



## **Mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context**

### **Submission to the World Bank's Safeguard Review and Update Process (Phase 1 – Public Consultation)**

#### **I. Background**

I wish to make a submission to the Public Consultation on the World Bank's Safeguard Review and Update Process, in my capacity as the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context. The mandate on adequate housing is one of the United Nations "special procedures," the general name given to the mechanisms established by the Human Rights Council (HRC) to address either specific country situations or thematic issues in all parts of the world. Besides the activities described above, special procedures mandate holders also provide advice on technical cooperation at the country and bi-lateral and multilateral levels, and engage in the promotion and dissemination of human rights standards and obligations. Mandate-holders of the special procedures serve in their personal capacity, and do not receive salaries or any other financial compensation for their work. The independent status of the mandate-holders is crucial in order to be able to fulfil their functions in all impartiality.

Since my appointment I have produced a number of thematic reports addressing emerging concerns related to the protection and realization of the right to adequate housing across the globe. When I was appointed to the position in May 2008, the international community was in the midst of devastating global financial and economic crises, the ramifications of which continue to be felt across developing and developed countries. My first report to the Human Rights Council therefore focused on the financial crisis, its causes and impact on the right to adequate housing (A/HRC/10/7). My report to the Human Rights Council in 2010 highlighted the impact of mega-events on the realization of the right to adequate housing (A/HRC/13/20). My first report to the General Assembly focused on climate change and the right to adequate housing (A/HRC/64/255) and I have developed the issue of post disaster and post conflict relief reconstruction and the right to adequate housing in two subsequent reports (A/HRC/16/42 and A/66/270). The report presented last year to the General Assembly 67<sup>th</sup> session dealt with the impact of housing finance policies on the right to adequate housing of those living in poverty (A/HRC/67/286).

I have visited the Maldives (2009), the United States of America (2010), Kazakstan (2010), Croatia (2010), Argentina (2011), Algeria (2011), Israel and the Occupied Palestinian Territory (2012) and Rwanda (2012). After each country visit, I have

reported to the HRC, including in my report concrete recommendations for States that are followed up by an interactive dialogue with the State concerned.

In the framework of my mandate I also receive information on alleged violations of the right to adequate housing. When reliable information is provided, I am mandated to write to the concerned government, either jointly with other special procedure mandate-holders or independently, inviting comment on the allegation, seeking clarification, reminding the Government of its obligations under international law and requesting information, where relevant, on steps being taken by the authorities to redress the situation in question.

The suggestions and recommendations included in this submission stem from my expertise and the thematic and country-specific research I have undertaken as Special Rapporteur on adequate housing since my appointment in 2008. They are also based on the mission I undertook to the World Bank in 2010 and the various fruitful exchanges I had with the Bank's staff. The final report on my mission was presented to the Human Rights Council at its 22<sup>nd</sup> session in March 2013 (A/HRC/22/46/Add.3).

The submission underscores the importance of the Bank's Operational Policy and Bank Procedures on Involuntary Resettlement (OP 4.12 and BP 4.12) in encouraging respect for and the realization of the right to adequate housing for people resettled in connection with World Bank-financed projects. It also highlights a number of ways in which current policy and practice could be improved.

I welcome the Bank's commitment to examine "emerging areas", including land tenure, as a part of the safeguards review. Given that security of tenure is recognized as an essential element of the right to adequate housing<sup>1</sup> I recommend the adoption of new policy requirements to secure and protect the tenure rights of vulnerable groups during the implementation and as a result of Bank-financed operations.

My submission also sheds light on the possible adverse implications for the right to adequate housing by Bank operations that are not subject to the Bank's current safeguards policy framework (such as development policy operations and Program-for-Results financing). Additionally, for certain types of investment lending operations that involve programmatic or sector-wide lending, I observe that safeguard policies as currently formulated are often ill-suited to address the impacts on the right to adequate housing of the different groups affected.<sup>2</sup>

## II. The World Bank's obligation to respect and promote human rights

The World Bank enjoys the status of a specialized agency of the United Nations, by agreement entered into with the Economic and Social Council in accordance with Articles 57 and 63 of the Charter of the United Nations. As a specialized agency, and as a subject of international law, the World Bank is required at a minimum to respect the purposes set forth in Article 55 of the Charter, including the "universal respect for, and

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, general comment No. 4 (1991) on the right to adequate housing, para. 8. See also A/HRC/22/46. I currently undertaking, in my capacity as Special Rapporteur a two-year study on security of tenure and the right to adequate housing. See [www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx](http://www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx).

