The complaint submitted by a group of people purporting to act on behalf of the Guji ethnic group alleged that fellow members of their ethnic group were subject to consistent torture, forced disappearance, death, detention, eviction from their house and land, and destruction of their livelihood since a referendum was held in the area to decide whether to put the area within the Southern Nations, Nationalities, and Peoples' Regional State or Oromia National Regional State.[65] They alleged that in the latest violent attacks against them by the Sidama ethnic group, some people were killed and others disappeared, many houses were set ablaze, some household animals were looted and killed, and farms were set on fire for the sole reason that they

62 See General Comment 7, *supra* n. 44, para. 6.

63 Mohammed Abdo, "National Human Rights Institutions and Economic, Social and Cultural Rights: An Examination of the Mandate and Practice of the Ethiopian Human Rights Commission," in *National Human Rights Institutions and Economic, Social and Cultural Rights*, eds. Eva Brems, Gauthier de Beco and Wouter Vandenhole (Intersentia, 2013), 144.

64 See The Ethiopian Human Rights Commission, *Report on the Investigation of Human Rights Violation Complaints in Wondogenet Area, Sidama Zone, South Regional State* (March 2011), 1–2.

65 Some areas inhabited by *Guji* were put within the Oromia National Regional State and some areas where *Guji* are the minority were put under the administration of the Southern Nations, Nationalities, and Peoples' Regional State.

happened to be ethnic Guji living among the Sidama. They added that the local administration dominated by the Sidama was complicit in the attacks targeting them.

The Commission did not however find that there was a deliberate and systemic policy to discriminate against and attack the Guji community that was put in place by the local administration dominated by the Sidama.[66] However, it discovered that security forces had failed to take adequate measures before full-fledged violence erupted, which could have averted the crisis.[67] It finally recommended measures to be adopted to solve inter-ethnic conflicts in the area.[68] To bring down forced evictions in the area, the Commission, in its specific recommendation, said that a combination of administrative, political, and traditional mechanisms had to be deployed to address the root cause of the conflict so that lasting peace may prevail in the area.[69] It also called upon the local administration to reinforce its endeavor to repair damaged houses and/or to rebuild houses that had burnt down.[70]

The recommendation is remarkable in that it used strong words against the police and security forces, blaming them for not acting prudently to avert the crisis in the first place and also in calling for the usage of traditional means in conjunction with formal laws dealing with the root cause of the problem.

7.3 *Monitoring and Investigating Complaints in the Context of Development Policy – The Grand Failure of the Commission*

Before examining complaints indicating the fiasco of the Commission failing to face up to challenging government policies impinging on human rights, it is important to offer a cursory view of the recent economic and development policies in force.

Despite achieving impressive economic growth in the last couple of years, Ethiopia remains one of the poorest nations in the world. Food insecurity, hunger, and malnutrition are traits associated with Ethiopia and continue to plague the lives of a considerable portion of its population. Ensuring food security in order to tackle deaths stemming from hunger as well as

66 See the report on the investigation, *supra* n. 64, 21.

67 Ibid.

68 It called upon the two states to bring the two communities together to resolve the long-standing grievances through traditional means to be led by independent elders; to bring to justice individuals who mobilize the community and incite violence between the two communities, and to distribute aid to the displaced fairly. For the report on the investigation, see *supra* n. 64, 22–23.

69 Ibid. at 18.

70 Ibid. at 22.

malnourishment should inevitably be the key development and economic policies of the government. Safety-net programs, promotion of small-scale irrigation schemes by local farmers and attracting foreign direct investment in commercial farming, and resettlement of populations are some of the major long-term development policies adopted by the incumbent government to ensure food security and food productivity.

To reinforce its development endeavor aimed at, among others, economic growth in general and securing food security in particular, the government has given ideological clout to it. The notion of 'developmental state' has thus gained a growing traction in the political discourse and vernacular of the ruling party, particularly since the debacle of the 2005 general election, which plunged the country into political turmoil.[71] To put the notion in concrete economic policies and plans, the government came up with the 'Growth and Transformation Plan' in 2011. Although it mentions public participation, transparency, and good governance, the Plan seems to favor a needs-based approach to development issues rather than a rights-based approach.[72] Because the term 'development' is linked almost exclusively to economic targets (i.e., the growth of GDP), it glosses over critical issues such as human rights, democratic participation by civil society and groups, and the protection of local populations.

Among the government development policies, foreign investment in agriculture and the resettlement program account for the bulk of the rapidly growing spate of forced evictions in rural areas.

Regarding foreign investment, Ethiopia is often cited as one of the countries where 'land-grabbing' occurs. It has been handing out huge tracts of land to foreign investors from different countries, including India, Saudi Arabia, and Djibouti. The bulk of fertile land transferred to investors is situated in less populated lowland areas, including Gambella and Benishangul-Gumuz Regions where much of the remaining intact forest in the country is situated. In many instances, local communities were driven out of their ancestral land to give way to commercial farming allegedly without prior consultation with the affected communities and/or inadequate compensation.

71 Asnake Kefale, "Narratives of Developmentalism and Development in Ethiopia: Some preliminary explorations," 2011, 8, accessed June 13, 2013, http://www.nai.uu.se/ecas-4/panels/41-60/panel-57/Asnake-Kefale-Full-paper.pdf.

72 The Plan aims to achieve Gross Domestic Product (GDP) growth of 11–15 percent per annum from 2010 through 2015. The emphasis from the first page of the Plan is on economic progress and the overall objective is to achieve GDP growth. It mentions the need to consider public participation, transparency, and good governance while attaining economic aspirations. See Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, *Growth and Transformation Plan 2011–2015* (2010), 57–60.

The recent resettlement program has focused on four regional states, namely Somali, Afar, Benishangul-Gumuz, and Gambella. At the heart of the program is the settlement of people in selected core areas so that better education, health, water, and other facilities can be made available to a sizeable population. It entails the eviction of people from the area they inhabit and restricts them to newly formed villages. Admittedly, it is largely a voluntary and participatory exercise. However, some suggest that these conditions were undermined by requirements to fulfill quotas for the program.[73]

Looked at from a human rights perspective, issues of participation, transparency, accountability, and effective access to remedies are to be given attention in the implementation of any government development policy in general and during forced evictions in particular. Investigating and monitoring whether the transfer of land to foreign investors and resettlement programs are implemented in ways that do not trample on the human rights of citizens are within the ambit of the Commission. Unfortunately the Commission, as an independent institution, could not discharge its functions in this regard. It failed to examine individual complaints arising from development policies let alone launch an inquiry on its own initiative to probe such important human rights issues.

The Commission appears to be more comfortable with the protection of human rights where the issues involved do not have political overtones and are politically not sensitive.[74] Where issues involved in a complaint have political overtones, the Commission tends to avoid them by disclaiming competence to handle them.[75] Two cases marking the Commission's inability to entertain politically sensitive matters confronting human rights deserve attention here.

The Gambella Case

The Commission rejected, for want of jurisdiction, an interesting complaint filed by a representative of people living in a protected forest that could have given rise to important human rights issues such as participation, transparency, and the provision of effective remedies with specific human rights issues including the right to housing, the right to work, and protection of the environment.[76] The complaint was instituted by Tamiru Ambello, acting on

73 UN Economic Council, *Report of the Special Rapporteur on the right to food, Jean Ziegler, Mission to Ethiopia*, E/CN.4/2005/47/Add.1, February 8, 2005, 15.

74 Mohammed Abdo, *supra* n. 63, 144.

75 Ibid.

76 The facts of the complaint and the informal decision to reject the case were narrated by the investigator, who wants to remain anonymous, involved in handling the case. I had

behalf of the community living in the area, to challenge the decision of the Gambella National Regional State, which decided to hand over the forest area to an investor for the purpose of tea farming.[77] The complainants alleged that they were not consulted before the decision was made and that the clearing of the forest to give way to tea farming would have a devastating impact on the environment as well as on their livelihood based on the forest. Their attempt to obtain a remedy by way of injunction from the local administration and regional government institutions was in vain.

Upon learning that the investor had already cleared a sizeable chunk of the forest, the complainants submitted a written request to the President of the country to intervene in the matter and help them halt the clearing of the forest. Sympathetic to their case, the President asked the Commission to intervene and investigate their complaint. They submitted their complaint to the Commission along with the letter of the President and other supporting documents. The investigation team at the Commission accepted the case but needed, before launching an investigation, professional advice on environmental issues at stake in the case and put their request informally to some experts and local organizations working on environmental issues such as Pact Ethiopia and Forum for Environment. The experts and the organizations asked the investigators to make a formal request, i.e., to produce a written letter from the Commission. The leadership of the Commission refused to issue a formal letter on the ground that the case did not fall within the purview of the Commission and ordered a referral of the case to the Ombudsman Institute, which in turn remanded the case back to the Commission. In the end, both institutions failed to deal with the case.

There is no provision that precludes the Commission, or Ombudsman, from investigating such complaint as it is not considered by courts and other institutions.[78] The Commission's action contravenes its obligations under the enabling statute to investigate any complaint related to human rights violations so long as the matter is not pending before other organs. Perhaps the leadership of the Commission, as well as that of the Ombudsman, felt that the issues involved in the case pitted them against the policy of the government to

---

the privilege to look at the file of the complaint, including the documents produced by the complainant and the correspondence between the investigator and others.

