

Key Issues for Upholding Housing, Land and Property Rights

in the International Finance Corporation's Review of the Environmental and Social Policy and Standards

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“The international community bears an obligation to promote, protect and fulfill the human right to housing, land and property. International financial, trade, development and other related institutions and agencies, including member or donor States that have voting rights within such bodies, should take fully into account the prohibition on forced evictions under international human rights law and related standards.”

- UN Basic Principles and Guidelines on Development-based Evictions and Displacement

The following paper outlines key housing, land and property rights issues to consider during the review of the implementation and effectiveness of the International Finance Corporation's (IFC) Environmental and Social Policy and Performance Standards (Policy and PS). This paper is meant to provide a broad overview of human rights related to forced evictions, development-induced displacement (DID), and related provisions in the IFC Policy and PS. However, a more detailed look at how the IFC Policy and PS can better incorporate human rights, along with a thorough review of current IFC procedures regarding displacement, should be considered over the course of the consultation process.

Overview of Human Rights and Displacement

The rights to adequate housing and security of the person and property are basic tenets of human rights law and serve to protect individuals and communities from being arbitrarily displaced from their homes and land. These human rights apply to everyone—including owners, renters and possessors—and state that no matter

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***Housing and Land Rights Network (HLRN)** is an integral part of the Habitat International Coalition (HIC), and works for the recognition, defence, promotion, and realisation of the human rights to adequate housing and land, which involves securing a safe and secure place for all individuals and communities, especially marginalised communities, to live in peace and dignity. Contact: Shivani Chaudhry, Associate Coordinator, South Asia Regional Programme, landhousing@gmail.com.*

***The International Network on Displacement and Resettlement (INDR)** is composed of professionals working to assure that people who are forcefully displaced become beneficiaries rather than victims of development (www.displacement.net). Contact: Ted Downing PhD., INDR President, downing@u.arizona.edu.*

what their status, wealth, religion, gender, age or ethnic background, all have the right to live in adequate housing and should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.ⁱ

Despite these guarantees in international law, every year, approximately 15 million people are forcibly evicted from their homes, communities and lands to make way for development projects such as mines, oil and gas pipelines, urban renewal schemes, mega-dams, ports and transportation infrastructure. Direct impacts from these projects, including land and real estate speculation, changes in land use and environmental pollution, further escalates the number of displaced. Together, these projects and their impacts have fueled an international crisis making development one of the leading causes of displacement worldwide, exceeding displacement caused by armed and ethnic conflict.ⁱⁱ

While displacement may be necessary in exceptional circumstances,ⁱⁱⁱ land acquisition and forced evictions caused by development largely occur in a manner that does not respect human rights and leads to the increased impoverishment of those who are affected.^{iv} Displacement often comes hand-in-hand with egregious corruption, the use or threat of violence to force people from their homes, and the undemocratic imposition of projects. Increasingly, these large-scale displacements also lead to social unrest, environmental degradation, and loss of cultural and biological diversity. Finally, those impacted by displacement face a number of well-documented specific risks including: homelessness; loss of livelihoods; food insecurity; psychological trauma; negative health impacts; loss of health status; increased morbidity and vulnerability, especially among women and children; economic and cultural marginalization and; social disintegration.^v

The severity of these risks and the vast number of people affected every year makes displacement one of the most pressing human rights issues associated with development. The international community—including United Nations agencies, multilateral financial institutions, human rights experts and non-governmental organizations— have begun to recognize the risks of DID and the need to systemically address the rights of affected people. A growing body human rights protections for displaced people and standards for the prevention and mitigation of displacement-related risks is emerging to challenge the flawed moral and economic assumptions that allow such massive hardship to be justified in the name of development.

Over the past decade, different international legal entities and institutions have responded to the human rights impacts and risks of development-induced displacement by formulating a variety of guidelines, laws and best practices. Some of the most important international guidelines and practice on this issue are:

- The UN *Basic Principles and Guidelines on Development-based Evictions and Displacement* presented in the annual report to the UN Human Rights Council by the UN Special Rapporteur on adequate housing, Miloon Kothari, 2007;
- *U.N. CESCR, General Comment No. 7: The Right to Adequate Housing: Forced Evictions, 16th Sess., U.N. Doc. E/1998/22 (1997) Arts. 7, 17 & 18;*
- The OECD's *Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects, 1992;* and
- The Report of the World Commission on Dams: *Dams and Development*, an influential framework for development decision-making, 2000.