<sup>2</sup> See Independent Evaluation Group (IEG), *Safeguards and Sustainability Policies in A Changing World: An Independent Evaluation of World Bank Group Experience* (World Bank, Washington D.C., 2010), p. 3.

observance of, human rights”.<sup>3</sup> Moreover, the obligations of States parties to the international human rights treaties should be understood as extending to their membership of the World Bank and their role as Executive Directors, including decisions to support the adoption of operational policies and to approve lending, credit and grant proposals. These obligations include the duty of States parties to the International Covenant on Economic, Social and Cultural Rights to respect the rights recognized in the Covenant and to take steps through international assistance and cooperation, to the maximum of their available resources, with a view to achieving progressively the full realization of these rights.<sup>4</sup>

Due to its far-reaching large-scale development assistance and cooperation, as well as its important role in providing technical assistance and setting the reform agenda in several Government policies, including housing, I believe that the World Bank is uniquely placed to support Governments around the world in meeting their international human rights obligations during the process of development and, in particular, to progressively realize economic and social rights in their countries.

The World Bank should therefore adopt safeguards policies aligned with the international human rights obligations of its member States and clients. Incorporating human rights protections will help member States fulfil their human rights obligations and improve development outcomes by ensuring respect for the rights of those the Bank seeks to benefit.

I would also like to note that States are increasingly recognizing that the responsibility to respect human rights goes beyond States and includes international organizations, businesses and other non-State actors. I therefore call on the World Bank to incorporate the principles outlined in the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (A/HRC/17/31, annex), adopted in 2011 by the Human Rights Council in its resolution 17/4, and to ensure that the safeguard policies are aligned with the Guiding Principles.

### III. Operational Policy and Bank Procedures on Involuntary Resettlement (OP 4.12 and BP 4.12)

Forced evictions and the displacement of people from their homes, lands, livelihood sources and communities because of private and public development projects have had grave implications worldwide for the enjoyment of the right to adequate housing. Some development projects have pursued important general welfare objectives, such as the improvement of people’s access to basic services and facilities through the construction or renovation of infrastructure. These projects have contributed to the realization of the right to adequate housing and other human rights for some segments of the population. Other projects have either had questionable general welfare benefits or primarily served corporate interests. In all of these situations, the costs of “development” have often been

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<sup>3</sup> Note also Article 59. See Mac Darrow, *Between Light and Shadow* (Oxford, World Bank, The International Monetary Fund and International Human Rights Law, 2003); Bahram Ghazi, *The IMF, The World Bank Group and the Question of Human Rights* (New York, Ardsley, 2005); S.I. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London, Cavendish, 2001).

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, art. 2. See also Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water, para. 36.

borne most heavily by the families and communities evicted to make these projects possible.

The World Bank should take pride in being the first development agency to adopt guidelines on involuntary resettlement more than thirty years ago. The Bank has made important contributions since that time to the overall understanding of the risks of evictions and mitigation measures that can be put into place to prevent the risks from materializing into harms.<sup>5</sup> The Bank's involuntary resettlement policy, which has undergone several changes over the past three decades, has been reflected in varying forms by several major public and private financial institutions, as well as a significant number of corporations, highlighting the extremely influential role the Bank has played in setting global standards.

World Bank-supported projects continue to cause substantial numbers of forced evictions, displacements and involuntary resettlements. The Bank's Independent Evaluation Group (IEG) estimates that "since the resettlement process lasts several years ... at any given time involuntary resettlement affects over 1 million people, two-fifths of which are likely to be physically displaced and three-fifths economically affected by active Bank-financed projects".<sup>6</sup> This estimate, derived from the documentation of the Bank's projects, includes only people that the Bank determines to be directly affected by its projects, which may be a significantly smaller group than the overall number of those displaced physically and economically as a result of Bank-financed projects worldwide.

As a part of the World Bank's duty to respect human rights, it must take measures to ensure that any resettlement that occurs in connection with the projects financed by the Bank does not result in the violation of the human rights of affected people. Involuntary resettlement amounts to a forced eviction when it occurs without the provision of, and access to, appropriate forms of legal or other protection.<sup>7</sup> Forced evictions are amongst the most disempowering violations of human rights and one of the most supreme injustices any individual, family, household or community can face. Forced evictions constitute a gross violation of a range of internationally recognized human rights, in particular the right to adequate housing.<sup>8</sup> The vulnerable situation in which victims of forced evictions are placed often results from structural discrimination and the lack of participation of those affected in project design and implementation. Evictions can also result in violations of the human rights to food, water, health, education, work, life, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, freedom of movement and equality. Thus, requiring legal and other protections is essential to prevent grave breaches of human rights and, in some cases, irreparable harms to victims.