77 The complaint was submitted to the Commission in May 2011.

78 Although not detailed, there is a general procedural rule to avoid potential overlap of jurisdiction between the Commission and the Institute. Article 29 of the Proclamation provides that the two institutions should settle overlap of jurisdiction by mutual agreement and in case this does not work, the institution to which a complaint is lodged first shall have the power to examine it.

transfer large chunks of land to investors on the one hand and allegations of so-called 'land-grabbing' for which the Ethiopian government has been criticized by experts and international organizations, on the other.[79] The government appears to be very sensitive about matters of allocation of massive swathes of land to foreign investors. It has always denied allegations that 'land-grabbing' has taken place and argues that its action is part of its long-term bid for economic development to attract foreign investment and technology transfer, to spur employment opportunities, and to help eradicate hunger and thereby ensure food self-sufficiency.[80] The Commission seemed to realize the sensitivities involved in the case and decided not to confront the government by investigating the matter, instituting a self-imposed restraint.

The Gura Farda Case

The Commission was tight-lipped over the recent forced eviction of thousands of people from the Gura Farda area, situated in the Southern part of the country. The Southern Nations, Nationalities, and Peoples' Regional State decided to evict thousands of people who were accused of illegally occupying land without a permit, causing deforestation, and damaging the ecosystem. As a result, many of the victims claimed to have been evicted without advance notice and time to even collect their personal belongings let alone agricultural produce. Some of them even alleged to have been forcibly loaded onto trucks and buses and dropped in Addis Ababa, from where they were finally sent to their place of origin, situated in some part of the Amhara National Regional State. The action of the government caused fury among human rights NGOs, both local and international, and the opposition parties operating both locally and abroad, becoming a headline issue for some time.[81] Some people went so far as

79 For instance, see the study funded by Oxfam International on land-grabbing in Africa in which Ethiopia is indicated as one of the countries where land-grabbing is taking place and its impact on small farmers and women, and the violation of human rights involved. See Tinyade Kachika, *Land Grabbing in Africa: A Review of the Impacts and the Possible Policy Response* (2011).

80 Dessalegn Rahmato, *Land to Investors: Large-Scale Land Transfers in Ethiopia* (Forum for Social Studies, 2011), 4–5 and 13.

81 See http://www.ethiolion.com/article/041312_Gura_Ferda_and_crimes_against_Humanity.html:
http://www.ethiosun.com/2012/04/15/gura-ferda-and-crimes-opposite-humanitytesfay-atsbeha-and-kahsay-berhe.
http://www.ethiopianreview.com/content/tag/ethiopia-gura-ferda.
http://ethsat.com/2012/04/06/mass-eviction-of-amahras-stirs-controversy/.
http://www.zenaddis.com/2012/04/11/shiferaw-shigute-dismisses-report-of-eviction.

saying the action was part of a systemic attack singling out the Amhara people.[82]

During a parliamentary session, the late Prime Minister Meles Zenawi angrily denied the accusation that it was a systemic action targeting the Amhara. He argued that it was a simple act to deter people from flocking to the area illegally and pointed out that settlement from one regional state to another had to be coordinated between the two states involved.[83] Bolstering the argument of the federal government, the local administration pointed out that those evicted were the ones who settled in the area illegally after 2005 and the ones who arrived before that period had already been given permission to settle.[84]

Some of the victims of the eviction lodged a group complaint to the Commission, alleging that the eviction was arbitrary, that they were subjected to violence, and had lost their entire fortune. Apparently fearing the sensitivities involved in the matter, the Commission refrained from taking any action regarding the case. By the same token, the Commission also failed to act on individual complaints from some of the victims in the case at hand. It opted to refer the matter to the Ombudsman, disclaiming jurisdiction over the case.

The rejection of the Gambella and Gura Farda cases begs the question of whose interest the Commission is serving. Actually, it negates the very underpinning for the establishment of the institution. Respect for and protection of human rights is the cornerstone of the Ethiopian constitution. The Commission is one of the institutional means to realize this. The basic rationale for its establishment is to achieve a permanent shift from the autocratic polities of the past to a just and democratic political arrangement in which the supremacy of law and good governance flourish.[85] The institution is thus meant to

82 Assefa Negash, *Why Have the Amharas Once Again Become Victims of Ethnic Cleansing by TPLF?* April 2012. See http://tassew.files.wordpress.com/2012/04/amaras_ethnic_cleansing_by_tplf_dr_assefa_negash.pdf.

83 The current government curbed settlement of people from one region to another, in sharp contrast to the past Ethiopian regimes. It limited settlement within a region. This policy emanates from the very policy of the government which promotes ethnic groups to control matters in their respective region and from fear that inter-regional settlement or villagization will disturb the ethnic makeup of regions, consistent with the foundation of the current federal arrangement based largely on ethno-linguistic factors. He (the Prime Minister) reiterated the same during a parliamentary session held on April 17, 2012.

84 People who settled there were given a certificate proving possession of land for farming and houses. See Ethiopian Reporter, April 1, 2012; see also: http://www.zenaddis.com/2012/04/11/shiferaw-shigute-dismisses-report-of-eviction/.

85 Inaugural Report, *supra* n. 55, 27.

serve as the frontline mainstay for ensuring that the new status quo does not slide back to the human rights abuses of the past by seeing to it that the fundamental human rights and freedoms of citizens remain the constant center of all developmental endeavors being made.[86] Quite contrary to its inherent objective, the failure of the Commission to investigate the case means that it failed to test whether the development policy of the government is in line with the human rights ethos espoused by the constitution.

Whenever the Commission dares to investigate politically sensitive matters, it relies on a behind-the-scenes approach rather than on its formal powers in the form of naming and shaming. Actually, a clandestine mode of engagement with government authorities is the hallmark of the Commission's enforcement mechanism.[87] Using informal means of communication, the Commission has been able to secure remedies for claimants in some instances. For instance, concerning forced eviction, the Commission's intervention helped to secure a remedy for people who were forcibly removed from their houses.[88] In another case, the Commission's intervention helped victims to resettle on the land from where they had been removed to give way to a hydropower and irrigation project in the Tana Beles area.[89] Actually, such informal engagement is inevitable in an authoritarian tradition. In such a system, informal communication produces far better results than usage of formal enforcement powers granted to NHRIs.[90] While informal means help offer a remedy in individual cases and

86 Ibid.

87 Mohammed Abdo, *supra* n. 63, 140–141.

88 The Commission has relied on an informal method of conveying information to government officials through means such as informal contact persons instead of written letters or publication of information through the media or other means. One case where such method proved successful is worth mentioning here. Many people were arrested following clashes between security forces of the government and the Ogaden National Liberation Front (ONLF), an insurgent group claiming to fight for the self-determination of the Ogaden people in the Somali National Regional State of Ethiopia. Following the clashes, the Somali National Regional State launched a campaign to arrest people without warrant and refused to bring them before court and also disregarded bail issued by court. It also carried out arbitrary searches of houses and seizure of property by forcefully evicting occupants. The campaign was part of the initiative to dislodge the alleged members of the ONLF, which was locked up in fierce clashes with the government in 2007 and 2008. The intervention of the Commission managed to help provide remedies to some families who were forcibly evicted from their houses. See Consolidated Five Year Report, *supra* n. 60, 36; see also Ethiopian Human Rights Commission, Annual Report 2006/2007, 22.

89 Annual Report 2011/2012, *supra* n. 60, 17.

90 Ibid.

keep the channel of communication with the government open, it undermines the Commission's inherent powers and thereby puts its credibility at risk.

7.4 *Lack of Systemic Inquiry*

The power to initiate *suo moto* and/or systemic investigation can help NHRIS meet the needs of individuals or communities who may not otherwise be heard.[91] Because disadvantaged and vulnerable sections of society are not likely in a position to access judicial and quasi judicial bodies, it gives such groups a public voice, making human rights violations a matter of general knowledge and concern, which is a requisite step towards dealing with them.[92]

The Commission is not active in the area of conducting both *suo moto* investigations and systemic inquiry into legal, policy, administrative, and institutional issues that give rise to recurring human rights problems in the country. The failure to do so is attributed predominantly to the Commission's inability to confront government policies and its lack of capacity to some degree. Be that as it may, the Commission has conducted limited *suo moto* investigations, most of which relate to the alleged killings of individuals in conflict situations and/or in isolated incidents, and orphanage facilities in different parts of the country.[93]

Potentially reversing its lack of pro-activism, the Commission plans to conduct inquiries into some issues, including issues of large-scale land transfer to investors as well as religious conflicts.[94] It appears that a torrent of criticism against the government decision to allocate a whopping portion of land to investors has spurred the Commission to plan this. In addition, the Commission intends to do so apparently to off-set its failure to investigate such matters under a group complaint submitted to it in 2011, for which it was fiercely denigrated. Such proposed *suo moto* investigation is akin to a public inquiry,

91 UN Office of the High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*. Professional Training Series No. 12 (New York and Geneva: UN, 2005), 49 (hereinafter referred to as 'Professional Training Series No. 12'); see also UN Office of the High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities, Professional Training Series No. 4 (Rev. 1)* (2011), 79.

92 Ibid.

93 Some relate to the investigation of violent conflicts between religious groups, inter-ethnic clashes between *Sidama* and *Oromo* in and around *Wondogene*t, and riots in some parts of the country. See Annual Report 2010/2011, 71. On the inquiry into orphanage facilities, see Annual Report 2011/2012, *supra* n. 60, 24–25; Inaugural Report, *supra* n. 55, 77–78; see also Consolidated Five Year Report, *supra* n. 60, 39.