Key Displacement Issues to Consider in the IFC's Performance Standard Review

During the review of the IFC's Policy and PS, it will be critical to consider whether and how the IFC's standards are meeting the principles and requirements outlined in international guidelines on DID. Specifically, the review should consider if IFC standards have effectively mitigated the risks of those displaced by its projects and, importantly, whether or not the displaced have benefited from projects in their

own terms. Many of the IFC's existing mitigation measures for displacement are included in Performance Standard 5 on Land Acquisition and Involuntary Resettlement (PS 5). However, as briefly described below, limited or unclear provisions in PS 5 may threaten the loss of livelihood, food insecurity, health problems and other impacts for those physically or economically displaced by IFC projects.

While this is not a comprehensive overview of provisions within PS 5 that may need review, some key issues to consider during the IFC policy update include:

1. Minimizing displacement and ensuring that displaced persons are project beneficiaries

A key principle integrated across international law and guidelines, and recognized in IFC standards, is *to avoid and minimize forced displacement*. And, in the event that displacement is unavoidable, assure that it is carried out with due procedure under international law and in a manner that protects the human rights of those affected. This objective reflects the established understanding that events such as forced evictions involve extreme risks of human rights violations and the creation of new poverty. Therefore, displacement should be seen as a last resort, for use only in *exceptional circumstances* including, for example, when the government takes actions that it determines to be in the public interest like the building of a new public hospital, school or road.^{vi} While there is no standard means of determining the public interest, there are emerging legal frameworks for doing so.^{vii} It is important to note, though, that even if a public interest determination has been made, due process in full accordance with relevant provisions of international human rights and humanitarian law must be followed.^{viii}

The principle to minimize displacement is designed to find project alternatives that do not include displacement or to lessen the impacts on affected communities and protect housing, land, and property rights. However, IFC should ensure that this principle is not applied in perverse ways in order to avoid higher project costs related to resettlement nor should it be applied in ways that put at risk the health and safety of affected communities. For example, if a pipeline is re-routed to avoid physical displacement but is then located within meters of community members' homes, the health and safety of those communities are at risk because displacement has been avoided. Displacement incurs increased projects costs and the principle to *avoid and minimize* displacement should not be conflated with avoiding or minimizing the *costs* of displacement.

Above all, where forced displacement is inevitable, the affected people must be made net beneficiaries of the project and must be entitled to receive equitable benefits. Adequate consultations should first be held with communities to explore alternative project options or designs that will minimize or eliminate the need for displacement. If there are unavoidable displacement impacts, the projects design, procedures, disclosures, timing, and financing should be included in a stand alone, involuntary resettlement component, that respects and protects human rights and assures that those affected by the project—both directly and indirectly—are beneficiaries of the project over and above compensation for their losses.

2. Protection for those displaced by non-land acquisition activities

IFC recognizes that displacement can be both physical and economic but stipulates that only those displaced by *land acquisition* will be afforded the benefits and mitigation measures provided in PS5. Those persons physically or economically displaced by project activities *other than* land acquisition, are relegated to the mitigation measures outlined in Performance Standard 1 on Social and Environmental Sustainability.

While land acquisition is an important cause of physical and economic displacement, decades of research by the World Bank itself shows that it is by no means the only cause. Individuals and communities who lose their livelihoods because of polluted fisheries, diminished water supplies, air pollution and other project impacts will face the full gamut of potential human rights violations and risks associated with unmitigated

displacement but are excluded from the specific compensation, redress and rehabilitation requirements that are unique to PS 5. Whether or not PS 1 is fully equipped to mitigate the exceptional risks associated with displacement is an important issue to consider. For instance, PS 5 contains a specific requirement that compensation for physically displaced people be provided “prior to relocation” however, no such specific requirement regarding the timing of compensation is outlined in PS1.^{ix} This difference can have a significant impact on the ability of project affected people to avoid impoverishment and protect their rights.

The IFC should align its policy with research findings and carefully consider whether or how distinguishing between those displaced by land acquisition and those displaced by other project activities is creating two or more “classes” of displaced persons. Who is affected and to what degree should be the result of a participatory, pre-appraisal eviction impact risk assessment^x of the entire population, not only a sample, and should include those indirectly affected by the project as well, such as host communities, or communities living downstream of a river that is dammed.