The World Bank's policy and procedures on involuntary resettlement provide a number of important protections for people physically and/or economically displaced by Bank-financed projects. The policy and procedures together establish a number of critical mandatory processes and entitlements to achieve the objectives of avoiding and minimizing displacement; executing resettlement as a sustainable development

<sup>5</sup> See M.M. Cernea, "The Risks and Reconstruction Model for Resettling Displaced Populations", *World Development*, vol. 25, No. 10 (October 1997), pp. 1569–1588.

<sup>6</sup> IEG, *Safeguards and Sustainability Policies*, p. xvi.

<sup>7</sup> Committee on Economic, Social and Cultural Rights, general comment No. 7 (1997) on forced evictions, para. 15; report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18, annex I, basic principles and guidelines on development-based evictions and displacement.

<sup>8</sup> Resolutions 1993/77 and 2004/28 of the Commission on Human Rights.

programme; and assisting displaced persons in their efforts to improve or at least restore their livelihoods and living standards.<sup>9</sup>

I therefore strongly support the maintenance of OP 4.12 as an essential measure in satisfying the Bank's duty to respect human rights. I would also like to make the following recommendations for strengthening the policy in order to better ensure that evictions and displacements connected to Bank-financed projects fully respect the right to adequate housing and contribute to its progressive realization for affected people who did not previously enjoy this basic human right. I believe that these recommendations are consistent with the Bank's objectives of creating a new generation of safeguard policies that can "help the Bank support measurable development outcomes or 'doing good,' in addition to maintaining the 'do no harm' principles of the current safeguard policies".<sup>10</sup>

### **A. Prohibition of forced evictions**

As a gross violation of human rights, forced evictions should be explicitly prohibited in the policy. I suggest that in the introductory paragraphs of the revised policy it is made clear that the Bank will not finance or otherwise provide assistance to any project or programme that causes or contributes to forced evictions. I also suggest the use of the definition of "forced evictions" adopted in the basic principles and guidelines on development-based evictions and displacement: "acts/ and or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection" (A/HRC/4/18, annex I, para. 4).

### **B. Exceptional circumstances and project alternatives**

The current policy objective to avoid where feasible, or minimize, involuntary resettlement, exploring all viable alternative project designs, reflects the World Bank's recognition that involuntary resettlement can give rise to severe hardships to displaced persons. There is an unusually high level of economic, social, cultural and environmental risk associated with involuntary resettlement. Measures necessary to mitigate these risks are complex, resource-intensive and, in practice, often imperfect. In recognition of these risks and mitigation challenges, and given the potential for violations of many internationally recognized human rights, international law standards authorize evictions only in exceptional circumstances and in accordance with the general principles of international law.<sup>11</sup>

In order to reinforce the current policy objective of avoidance and minimization, and harmonize with international human rights standards, the revised policy should be explicit in permitting involuntary resettlement in connection with Bank-financed

<sup>9</sup> OP 4.12, para. 2.

<sup>10</sup> "The World Bank's safeguard policies: Proposed safeguards review and update", approach paper, October 2012, para. 8.

<sup>11</sup> Committee on Economic, Social and Cultural Rights, general comment No. 4, para. 18; and basic principles and guidelines on development-based evictions and displacement, para. 21.

projects only in exceptional circumstances, namely the promotion of the general welfare consistent with the State's international human rights obligations.<sup>12</sup>

The revised policy should include a requirement for the borrower Government to provide the Bank – as a part of its project proposal – with a detailed account of the general welfare value of the project, particularly for those to be evicted or displaced and other poor or vulnerable groups, consistent with its international obligations to respect, protect and/or fulfil human rights. Based on public consultations, the account should reflect the development priorities of the project expected beneficiaries. The policy should also require that the account of the general welfare value of the project be made publicly available in an accessible form and language. In cases in which the borrower Government is unable to justify the need for evictions or displacements based on an exceptional circumstance, the Bank should not agree to provide assistance until a feasible alternative is agreed upon that will not result in forced evictions or displacements.