94 Annual Report 2011/2012; see *supra* n. 60, 20.

although the details of how to go about conducting it are not yet available. Be that as it may, if the outcome of the study is going to be presented for public discussion, it could reshape public views regarding such matter, which in the long run might shape policy on it.

8 Concluding Remarks

The NHRIs are institutions whose role is to realign state behavior by constantly criticizing the government's wrongful acts that trample on human rights, offering an inside perspective on it. By the very nature of their mandate, it is inevitable for NHRIs to be on collision course with the government. If there is no more friction between the institutions and their respective governments, such institution is not part of NHRIs anymore.[95] It is thus vital for the legitimacy of particular NHRIs not to yield to pressure, directly or indirectly, from a government agency in carrying out its role even if it pits it against the government.[96] Indeed, tackling controversial issues, even if it puts the institution on collision course with the government or its agencies, is the public legitimacy litmus test for a NHRI.[97]

Avoiding confrontation with the government, the Commission refused to act on complaints alleging important questions of human rights violations, notably on politically sensitive issues, by disclaiming jurisdiction. Its failure to handle such matters has seriously undermined its standing, giving rise to the perception of a lack of independence.

The failure of the Commission to hold the government to account is rooted partly in the authoritarian political tradition that tightly controls all government institutions and the rampant culture of impunity. When authoritarianism is deeply embedded, the accountability mechanisms such as tribunals and NHRIs have a limited role in constraining government powers.

Be that as it may, the Commission, as an independent institution, was set up for the purpose of protecting human rights. The real test of its independence lies in its ability to challenge the government by investigating human rights violations appearing before it. The Commission should not thus shy away from probing politically sensitive matters.

95 Buhm-Suk Baek, "Do We Need National Human Rights Institutions? The Experience of Korea" (Doctoral Student Paper, Law School, Cornell University, 2010), 9.

96 Anne Smith, "The Unique Position of National Human Rights Institutions," *Human Rights Quarterly* 28/4 (2006): 936.

97 Ibid.

NHRIs need to have clear legal criteria and procedures in place when dealing with a controversial case, especially in a delicate political and legal environment.[98] In its operational procedure, the Commission needs to enunciate a clear procedure on considering sensitive and high-profile cases in order to avoid selectivity in launching investigations of matters. Even though crucial policies are involved in government development ventures, the obligation to protect implies an active role on the part of the state and its institutions to ensure that policies and actions taken to effect government programs are carried out in conformity with human rights norms and relevant principles. As Ethiopia is still at an early stage in the transition towards democracy, there is a need for democratic institutions to hold the government accountable. This is significant given the fact that human rights abuses, particularly forced evictions, are a recurring problem in the country. It is thus incumbent upon the Commission to challenge the government when instances for doing so materialize. Also, the Commission ought to regularly conduct human rights training for relevant authorities involved in or concerned with forced evictions. Such endeavor could help prevent human rights violations within the context of forced evictions. Additionally, the Commission has to conduct systemic investigations of the practice and publicize its findings so as to trigger debate on the subject matter.

Bibliography

Asnake Kefale. "Narratives of Developmentalism and Development in Ethiopia: Some Preliminary Explorations, 2011," accessed June 13, 2013. http://www.nai.uu.se/ecas-4/panels/41-60/panel-57/Asnake-Kefale-Full-paper.pdf.

Baek, Buhm-Suk. "Do We Need National Human Rights Institutions? The Experience of Korea." Doctoral Student Paper, Law School, Cornell University, 2010.

Desalegn Rahmato. *Land to Investors: Large-Scale Land Transfers in Ethiopia.* Forum for Social Studies, 2011.

Ethiopian Human Rights Commission. Annual Report 2009/2010.

Ethiopian Human Rights Commission. Annual Report 2010/2011.

Ethiopian Human Rights Commission. Annual Report 2011/2012.

Ethiopian Human Rights Commission. Annual Report 2012/2013.

Ethiopian Human Rights Commission. Consolidated Five Year Report 2011.

Ethiopian Human Rights Commission. Inaugural Report 2011.

Ethiopian Human Rights Commission. *Bulletin* 1/5, 2011.

98 Ibid.

Ethiopian Human Rights Commission. *Report on the Investigation of Human Rights Violation Complaints in Wondogenet Area, Sidama Zone, South Regional State*. March 2011.

Ethiopian Human Rights Commission. *Strategic Plan for the Ethiopian Human Rights Commission 2006–2011*. The Office of the Team of International Consultants and the Justice for All and Prison Fellowship Ethiopia, 2006.

Federal Democratic Republic of Ethiopia. Ministry of Finance and Economic Development. *Growth and Transformation Plan 2011–2015*. 2010.

Federal Democratic Republic of Ethiopia. Legal Standing Committee of the House of People's Representatives. Document prepared, in Amharic, to elaborate draft laws to establish the Commission and the Ombudsman (unpublished 1999).

Human Rights Watch. *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001).

International Council on Human Rights Policy. *Performance and Legitimacy: National Human Rights Institutions*. Versoix: Switzerland, 2000.

Kachika, Tinyade. *Land Grabbing in Africa: A Review of the Impacts and the Possible Policy Responses* (2011).

Lindsnaes, Birgit, and Lone Lindholt. "National Human Rights Institutions – Standard Settings and Achievements." In *National Human Rights Institutions: Articles and Working Papers*, edited by Birgit Lindsnaes, Lone Lindholt and Kristine Yigen. Danish Center for Human Rights, 2001.

Mohammed Abdo. "Challenges Facing the New Ethiopian Ombudsman Institution." *International Ombudsman Yearbook* 6 (2002).

Mohammed Abdo. "The Ethiopian Human Rights Commission: Challenges Confronting Its Effective Functioning." *Chinese Year Book of Human Rights* 4 (2006).

Mohammed Abdo. "National Human Rights Institutions and Economic, Social and Cultural Rights: An Examination of the Mandate and Practice of the Ethiopian Human Rights Commission." In *National Human Rights Institutions and Economic, Social and Cultural Rights*, edited by Eva Brems, Gauthier de Beco and Wouter Vandenhole. Cambridge: Intersentia, 2013.

Murray, Rachel. "The Role of NHRIs at the International and Regional Levels: The Experience of Africa." *Human Rights Law in Perspective* 11 (2007).

Observatory for the Protection of Human Rights. *Ethiopia: Human Rights Defenders under Pressure*. Report: International Fact-Finding Mission (2005).

Office of the High Commissioner for Human Rights. "The Right to Adequate Housing (Art. 11.1) of the Covenant – General Comment 4, E/1992/23," Committee on Economic, Social and Cultural Rights (1991).

Office of the High Commissioner for Human Rights. "The Right to Adequate Housing (Art. 11.1): Forced Evictions – General Comment 7, 05/20/1997," Committee on Economic, Social and Cultural Rights (1997).

Office of the High Commissioner for Human Rights. *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*. Professional Training Series No. 12. New York and Geneva: UN, 2005.

Office of the High Commissioner for Human Rights. *National Human Rights Institutions: History, Principles, Roles and Responsibilities*. Professional Training Series No. 4 (Rev. 1) (2011).

Smith, Anne. "The Unique Position of National Human Rights Institutions." *Human Rights Quarterly* 28/4 (2006): 904–946.

Tegegn Gebre-Egziabher. *Livelihood and Urban Poverty Reduction in Ethiopia: Perspectives from Small and Big Towns.* (Organization for Social Science Research in Eastern and Southern Africa (OSSREA), 2010.

Thio, Li-Ann. "Panacea, Placebo, or Pawns? The Teething Problems of the Human Rights Commission of Malaysia (Suhakam)." *George Washington International Law Review* 40/4 (2009): 1271–1342.

UN. "Basic Principles and Guidelines on Development-based Evictions and Displacement" (2007).

UN Commission on Human Rights. "Forced Evictions: Resolution 77/1993," E/CN.4/RES/1993/77 (1993).

UN Commission on Human Rights. "Prohibition of Forced Evictions: Resolution 28/2004," E/CN.4/RES/2004/28 (2004).

UN Economic Council. Report of the Special Rapporteur on the Right to Food, Jean Ziegler, Mission to Ethiopia, E/CN.4/2005/47/Add.1, 8 February 2005.

Vaughan, Sarah, and Kjetil Tronvoll. *The Culture of Power in Contemporary Ethiopian Political Life*. SIDA Studies No. 10 (2005).

Welch, Claude E. *Protecting Human Rights in Africa: Strategies and Roles of Non-Governmental Organizations*. University of Pennsylvania Press, 1995.

World Bank. *Ethiopia: Legal and Judicial Sector Assessment* (2004).

CHAPTER 13

Gender Equality, Women's Rights, and Environmental Sustainability

The Case of Climate Change

Nicky Broeckhoven

Abstract

This paper seeks to draw attention to the linkages between gender equality, women's rights, and climate change by exploring its international legal and policy dimension. To this end, the paper describes how these linkages have been addressed both within the international climate change regime and the international human rights regime. The analysis shows that both regimes have recognized, to a certain extent, the importance of integrating a gender and human rights perspective into efforts to tackle climate change. However, so far, attempts to integrate both perspectives have taken a parallel rather than an integrated approach. Therefore, the author highlights the need for a gender-responsive human rights-based approach to climate change.