3. *Land-based compensation and livelihood restoration*

According to the UN Basic Principles and Guidelines on Development-based Evictions and Displacement:

“Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case. Cash compensation should under no circumstances replace real compensation in the form of land and common property resources. Where land has been taken, the evicted should be compensated with land commensurate in quality, size and value or better.”^{xi}

Currently, the IFC does not require land-for-land compensation. Instead it states that where the “livelihoods of displaced persons are land-based,” the client will offer land-based compensation “where feasible” and cash-based compensation otherwise.^{xii} However, cash-based compensation has been repeatedly found to rarely improve the livelihoods of displaced persons and is counter to the international guidelines described above.^{xiii} The IFC should ensure that land-takings are compensated with alternate land that is cultivable, irrigated, and located close to the original habitation to ensure that livelihoods are not disrupted. Furthermore, according to current research on development-induced displacement “compensation by itself [cash- or land-based] cannot adequately restore and improve the income levels and livelihood standards of people subjected to expropriation and forced displacement.”^{xiv} Indeed, compensation as the only benefit provided to displaced persons is one of the primary causes leading to affected persons being left with a lower standard of living than before project.

While IFC recognizes that “other assistance” such as “credit facilities, training and job opportunities” are necessary opportunities to improve or at least restore the livelihoods of displaced persons,^{xv} during the Policy and Performance Standards review, it will be critical to investigate how cash-for-land compensation has affected displaced persons and how livelihood restoration measures have met their objectives.

In addition, the provisioning of community assistance should not be confused or substituted for specific actions designed to assure that project affected peoples, particularly the most vulnerable, are specific beneficiaries of the project. This means that their sustainable livelihood, apart from the temporary economic boom benefits of project construction, has been improved and they are not facing new, project associated impoverishment risks.

4. Freedom from coercion in negotiated settlements

In PS 5, IFC encourages clients to “acquire land rights through negotiated settlements wherever possible, even if they have the legal means to gain access to the land without the seller’s consent.” These negotiated settlements are meant to be achieved by “providing fair and appropriate compensation and other incentives or benefits to affected persons or communities, and by mitigating the risks of asymmetry of information and bargaining power.”

This standard is an open invitation to the asymmetric exercise of coercive power. Performance Standard 5 leaves unclear the measure for “fair and appropriate compensation” which cannot be set by the IFC’s client, who has a conflict of interest. A key concern is the lack of options that the forcibly displaced have when land expropriations for project implementation are legalized by the state. In these cases, communities find themselves without bargaining power from the beginning of negotiations, because the outcome of this process must always be the community’s acceptance of a negotiation package or the uncertainty of state sanctioned land takings. Without a clear framework for third-party monitoring of negotiations, including provision for legal representation or advocacy, companies operate without supervision of their obligation to provide unbiased information and fair compensation. In addition, IFC should ensure that there are specific requirements for providing information and training about rights and processes options (including IFC policies and accountability mechanisms) by a third party prior to negotiations to help balance the bargaining power.

5. Guidelines for consultation and participation

IFC should ensure that that project affected populations are informed in a timely and culturally appropriate manner of the risks they are likely to face and the full range of options that might be taken to avoid or mitigate these risks. This obligation begins with informing affected people of the IFC standards themselves. Additionally, while IFC standards describe some consultation requirements, these fall short of international standards which include a number of requirements regarding information disclosure, consultation and consent. The UN Guidelines on Development-based Evictions and Displacement, for example, require the following procedures prior to evictions: (a) appropriate notice to all potentially affected and evicted persons; (b) a reasonable time period for public review or commenting on the proposed plan; (c) opportunities for the provision of legal advice to persons about their rights and options and; (d) holding of consultations that provide affected persons and their advocates an opportunity to challenge the evictions or propose alternative plans.^{xvi}

The Asian Development Bank has also recently approved specific requirements for “meaningful consultations” with potentially displaced persons. These requirements outline a process that begins early in project preparation, provides accessible information disclosure, is free of intimidation or coercion, is gender inclusive and tailored to the needs of disadvantaged and vulnerable groups and enables the incorporation of views of affected people in decision making.^{xvii} Furthermore, special standards for consultation and consent apply to indigenous peoples over and above the UN Guidelines on DID and ADB policy. The UN Declaration on the Rights of Indigenous Peoples requires that:

“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, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”^{xviii}

In this regard, anytime land acquisition or economic displacement affects the property rights, in particular, of indigenous peoples, lack of consent should prevent project activities from moving forward.