Keywords

gender mainstreaming – gender equality – social inequality – human rights based approach – Convention on the Elimination of All Forms of Discrimination against Women – climate change regime – Conferences of the Parties

1 Introduction

The signs of climate change and global warming are all around us. Climate change poses huge challenges to every country in the world, not only because of its environmental impacts but also because of the economic and social issues it raises. The 2007 UNDP Human Development Report stated that "climate change is the defining human development issue of our generation."[1]

1 United Nations Development Programme (UNDP), *Human Development Report 2007/2008: Fighting Climate Change: Human Solidarity in a Divided World* (*Summary*) (New York: UNDP, 2007), 7, accessed May 2, 2014, http://hdr.undp.org/en/reports.

 | DOI 10.1163/9789004280250_015

For millions of people climate change means loss of livelihood, displacement, conflict, hunger, and poverty. As such, the effects of climate change can and are already jeopardizing the progress made so far by development. At the same time, climate change also affects our notion of development as it becomes crucial to find ways to align the pursuit of development with the avoidance of further destroying our planet. Climate change is not only interfering with development and the right to it. It is also undermining a broad range of other internationally protected human rights such as rights to life and security, health, adequate food, water, shelter, and property.[2] For developing countries and vulnerable populations dealing with climate change has become a daily struggle to survive.

However, the impacts of climate change are not only disproportionately felt by the poorest and most vulnerable communities. There are also disparities along the gender lines. The aim of this paper is to critically assess the linkages between gender equality, women's rights, and climate change from an international legal perspective. First, the linkages between gender equality, women's rights, and climate change are briefly addressed (Section II). Second, an extensive overview is provided of the way these linkages have been made in the international climate change regime and the international human rights regime (Section III). Based on this overview, the author then discusses the need for a gender-responsive human rights-based approach to climate change as a complementary and reinforcing tool to gender mainstreaming (Section IV). To conclude, existing gaps at the international level are highlighted and the relevance in a national context is demonstrated.

2 Linking Gender Equality, Women's Rights, and Climate Change

The linkages between gender equality, women's rights, and climate change are highly complex and multi-dimensional.[3] However, if we look at the majority of literature on gender and climate change, we often find a very narrow interpretation of what gender equality and women's rights mean in the context of

2 Siobhán McInerney-Lankford, Mac Darrow and Lavanya Rajami, *Human Rights and Climate Change. A Review of the International Legal Dimensions* (Washington, D.C.: The World Bank, 2011), 145.

3 See Irene Dankelman, ed., *Gender and Climate Change: An Introduction* (London: Earthscan, 2010); BRIDGE, *Gender and Climate Change Cutting Edge Pack* (UK: Institute for Development Studies, 2011), accessed April 28, 2014, http://www.bridge.ids.ac.uk/go/bridge-publications/cutting-edge-packs/.

climate change. The linkages between gender and climate change are often brought down to women's vulnerability to climate change (women as victims) and to their role as agents of change. This narrow approach has been criticized by a number of authors for detracting attention from the underlying problems.[4] Identifying women's specific needs and vulnerabilities in the context of climate change is highly important. However, analyzing the gender dimensions of climate change to really understand why some women are particularly vulnerable and why they can play a crucial role as agents of change requires a much broader approach. Men and women experience climate change differently and their capacity to cope with it varies because of existing inequalities, pervasive discrimination, women's limited access and control over resources, and their restricted rights. These aspects are overlooked when focusing only on women's needs and vulnerabilities to climate change. A true gender analysis in the climate context needs to look at underlying social and gender inequalities and power imbalances that influence the extent to which people (both men and women) are affected by climate change.

3 Recognition of Linkages in International Law and Policy

During the last three decades, the crucial link between gender equality, women's rights, and environmental sustainability has increasingly been recognized at the international level.[5] This section provides an overview of how the linkages between gender equality, women's rights, and climate change have been addressed in both the international climate change regime and the international human rights regime.

3.1 *International Climate Change Regime*

The 1992 United Nations Framework Convention on Climate Change[6] (hereafter, UNFCCC) provides the common international framework to address the causes and consequences of climate change. The ultimate goal of the

4 See Seema Arora-Jonsson, "Virtue and Vulnerability: Discourses on Women, Gender and Climate Change," *Global Environmental Change* 21/2 (2011): 744–751; Sherilyn MacGregor, "Gender and Climate Change: From Impacts to Discourses," *Journal of the Indian Ocean Region* 6/2 (2010): 223–238.

5 For a good overview, see Irene Dankelman, "Women Advocating for Sustainable Livelihoods and Gender Equality on the Global Stage," in *Women Reclaiming Sustainable Livelihoods. Spaces Lost, Spaces Gained*, ed. Wendy Harcourt (UK: Palgrave Macmillan, 2012), 21–41.

6 United Nations Framework Convention on Climate change (UNFCCC), May 9, 1992, S. Treaty Doc No. 102–138, 1771 U.N.T.S. 107.

Convention is to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent anthropogenic interference with the climate system. Initially, the climate change negotiations focused mainly on scientific, environmental, and economic aspects. Only as scientific understanding has evolved and impacts on human lives and living conditions have become more evident, has the focus of the debate broadened and increased attention been given to the human and social dimensions of climate change.[7] As a result, gender issues hardly figured in the international legal and policy discourse on climate change until 2009. Neither the UNFCCC itself, nor its Kyoto Protocol[8] referred in any way to gender aspects and their relation to climate change.

The first text on gender equality and women's participation appeared in the outcome documents of the Conference of the Parties[9] (hereafter, COP) session in Marrakesh in 2001. During that session, the Parties to the UNFCCC adopted a specific decision to improve the participation of women in the UNFCCC process.[10] They also recognized that gender equality should be one of the guiding elements in the preparation of National Adaptation Programmes of Action (NAPAs).[11] Despite this initial recognition of the importance of gender issues,

7 United Nations High Commissioner for Human Rights, *Report of the OHCHR on the Relationship between Climate Change and Human Rights* (A/HRC/10/61, January 15, 2009), 3, accessed May 2, 2014, http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx.

8 Kyoto Protocol to the United Nations Framework Convention on Climate Change (KP), Dec. 10, 1997, 2303 U.N.T.S. 148.

9 The Conference of the Parties (COP) is the supreme decision-making body of the UNFCCC. All State Parties to the Convention are represented at the COP, at which they review the implementation of the Convention and any other legal instruments that the COP adopts and make decisions necessary to promote the effective implementation of the Convention, including institutional and administrative arrangements. All COP decisions can be found at: https://unfccc.int/documentation/decisions/itms/3597.php.

10 UNFCCC Decision 36/CP.7, "Improving the participation of women in the representation of Parties in bodies established under the United Nations Convention on Climate Change and the Kyoto Protocol," FCCC/CP/2001/13/Add. 4.

11 The UNFCCC requires that Least Developed Countries (LDCs) submit a National Adaptation Programme of Action (NAPA) in which the country describes its priorities and strategies in relation to climate change. In 2001, Parties to the UNFCCC adopted a set of guidelines for the preparation of NAPAs through UNFCCC Decision 28/CP.7. Gender equality was recognized as one of the guiding elements in the preparation of the NAPAs and it was advised that gender issues be included in NAPA teams (UNFCCC Decision 28/CP.7, Annex, D, 7(e)). During the last few COP meetings, decisions have been taken that move beyond gender equality as a guiding principle towards taking a gender-sensitive

the outcome decisions of the following nine COP sessions where completely gender-blind. However, the tide turned again during the 16th COP session in 2010 with the adoption of the Cancun Agreements. The Agreements recognized that gender equality and the effective participation of women are important for effective action on all aspects of climate change. They also recognized that a gender-sensitive approach to action on adaptation should be taken, that gender considerations should be addressed when developing and implementing national strategies or action plans on climate mitigation, and that gender aspects related to capacity-building should be taken into account.[12]

Since the Cancun Agreements, attention to gender issues during the climate negotiations has increased considerably. The COP outcome decisions have since integrated references to gender in each of the main UNFCCC focus areas (including adaptation, mitigation, finance, technology, and capacity-building). This can be concluded from looking at the decisions of the last three COP sessions. The decisions of the 17th COP session in Durban, for example, strongly built upon the foundations of the Cancun Agreements by reiterating its gender language.[13] Additionally, this COP session also adopted a decision on the launch of the Green Climate Fund which included references to gender balance and women's participation.[14] The last two climate sessions, COP 18 and COP 19, have even been described as 'Gender COPs' due to the considerable attention given to gender issues. During the climate talks of COP 18, gender issues were the focal point of discussion. This resulted in the adoption of a new decision for promoting gender balance and improving the participation of

approach to action on adaptation (UNFCCC Decision 5/CP.17, I, 3 and UNFCCC Decision 12/CP.18, preamble, para. 9).

12 UNFCCC Decision 1/CP.16, "The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention," FCCC/CP/2010/7/Add. 1, March 15, 2011. References to 'gender' and 'women' can also be found in two other COP 16 decisions: UNFCCC Decision 6/CP.16 and UNFCCC Decision 7/CP. 16.

13 See UNFCCC Decision 2/CP.17, "Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention," FCCC/CP/2011/9/Add. 1. With one exception though, in 2010, gender equality and the effective participation of women had been seen as a cross-cutting issue in Section I (shared vision for long-term cooperative action) of the Cancun Agreements (UNFCCC Decision 1/CP.16, I, 7). Unfortunately, this was not reiterated in the Durban Outcomes of 2011.

14 Annex to UNFCCC Decision 3/CP.17, "Launching the Green Climate Fund," FCCC/CP/2011/9/Add.1. References to gender issues can be found in Part I 'Objectives and guiding principles', Part II 'Governance and institutional arrangements', Part V 'Operational modalities', and Part XIII 'Stakeholder input and participation'.

women.[15] The decision recognized "the need for women to be represented in all aspects of the UNFCCC process (…) in order to inform gender-responsive climate policy." It also invited State Parties to take a number of actions to improve the participation of women, such as committing to meeting the goal of gender balance, encouraging more women to be candidates for positions in UNFCCC bodies, and striving for gender balance in their delegations to the UNFCCC meetings. Unfortunately, we can't say that these constitute hard obligations for Parties as the wording of the text allows the Parties the discretion as to whether they will comply with the invitation. However, the UNFCCC secretariat did request Parties and observer organizations to submit their views on options and ways to advance the goal of gender balance.[16] During the last COP session in Warsaw, State Parties continued to build on this gender momentum by adopting draft conclusions on gender and climate change.[17]

Slowly but surely gender issues have found their way onto the international climate agenda.[18] However, despite the progress in terms of integrating gender issues within the frame of the UNFCCC, Parties still fail to fully acknowledge the need for gender equality when addressing climate change. While the call for 'gender balance' is important from an equity and human rights perspective, it will be insufficient to reach the goal of substantial gender equality which is needed to transform underlying social and gender inequalities.[19]

The overview above shows that, within the UNFCCC negotiations, gender aspects and in particular women's participation have increasingly received attention since 2009. A similar but less dynamic development can be seen in terms of integrating human rights language in these negotiations. The first explicit reference to 'human rights' was made in the 2010 Cancun Agreements. In the shared vision for long-term cooperative action, the Cancun Agreements emphasized that "Parties should, in all climate change-related actions, fully

15 UNFCCC Decision 23/CP.18, "Promoting gender balance and improving the participation of women in the UNFCCC negotiations and in the representation of Parties in bodies established pursuant to the Convention or the Kyoto Protocol," FCCC/CP/2012/8/Add.3 (See also n. 10).

16 The full text of the submissions from Parties to the COP and from Observers can be found under the heading 'Documents & Decisions', http://www.unfccc.int/.

17 UNFCCC, Subsidiary Body for Implementation (SBI), "Gender and Climate Change. Draft conclusions proposed by the Chair," FCCC/SBI/2013/L.16.

18 Both literally and figuratively as UNFCCC Decision 23/CP.18 decided to "add the issue of gender and climate change as a standing item on the agenda of the session of the Conference of the Parties" (art. 9).

19 GenderCC-Women for Climate Justice, "Press Statement: Ironically Gender in the Fossil Patriarchy," Dec. 8, 2012, accessed May 2, 2014, http://www.gendercc.net/.

respect human rights" [emphasis added].[20] This paragraph forms the first important and comprehensive step towards establishing human rights protections in the climate regime.[21] Through the recognition of Parties' existing human rights obligations, the UNFCCC has determined that climate policies, institutions, and mechanisms should be guided by human rights considerations.[22] The decisions adopted in the frame of the next COPs, however, did not explicitly refer to human rights.[23] This is highly deplorable as the issues discussed and decisions taken do have real impacts on the lives and livelihoods of people, especially of those most vulnerable to climate change.[24] Even though explicit human rights language within the frame of the UNFCCC is highly limited, the UNFCCC COP decisions have increasingly referenced international human rights instruments.[25]

3.2 *International Human Rights Regime*

Section 3.1 has provided an overview of the linkages between gender equality, women's rights, and climate change made in the international climate change regime. This section takes a closer look at the international human rights regime to find out how this regime has dealt with the linkages.

3.2.1 Human Rights Instruments

The notion that both men and women should be able to enjoy their human rights has been integrated into all the main international human rights

20 UNFCCC Decision 1/CP.16, "Cancun Agreements," Section I, *supra* n. 12, 8.

21 Center for International Environmental Law (CIEL), "Analysis of Human Rights Language in the Cancun Agreements," Updated March 14, 2011, accessed May 2, 2014, http://www.ciel.org/Publications/HR_Language_COP16_Mar11.pdf.

22 Center for International Environmental Law (CIEL), "Analysis of Human Rights Language in the Cancun Agreements," Updated March 14, 2011, accessed May 2, 2014, http://www.ciel.org/Publications/HR_Language_COP16_Mar11.pdf.

23 However, they are included in the overall outcome by reference to the Cancun Agreements. UNFCCC Decision 1/CP. 18 recalled UNFCCC decision 1/CP.13 (Bali Action Plan), decision 1/CP.16 (Cancun Agreements), decision 1/CP.17 (Outcome AWG-LCA) and decision 2/CP.17 (Establishment of AWG-DPA).

24 For a good overview of these rights-related issues, see: Center for International Environmental Law (CIEL), "Human Rights Analysis of the Doha Gateway," last revised May 29, 2013, accessed May 2, 2014, http://www.ciel.org/.

25 For example: UNFCCC Decision 36/CP.7 recalled the Beijing Declaration of the Fourth World Conference on Women and the Beijing Platform of Action, *supra* n. 10; UNFCCC Decision 23/CP. 18 recalled the Convention on the Elimination of All Forms of Discrimination against Women and the Beijing Declaration and Platform for Action, *supra* n. 15.

instruments.[26] The Charter of the United Nations, as the foundation of our international human rights system, reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women."[27] The so-called Bill of Human Rights including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), refers explicitly to the principles of non-discrimination and equality.[28] The UDHR proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.[29] State Parties to these International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil, and political rights. Additionally, more specialized international human rights instruments affirm that State Parties shall respect and ensure the rights as laid down therein without distinction of any kind.[30] As such, all of these international human rights instruments are relevant to linking gender equality, women's rights, and climate change.

However, this part focuses specifically on one international human rights instrument of much relevance for linking gender equality, women's rights, and climate change: *the Convention on the Elimination of All Forms of Discrimination against Women* (hereafter, CEDAW).[31] This Convention, adopted in 1979 by the UN General Assembly, defines what constitutes discrimination against women[32] and sets out an agenda for national action to end such

26 Fleur Van Leeuwen, "The United Nations and the Promotion and Protection of Women's Human Rights: A Work in Progress," in *The Women's Convention turned 30*, ed. Ingrid Westendorp (Cambridge: Intersentia, 2012), 16.

27 United Nations, *Charter of the United Nations*, Preamble, para. 1, Oct. 24, 1945, 1 U.N.T.S. XVI.

28 UN General Assembly, *Universal Declaration of Human Rights*, Dec. 10, 1948, 217 A (III); UN General Assembly, *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, Dec.16, 1966, 993 U.N.T.S. 3.

29 Articles 1–2, Universal Declaration of Human Rights.

30 Van Leeuwen, "Women's Human Rights," 16.

31 UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (*cedaw*), Dec. 18, 1979, UN Doc. A/34/46, 1249 U.N.T.S. 13.

32 The Convention defines discrimination against women as: *...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a*

discrimination. By accepting CEDAW, State Parties commit themselves to undertaking a series of measures to end discrimination against women. They also agree to ensure that women can enjoy all of their human rights and fundamental freedoms. Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice.[33]

Although CEDAW does not explicitly address environmental concerns, the Convention has its importance in the climate change context as the advancement of women's rights and gender equality is critical for progress towards sustainable development.[34] In this regard, a number of provisions are highly relevant. Examples include article 2, article 7 (participation in political and public life), article 10 (education/information), article 12 (health), and articles 11 and 13 (employment). One provision that stands out in terms of relevance is article 14 of CEDAW. This article, which specifically addresses the human rights of rural women, can be considered as a gateway to bring sustainable development and environmental issues within CEDAW. As rural women are often disproportionately impacted by climate change, due to their social roles and the discrimination they face, climate change issues should fall within the scope of article 14 CEDAW.

The CEDAW Committee, the treaty body of independent experts that monitors the implementation of the CEDAW Convention, has played a crucial role in connecting women's rights to climate change through its General Recommendations.[35] The purpose of the General Recommendations is to provide appropriate and authoritative guidance to State Parties on the measures to be adopted to ensure full compliance with their obligations to respect, protect, and fulfill the rights of women. In General Recommendation no. 27 on

basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (Article 1, CEDAW).

33 For more information on CEDAW, see: http://www.un.org/womenwatch/daw/cedaw/ and http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx.

34 UN Women Policy Division, *A Transformative Stand-alone Goal on Achieving Gender Equality, Women's Rights and Women's Empowerment: Imperatives and Key Components* (US: UN Women, 2013), 48, accessed May 2, 2014, http://www.unwomen.org.

35 The following CEDAW General Recommendations include references to environmental issues: General Recommendation no. 28, "The Core Obligations of States Parties under article 2 of CEDAW," Dec. 16, 2010; General Recommendation no. 27, "Older Women and Protection of Their Human Rights," Dec. 16, 2010; General Recommendation no. 26, "Women Migrant Workers," Dec. 5, 2008; General Recommendation no. 23, "Women in Political and Public Life," 1997; General Recommendation no. 21, "Equality in Marriage and Family Relations," 1994.

older women and their human rights, the Committee stated that climate change has different impacts on women, especially on older women. It was highlighted that they are particularly disadvantaged in the face of natural disasters:

> due to their physiological differences, physical ability, age and gender, as well as social norms and roles and an inequitable distribution of aid and resources relating to social hierarchies.[36]

The Committee recommended State Parties to "ensure that climate change and disaster risk-reduction measures are gender-responsive and sensitive to the needs and vulnerabilities of older women." Furthermore, "States Parties should also facilitate the participation of older women in decision-making for climate change mitigation and adaptation."[37] It is to be hoped that future General Recommendations by the Committee will continue to address climate change issues in order to make the linkages between women's rights and climate change even more clear.