Upholding Human Rights in IFC Performance Standard

The issues outlined here should contribute to a more comprehensive dialogue on integrating human rights into the IFC Performance Standards, including PS 5. We recognize that a process beyond the ongoing policy review may be needed to fully address the suite of human rights impacts triggered by IFC-supported investments. However, this review should be used as an opportunity to identify the relevant reference points within human rights law and begin to concretize these within the IFC's sustainability framework. Framing the IFC's policy and standards through a human rights lens will facilitate the institution's capacity to respond to emerging human rights standards and will lead to better development outcomes for communities protected by these rights.

ⁱ See, for example: U.N. CESCR, General Comment No. 7: The Right to Adequate Housing: Forced Evictions, 16th Sess., U.N. Doc. E/1998/22 (1997) Arts. 7, 17 & 18; Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Vol. I (A/CONF.151/26/Rev.1 vol.I), annex II, Agenda 21, chap. 7.9 (b); Report of the United Nations Conference on Settlements (Habitat II) (A/CONF.165/14), annex II, The Habitat Agenda, para. 40 (n); Commission on Human Rights resolution 1993/77, para. 1.

ⁱⁱ Statement by Mr. Miloon Kothari, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, to the World Urban Forum III (19-23 June 2006) in Vancouver. Available at:

<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/8D7EB03469E474FAC12571930049A410?opendocument>.

ⁱⁱⁱ See UN Basic Principles and Guidelines on Development-based Displacement and Evictions, para. 21. Available online at: http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf.

^{iv} W. Courtland Robinson, *Risks and Rights: The Causes, Consequences, and Challenges of Development-Induced Displacement*, The Brookings Institution-SAIS Project on Internal Displacement, (Washington D.C: 2003) p. 3.

^v Michael Cernea, *Why Economic Analysis is Essential to Resettlement: A Sociologist's View*, (1999). In Michael Cernea (ed) *The Economics of Involuntary Resettlement: Questions and Challenges* (Washington, DC: World Bank).

^{vi} U.N. Basic Principles and Guidelines on Development-based Evictions and Displacement (2007), para. 21.

^{vii} See, for example, the UN Guidelines which state that the "promotion of the general welfare refers to steps taken by States consistent with their international human rights obligations, in particular the need to ensure the human rights of the most vulnerable." (emphasis added) U.N. Basic Principles and Guidelines on Development-based Evictions and Displacement (2007), para. 21, footnoted. Also, see, the U.N. Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (2007).

^{viii} This includes giving priority to exploring strategies that minimize displacement, conducting eviction impact assessments, dissemination of adequate information, opportunities for dialogue and consultation, and adequate prior notification. See, paragraphs 6, 32 - 42 of the U.N. Basic Principles and Guidelines on Development-based Evictions and Displacement (2007).

^{ix} International Finance Corporation, *Performance Standard 5 Land Acquisition and Resettlement*, (2006), para. 16.

^x See paragraphs 32 and 33 of the U.N. Basic Principles and Guidelines on Development-based Evictions and Displacement (2007).

^{xi} *Ibid*, Paragraph 60.

^{xii} International Finance Corporation, *Performance Standard 5 on Land Acquisition and Involuntary Resettlement*, (2006) para. 8 and 20.

^{xiii} See, for example: W. Courtland Robinson, *Risks and Rights: The Causes, Consequences, and Challenges of Development-Induced Displacement*, The Brookings Institution-SAIS Project on Internal Displacement, (Washington D.C: 2003).

^{xiv} See, for example: Theodore E. Downing, *Avoiding New Poverty: Mining-Induced Displacement and Resettlement*, (2002) p. 5.

^{xv} International Finance Corporation, *Performance Standard 5 on Land Acquisition and Involuntary Resettlement*, (2006) para. 20.

^{xvi} See paragraphs 37 - 39 of the U.N. Basic Principles and Guidelines on Development-based Evictions and Displacement (2007).

^{xvii} Asian Development Bank. *Safeguard Policy Statement*, (2009), Glossary.

^{xviii} United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), article 32.