Besides General Recommendations, the CEDAW Committee also issues *Statements* during its annual sessions. One of these *Statements* has dealt specifically with the issue of gender and climate change. In this *Statement*, the CEDAW Committee expressed concern about the lack of gender perspective in global and national policies and initiatives on climate change.[38] According to its examination of State Parties' reports, climate change does not affect women and men in the same way, and thus has a gender-differentiated impact. Therefore, the Committee highlights that "all stakeholders should ensure that climate change and disaster risk reduction measures are gender responsive, sensitive to indigenous knowledge systems and respect human rights." Furthermore, the Committee states that "women's right to participate at all levels of decision-making must be guaranteed in climate change policies and programmes."[39] Specifically with regard to the UNFCCC, the Committee calls for the inclusion of gender equality in alignment with various international

36 Para. 25, General Recommendation no. 27, "Older Women and Protection of Their Human Rights," Dec. 16, 2010.

37 Ibid., para. 35.

38 CEDAW Committee, "Statement of the CEDAW Committee on Gender and Climate Change," 44th session, 2009, accessed on May 2, 2014, http://www2.ohchr.org/english/bodies/cedaw/docs/Gender_and_climate_change.pdf.

39 Ibid., para. 1.

agreements such as the CEDAW Convention, the Beijing Platform for Action, and ECOSOC resolution 2005/31.[40]

3.2.2 UN Human Rights Institutions

This section takes a closer look at different UN human rights institutions that have addressed the linkages between gender, (women's) human rights, and climate change.[41]

Commission on the Status of Women

The Commission on the Status of Women (hereafter, CSW) is the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the empowerment of women. According to UN Women, the Commission is "instrumental in promoting women's rights, documenting the reality of women's lives throughout the world, and shaping global standards on gender equality and the empowerment of women."[42] The CSW has addressed the linkages between gender, women's rights, and climate change on a number of occasions.

CSW Agreed Conclusions

The first mention of the link between gender and climate change by the CSW was made in the Agreed conclusions of its 46th session in 2002.[43] During that session, the CSW convened an expert panel discussion on the gender

40 Over the years, the UN Economic and Social Council (ECOSOC) has adopted a number of resolutions related to gender mainstreaming. An overview of these resolutions can be found at: http://www.unwomen.org/~/media/Headquarters/Attachments/Sections/How%20We%20Work/UNSystemCoordination/UNWomen-GenderMainstreamingReportsAndResolutions-en%20pdf.pdf.

41 Not only international human rights institutions like the HRC and the OHCHR have addressed the link between human rights and climate change; also in literature a number of good overviews are available. Non-exhaustive: McInerney-Lankford, Darrow and Rajami, *Human Rights and Climate Change*, *supra* n. 2; Stephen Humphreys, *Climate Change and Human Rights: A Rough Guide* (Switzerland: ICHR, 2008), 107, accessed from http:www.ichrp.org/; Stephen Humphreys, ed., *Human Rights and Climate Change* (UK: Cambridge University Press, 2009), 348.

42 "Commission on the Status of Women," on UN Women website, accessed May 2, 2014, http://www.unwomen.org/en/csw.

43 The Commission on the Status of Women took up the issue of 'women and the environment' for the first time during its 41st session in 1997. During that session, the CSW held a panel discussion on the issue, which led to the adoption of Agreed conclusions. See CSW, Agreed conclusions 1997/1, "Women and the Environment," E/1997/27 CSW.

perspective in environmental management and mitigation of natural disasters.[44] As a result of that discussion, the CSW adopted agreed conclusions on the issue.[45] In the conclusions, the CSW first recalled existing international mandates on 'women and environment' like the Beijing Declaration and the Platform for Action.[46] With respect to climate change, the CSW urged governments to take action to accelerate implementation of the strategic objectives to address the needs of all women. Amongst these actions is the mainstreaming of:

> a gender perspective into ongoing research by, inter alia, the academic sector on the impact of climate change, natural hazards, disasters and related environmental vulnerability, including their root causes, and encourage the applications of the results of this research in policies and programmes.[47]

Six years later, during its 52nd session in 2008, the CSW explicitly considered 'gender perspectives on climate change' as an emerging issue. During an interactive expert panel on the issue, the CSW had the chance to discuss gender issues in relation to climate change mitigation, adaptation, technology, and financing.[48] Participants of the panel affirmed that "climate change is not a gender-neutral phenomenon" by highlighting many of its gender-specific impacts.[49] From a policy perspective, they stressed the need for the adoption of gender equality principles both at the international and national level.[50] They observed that climate change discussions had largely been gender-blind. The panel also moved beyond specific gender issues to address the wider social justice dimension by suggesting that climate change should be approached

44 For additional information on the CSW panel 'Environmental management and the mitigation of natural disasters: a gender perspective', see: http://www.un.org/womenwatch/daw/csw/csw46/46CSWPanel2.htm (accessed May 2, 2014).

45 CSW, Agreed conclusions, "Environmental Management and Mitigation of Natural Disasters: A Gender Perspective," 129–135, accessed May 2, 2014, http://www.un.org/womenwatch/daw/csw/agreedconclusions/Agreed%20conclusions%2046th%20session.pdf.

46 Ibid., para. 1.

47 Ibid., para. 7(e).

48 52nd Session of the Commission on the Status of Women, *Issues Paper on 'Gender Perspective on Climate Change'*, accessed May 2, 2014, http://www.un.org/womenwatch/daw/csw/52sess.htm.

49 52nd Session of the Commission on the Status of Women, *Moderator's summary*, para. 2 (see also n. 48).

50 Ibid., para. 12.

from a human rights perspective.[51] In practice, this would mean ensuring that the UNFCCC complies with different international human rights instruments, including CEDAW.

However, the CSW has not yet adopted agreed conclusions on 'gender and climate change'. This is a pity as its agreed conclusions normally provide a set of concrete recommendations for governments, intergovernmental bodies, other institutions, civil society actors, and other relevant stakeholders, to be implemented at all policy levels. Despite the fact that, since 2009, the UNFCCC has increasingly paid attention to gender issues, agreed conclusions on gender and climate change could still provide a valuable addition.

CSW Resolutions

The CSW has not only touched upon the linkages between gender equality and climate change in its agreed conclusions, it has also adopted a resolution on the issue. During its 55th session in 2011, the CSW adopted a resolution on 'Mainstreaming gender equality and promoting empowerment of women in climate change policies and strategies'.[52] The resolution recalls different existing international instruments which contain commitments on women's empowerment and climate change.[53] It calls upon governments to:

> integrate a gender perspective in environmental and climate change policies and to strengthen mechanisms (including adequate resources) to ensure women's full and equal participation in decision-making at all levels on environmental issues.[54]

Directly linked to the international climate change regime, the resolution encourages governments to integrate a gender component into their periodic reporting as State Parties to the UNFCCC. Furthermore, governments were called upon to continue to incorporate a gender perspective and to make efforts to ensure the effective participation of women in ongoing climate change talks.[55]

---

51 Ibid., paras. 15–16.

52 CSW Resolution, "Mainstreaming Gender Equality and Promoting Empowerment of Women in Climate Change Policies and Strategies," March 1, 2011, accessed May 2, 2014, http://www.un.org/womenwatch/daw/csw/csw55/other-outcomes/Climate-change-adv-unedit.pdf.

53 Ibid., preamble.

54 Ibid., para 2.

55 Ibid., paras. 11–12.

Human Rights Council

The Human Rights Council (hereafter, HRC) was established by the UN General Assembly as the key United Nations intergovernmental body responsible for human rights. In that capacity, the Human Rights Council has played a key role in addressing the linkages between human rights and climate change. Between 2008 and 2011, the HRC adopted three resolutions on human rights and climate change which are also highly relevant in terms of linking gender equality, women's rights, and climate change.

Its first resolution on human rights and climate change was issued on March 28, 2008.[56] The HRC expressed its concern about the immediate and far-reaching threat that climate change poses to people and communities around the world and about the implications thereof for the full enjoyment of human rights. The HRC also reaffirmed a number of existing international conventions and frameworks related to human rights and environment/climate change. However, the main decision of the resolution was a request to the Office of the High Commissioner for Human Rights (OHCHR) to conduct a detailed analytical study of the relationship between climate change and human rights.

On March 25, 2009, the HRC adopted its second resolution on human rights and climate change.[57] The resolution noted that "climate change related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights."[58] It recognized that:

> the effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous status and disability

and that "effective international cooperation (…) is important to support national efforts for the realization of human rights implicated by climate change related impacts."[59] The resolution also affirmed that:

56 Human Rights Council, Resolution 7/23, "Human Rights and Climate Change," March 28, 2008, accessed May 2, 2014, http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Study.aspx.

57 Human Rights Council, Resolution 10/4, "Human Rights and Climate Change," March 25, 2009, accessed May 2, 2014, http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf.

58 Ibid., preamble, §7.

59 Ibid., preamble, §8–9.

> human rights obligations and commitments have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes.[60]

With this last paragraph, the HRC highlighted the importance of applying a human rights-based approach to the global climate crisis.[61]

Two years later, the HRC adopted its third resolution on human rights and climate change.[62] To a large extent, the resolution reiterated the preambular paragraphs of the last HRC resolution on human rights and climate change. Furthermore, the resolution requested the OHCHR to convene a seminar on addressing the adverse impacts of climate change on the full enjoyment of human rights.[63]

Both its second and third resolution made an explicit reference to gender as one of the factors making people vulnerable to climate change. In its second resolution, the HRC recognized that the effects of climate change will be felt most acutely by the people who are already in vulnerable situations because of different factors such as gender. This was reiterated in its third resolution.[64]

The Office of the High Commissioner for Human Rights

The Office of the High Commissioner for Human Rights (hereafter: OHCHR) is mandated to promote and protect all human rights established in the Charter of the UN and in international human rights law. In addition to its core mandate, the OHCHR leads efforts to integrate a human rights approach within all work carried out by the UN agencies.[65] In recent years, the OHCHR has also

60 Ibid., preamble, §10.

61 Office of the High Commissioner for Human Rights (OHCHR), "Concept paper: Seminar on Addressing the Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights," 2, accessed May 2, 2014, http://www.ohchr.org/en/Issues/HRAndClimateChange/Pages/HRCseminaronHRandclimatechange.aspx.

62 Human Rights Council, Resolution 18/22, "Human Rights and Climate Change," September 30, 2011, accessed May 2, 2014, http://www.ohchr.org/Documents/Issues/ClimateChange/A.HRC.RES.18.22.pdf.

63 The report of this seminar will be discussed below.

64 Albeit in slightly different language as HRC Resolution 10/4 used the wording '*recognizing*' whereas HRC Resolution 18/22 used the wording '*expressing concern*'.

65 "Mandate," Office of the High Commissioner for Human Rights Website, accessed May 2, 2014, http://www.ohchr.org/EN/AboutUs/Pages/Mandate.aspx.

taken up climate change issues and has supported the Human Rights Council in developing the linkages between human rights and climate change.[66]

In January 2009, the OHCHR drafted a detailed analytical study on the relationship between climate change and human rights. As mentioned above, this study had been requested by the HRC in its resolution 7/23. The OHCHR report of the study included a number of important conclusions. They were summarized by John Knox as follows:

> climate change threatens the enjoyment of a broad array of human rights; climate change does not, however, necessarily violate human rights; human rights law nevertheless places duties on States concerning climate change and those duties include an obligation of international cooperation.[67]

In addition to these overarching conclusions, the OHCHR report also included a section about the effects of climate change on specific groups, namely women, children, and indigenous people.[68] In this section, the OHCHR report first reiterated the 2007 IPCC report by stating that:

> the effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations due to factors such as poverty, gender, age, minority status and disability.[69]

Based on this information, the OHCHR concluded that states are legally bound to address such vulnerabilities in accordance with the principle of equality and non-discrimination.[70] The section of the report that deals with women, as a specific group, addressed the reasons behind their vulnerability to climate change and highlighted their potential for successful climate change

66 International Council on Human Rights Policy, *Advancing the Human Rights and Climate Change Agenda at the United Nations. Possibilities and Challenges*, A supporting paper to the 2011 Report of the Panel on Human Dignity, Dec. 2011, 7, accessed May 2, 2014, http://www.ichrp.org.

67 John Knox, "Linking Human Rights and Climate Change at the United Nations," *Harvard Environmental Law Review* 33 (2009): 477, accessed May 2, 2014, http://www.law.harvard.edu/students/orgs/elr/vol33_2/Knox.pdf.

68 OHCHR, "Report on Climate Change and Human Rights," 2009, *supra* n. 7, paras. 42–54.

69 Martin Parry et al., eds., *Contribution of the Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (UK: Cambridge University Press, 2007), Chapter 7, 374, http://www.ipcc.ch.

70 OHCHR, "Report on Climate Change and Human Rights," 2009, *supra* n. 7, para. 42.

adaptation.[71] In this regard, the report stressed the need to assess and address the gender-differentiated impacts of climate change as underlined by international human rights standards and principles.[72]

In February 2012, the OHCHR convened a seminar on addressing the adverse impacts of climate change on the full enjoyment of human rights, in accordance with HRC resolution 18/22.[73] During the seminar, the development of a human rights-based approach to climate change was discussed extensively.[74] The High Commissioner for Human Rights stated that "the international development policy framework must necessarily be based on an understanding of climate change from a human rights perspective" in order to avoid progress at the cost of the most vulnerable and discriminated members of society.[75] The panelists of the 1st session further explained that a human rights-based approach should inform all policies related to climate change.[76] Taking a human rights-based approach, according to the panelists of the 4th session, will assist states in recognizing if and where they are failing to fulfill their international and domestic obligations.[77]

The seminar also touched upon the gender dimensions of climate change. During her keynote speech, the High Commissioner for Human Rights noted the gender-differentiated impacts of climate change.[78] Furthermore, panelists acknowledged the difficulty of integrating a gender perspective due to the dominant climate change discourse.[79] One of the rapporteurs highlighted the need for stronger linkages between the human rights and climate change communities. In this regard, close attention must be paid to members of vulnerable and marginalized groups and communities that will be affected the most by climate change. As women will face the largest impacts of climate change, the report of the OHCHR concluded that the gender dimensions of climate change must be clarified.[80]

---

71 Ibid., paras. 45–46.

72 Ibid., para. 47.

73 HRC, Resolution 18/22, *supra* n. 62, para. 2(a).

74 Office of the High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Outcome of the Seminar Addressing the Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights* (A/HRC/20/7), April 10, 2012, accessed May 2, 2014, http://www.ohchr.org.

75 Ibid., para. 7.

76 Ibid., para. 24.

77 Ibid., para. 48.

78 Ibid., para. 5.

79 Ibid., para 22.

80 Ibid., paras. 56–57.

4 A Gender-Responsive *Human* Rights-Based Approach to Climate Change

The overview of the linkages that have been made between gender equality, women's rights, and climate change by both the international climate change regime and the international human rights regime (Section 3), leads to two conclusions. On the one hand, there have been efforts to mainstream gender within the international climate change negotiations and outcome documents. On the other hand, the linkages between human rights and climate change have increasingly been recognized in the international human rights regime and there have been attempts to include a gender angle.

4.1 *Gender Mainstreaming & Climate Change*

As shown, attempts have been made to mainstream a gender perspective into the international climate change regime. Over the last few years, a lot of attention has been paid to the need for gender balance and women's participation within the UNFCCC process. To a certain extent, the link between gender issues and different key aspects of climate change (adaptation, mitigation, finance, capacity-building) has also been recognized and addressed. However, two important shortcomings can be detected. On the one hand, Parties don't seem to fully grasp the concept of gender and what exactly it means in the climate context. As mentioned above, gender balance and women's participation do not automatically lead to gender-sensitive or gender-responsive climate policy. On the other hand, while a lot of lip service has been paid to the issue of gender equality and women's participation within the international climate change regime, the implementation of these commitments is seriously lagging behind. Nevertheless, gender mainstreaming remains an important strategy for integrating women and gender aspects in international climate negotiations and politics. However, because of the complex linkages between gender and climate change, achieving true justice between men and women will require more fundamental changes in our societies.[81] Therefore, a gender-responsive human rights-based approach to climate change should be considered as a complementary and mutually reinforcing tool to gender mainstreaming.

81 See also LIFE e.V. and GenderCC, "Gender Mainstreaming and Beyond – 5 Steps Towards Gender-Sensitive Long-Term Cooperation," a submission made to the negotiating text for consideration at the 6th session of the AWG-LCA, accessed May 2, 2014, http://unfccc.int/resource/docs/2009/smsn/ngo/140.pdf.

4.2 *A Human Rights-Based Approach to Climate Change*

At the international level, the human rights-based approach (hereafter, HRBA) to climate change is gaining more and more ground. As mentioned, the Cancun Agreements to the UNFCCC highlighted that Parties should in all climate-related actions fully respect human rights. Within the international human rights regime, different institutions – especially the HRC and the OHCHR – have expressed the importance of taking a HRBA to climate change.

A HRBA to climate change has been proposed by international human rights institutions for a number of good reasons. First, a HRBA provides a conceptual framework which is based on existing international human rights standards and principles. According to the OHCHR, this approach seeks to "analyze obligations, inequalities and vulnerabilities and to redress discriminatory practices and unjust distributions of power that impede progress and undercut human rights."[82] As such, a HRBA would integrate the norms, standards, and principles of the international human rights system into the plans, policies, and processes related to climate change and the responses to it. Second, a HRBA to climate change would identify rights-holders and the corresponding duty-bearers. This would include empowering rights-holders to claim their rights from duty-bearers and to hold them accountable.[83] Third, as participation is one of the core principles of a HRBA, affected individuals and communities should be able to participate fully and effectively in the design and implementation of climate change adaptation or mitigation measures.[84] Fourth, a HRBA to climate change would focus on the rights of those who are already vulnerable and marginalized due to poverty and discrimination.[85] Last but not least, taking a HRBA to climate change would avoid limitations due to the 'horizontal' (governing state-to-state relations) application of environmental agreements like the UNFCCC and would allow for a 'vertical' (between a State Party and individual) application of human rights treaty provisions.[86]

As such, a HRBA is a powerful tool to address human rights violations resulting from climate change itself and from the responses to it. At the same time,

82 United Nations Office of the High Commissioner for Human Rights (OHCHR), "Applying a Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures," accessed May 2, 2014, http://www.ohchr.org/Documents/Issues/ClimateChange/InfoNoteHRBA.pdf.

83 Ibid., 1.

84 Ibid., 2; CIEL, "Analysis of Human Rights Language," *supra* n. 22.

85 Humphreys, *Climate Change and Human Rights* (2008), *supra* n. 41, 8.

86 McInerney-Lankford, Darrow and Rajami, *Human Rights and Climate Change*, *supra* n. 2, 434.

it is a powerful tool to complement efforts, taken at different levels, to grapple with climate change.[87]

4.3 *A Gender-Sensitive or Gender-Responsive HRBA to Climate Change*

A human rights-based approach to climate change however does not necessarily guarantee that women's human rights are respected, protected, and fulfilled. Neither does it guarantee a gender equal outcome. Taking a human rights-based approach to climate change is therefore an important step, but unless states ensure that this approach is gender-sensitive or even gender-responsive,[88] they will (continue to) fail their human rights obligations under international law.[89] As mentioned, the strategy of gender mainstreaming has been used as a way to integrate a gender perspective within the international climate change negotiations and outcome documents of the UNFCCC. However, a real connection between gender equality and human rights in addressing the issue of climate change has so far been absent. The international human rights regime, on the other hand, has recognized the need to connect gender issues, human rights, and climate change, albeit in a very one-sided way by focusing primarily on women's special vulnerability to climate change. In this regard, both regimes fail to comprehensively address the impacts of climate change on women's human rights and on gender equality.

To remedy the existing shortcomings, a gender-responsive HRBA to climate change is urgently needed as a complementary and mutually reinforcing approach to gender mainstreaming. Such an approach would require a number of actions. For example, a gender-sensitive impact assessment of all proposed policies, programs, and projects dealing with climate change, and related development issues, would need to be undertaken in order to determine whether or not international standards on women's human rights and gender equality would be violated. This approach would also require the evaluation and monitoring of existing climate change-related policies, programs,

87 OHCHR, "Applying a Human Rights Based Approach," *supra* n. 82, 2.

88 Definitions of these gender terms have been provided by LIFE e.V. in their submission pursuant to UNFCCC Decision 23/CP. 18. The term 'gender-sensitive' indicates gender awareness, although no remedial action is developed. The term 'gender responsive' goes further as it is understood as a policy or a program that considers gender norms, roles, and inequality with measures taken to actively reduce their harmful effects. LIFE e.V., "Submission to the Subsidiary Body for Implementation," August 28, 2013, accessed May 2, 2014, http://www.ohchr.org/Documents/Issues/ClimateChange/InfoNoteHRBA.pdf.

89 Abigail Ruane, Rachel Harris, and Nicky Broeckhoven, "Gender, Human Rights and Sustainable Development at the United Nations: A Guide to Agreed Language and a Strategy for Moving Forward" (WEDO Working Paper, 2013, unpublished).

and projects in order to expose gender-differentiated impacts, address women's human rights violations, and rectify gender and social inequalities. In that sense, a gender-responsive HRBA could contribute to achieving a transformative shift in our societies which is needed to achieve true justice between men and women in the area of climate change and beyond.

5 Conclusion

The aim of this paper is to critically assess the link between gender equality, women's rights, and climate change from an international legal perspective. The analysis of the international climate change regime and the international human rights regime has shown that both regimes have explicitly addressed the link between these three issues. However, it should be noted that the recognition of the link between gender equality, women's rights, and climate change has been quite recent and the extent to which these issues have been addressed remains rather superficial. In the international climate change regime increasing attention has been paid to gender issues since 2010. But State Parties still fail to fully acknowledge the need for gender equality and women's rights when addressing climate change. In the international human rights regime, both gender equality issues and human rights have been linked to climate change since 2009. Since then, considerable efforts have been made by international human rights institutions to take a gender and human rights perspective to climate change in accordance with their specific mandates. However, a true connection between gender equality and human rights in addressing climate change has been missing from both regimes.

Therefore the author has suggested a gender-sensitive or gender-responsive human rights-based approach to climate change as a complementary approach to gender mainstreaming. This kind of approach would help address the problem of gender injustice and human rights violations due to climate change in a more comprehensive way. It would help to achieve real justice between men and women and to guarantee that women's human rights are respected, protected, and fulfilled.

Although this paper has taken an international legal approach to gender equality, women's rights, and climate change, the findings are also highly relevant in a national context. On the one hand, national governments have recently paid a lot of lip service to the linkages between gender equality, women's rights, and climate change. In this regard, certain (political) commitments have been made. As part of these commitments, it is now time for national governments to turn these lofty words into action. On the other hand, climate

change is posing huge challenges for countries, governments, and people worldwide. As such, it is crucial for national governments to comprehensively address the linkages between gender equality, women's rights, and climate change within their own policies, strategies, and actions. Taking a gender-sensitive or gender-responsive human rights-based approach to the issue of climate change could help each country to tackle the adverse effects of climate change while guaranteeing that gender equality and human rights principles are upheld.

Bibliography

Arora-Jonsson, Seema. "Virtue and Vulnerability: Discourses on Women, Gender and Climate Change." *Global Environmental Change* 21/2 (2011): 744–751.

BRIDGE. *Gender and Climate Change Cutting Edge Pack*. UK: Institute for Development Studies, 2011. Accessed April 28, 2014. http://www.bridge.ids.ac.uk/go/bridge-publications/cutting-edge-packs/.

Center for International Environmental Law (CIEL). "Analysis of Human Rights Language in the Cancun Agreements." updated March 14, 2011. Accessed May 2, 2014. http://www.ciel.org/publications/HR_Language_COP16_March11.pdf.

Center for International Environmental Law (CIEL). "Human Rights Analysis of the Doha Gateway." last revised May 29, 2013. Accessed May 2, 2014. http://www.ciel.org/Publications/Analysis_Doha_10Apr2013.pdf.

Dankelman, Irene, ed. *Gender and Climate Change: An Introduction.* London: Earthscan, 2010.

Dankelman, Irene. "Women Advocating for Sustainable Livelihoods and Gender Equality on the Global Stage." In *Women Reclaiming Sustainable Livelihoods. Spaces Lost, Spaces gained*, ed. Wendy Harcourt, 21–41. UK: Palgrave, 2012.

GenderCC – Women for Climate Justice. "Press Statement: Ironically Gender in the Fossil Patriarchy." Dec. 8, 2012. Accessed May 2, 2014. http://www.gendercc.net/fileadmin/inhalte/Dokumente/UNFCCC_conferences/COP18/Press_statement_Doha_GenderCC.pdf.

Humphreys, Stephen. *Climate Change and Human Rights: A Rough Guide*. Switzerland: ICHRP, 2008. Accessed May 2, 2014. http://www.ichrp.org/.

Humphreys, Stephen, ed. *Human Rights and Climate Change.* UK: Cambridge University Press, 2009.

International Council on Human Rights Policy. *Advancing the Human Rights and Climate Change Agenda at the United Nations. Possibilities and Challenges.* Dec. 2011. Accessed May 2, 2014. http://www.ichrp.org.

Knox, John. "Linking Human Rights and Climate Change at the United Nations." *Harvard Environmental Law Review* 33 (2009): 477.

LIFE e.V. "Submission to the Subsidiary Body for Implementation, Pursuant to Decision 23/CP.18." August 28, 2013. Accessed May 2, 2014. http://unfccc.int/resource/docs/2013/smsn/ngo/361.pdf.

LIFE e.V. and GenderCC. "Gender Mainstreaming and Beyond – 5 Steps Towards Gender-Sensitive Long-Term Cooperation." Accessed May 2, 2014. http://unfccc.int/resource/docs/2009/smsn/ngo/140.pdf.

MacGregor, Sherilyn. "Gender and Climate Change: From Impacts to Discourses." *Journal of the Indian Ocean Region* 6/2 (2010): 223–238.

McInerney-Lankford, Siobhán, Mac Darrow and Lavanya Rajami. *Human Rights and Climate Change. A Review of the International Legal Dimensions*. Washington, D.C.: The World Bank, 2011.

Office of the United Nations High Commissioner for Human Rights (OHCHR). "Applying a Human Rights Based Approach to Climate Change Negotiations, Policies and Measures." Accessed May 2, 2014. http://www.ohchr.org/Documents/Issues/ClimateChange/InfoNoteHRBA.pdf.

Office of the United Nations High Commissioner for Human Rights (OHCHR). Report of the OHCHR on the Relationship between Climate Change and Human Rights (A/HRC/10/61), January 15, 2009.

Office of the United Nations High Commissioner for Human Rights (OHCHR). Report of the United Nations High Commissioner for Human Rights on the Outcome of the Seminar Addressing the Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights (A/HRC/20/7), April 10, 2012.

Parry, Martin, Osvaldo Canziani, Jean Palutikof, Paul Van der Linden, and Claire Hanson, eds. *Contribution of the Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*. UK: Cambridge, 2007.

Ruane, Abigail, Rachel Harris, and Nicky Broeckhoven. "Gender, Human Rights and Sustainable Development at the United Nations: A Guide to Agreed Language and a Strategy for Moving Forward." WEDO Working Paper, 2013. Unpublished.

United Nations Development Programme (UNDP). *Human Development Report 2007/2008: Fighting Climate Change: Human Solidarity in a Divided World* (*Summary*). New York: UNDP, 2007.

UN Women Policy Division. *A Transformative Stand-alone Goal on Achieving Gender Equality, Women's Rights and Women's Empowerment: Imperatives and Key Components*. US: UN Women, 2013. Accessed May 2, 2014. http://www.unwomen.org/lo/digital-library/publications/2013/7/post-2015-long-paper.

Van Leeuwen, Fleur. "The United Nations and the Promotion and Protection of Women's Human Rights: A Work in Progress," In *The Women's Convention Turned 30*, edited by Ingrid Westendorp, 13–29. Cambridge: Intersentia, 2012.

Index

Index entries marked in bold indicate a more in-depth treatment of the subject.