For projects which will result in displacement, the consideration of feasible alternatives is not only a critical feature of comprehensive cost-benefit analysis but also an international law obligation.<sup>13</sup> The revised policy on involuntary resettlement should thus maintain the current objective of avoiding and minimizing displacement and the requirement in BP 4.12 for the Bank's task team and borrower staff to explore all viable alternative project designs to avoid and minimize displacement.<sup>14</sup> In order to strengthen implementation of this requirement, the new policy should place a procedural requirement on the borrower Government to provide to the Bank – as a part of its project proposal – a detailed account of alternative project designs considered to achieve the development and general welfare objectives, including the result of consultations about potential alternatives with persons expected to be displaced.

### **C. Protections to uphold the right to adequate housing**

Upon rigorous application of the recommended requirements set forth above, involuntary resettlement in connection with Bank projects should only occur in exceptional circumstances and be minimized to the extent possible through project design. However, there will be some projects for which displacement will be unavoidable. Displaced persons must be afforded due legal and other protections throughout the resettlement process.

Current policy protections, while generally compatible with human rights standards, fall short of guaranteeing that the right to an adequate standard of living, including adequate housing, will be upheld for displaced persons. I would therefore like to make a number of recommendations that may strengthen the policy so that it provides necessary protections to displaced persons to ensure that their human rights are not infringed.

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<sup>12</sup> International Covenant on Economic, Social and Cultural Rights, art. 4; Committee on Economic, Social and Cultural Rights, general comment No. 7, para. 5.

<sup>13</sup> See Committee on Economic, Social and Cultural Rights, general comment No. 7, para. 13.

<sup>14</sup> OP 4.12, para. 2; BP 4.12, para. 2.

### **(i) Right to the continuous improvement of living standards**

I suggest that the revised policy explicitly recognize the right to the continuous improvement of living standards,<sup>15</sup> and require that measures are taken to ensure that resources and opportunities available to affected persons to enhance their own standards of living are in no way diminished or restricted as a result of resettlement.

### **(ii) Control over the resettlement process**

The Bank's recognition of the importance of access to information, participation and consultation in inclusive and sustainable development is reflected in the policy objective that displaced persons should be "meaningfully consulted" and "have opportunities to participate in planning and implementing resettlement programs".<sup>16</sup> The policy requires borrower Governments to include in their resettlement planning instruments "measures to ensure displaced persons are (i) informed about their options and rights pertaining to resettlement; (ii) consulted on, offered choices among, and provided with ... resettlement alternatives".<sup>17</sup> The policy also requires that displaced persons and their communities, and any host communities, be "offered opportunities to participate in planning, implementing, and monitoring the resettlement".<sup>18</sup> When meaningfully applied, these requirements constitute important protections against forced eviction, consistent with international obligations.

However, according to information I receive in my capacity as Special Rapporteur on adequate housing, in practice, the dissemination of information and consultation on both project alternatives and resettlement options are often not done in a comprehensive and meaningful manner. Women, children and persons with disabilities and other disadvantaged households are often marginalized from consultation processes, resulting in the disregard of their opinions, choices and particular interests. In some cases, the communication of information and methods of consultation are not appropriate for ethnic or linguistic minorities or illiterate groups. In the worst cases, threats, intimidation or violence are used to coerce people into accepting resettlement terms.<sup>19</sup>

Noting once again the Bank's duty to respect human rights and its shared responsibility to ensure accountability in this regard, I recommend that the Bank play a greater role in ensuring appropriate and effective dissemination of information to affected people about their entitlements under the policy. The Bank should support, through appropriate local organizations, the provision of legal advice and technical assistance to affected people from the earliest stages of the project and throughout the project cycle.

Moreover, the degree of upheaval to affected people's lives brought about by involuntary resettlement calls for a higher level of empowerment in resettlement decision-making than that stipulated in the current policy. The policy rightly acknowledges that "resettlement activities should be conceived and executed as sustainable development programs" enabling displaced persons to share in project

<sup>15</sup> Universal Declaration of Human Rights, art. 25, and International Covenant on Economic, Social and Cultural Rights, art. 11. A similarly constituted right is recognized in the European Bank for Reconstruction and Development environmental and social policy "PR 5: Land Acquisition, Involuntary Resettlement and Economic Displacement", para. 3.

<sup>16</sup> OP 4.12, para. 2 (b).

<sup>17</sup> Ibid., para. 6 (a).

<sup>18</sup> Ibid., para. 13 (a).

<sup>19</sup> World Bank Inspection Panel, *Investigation Report, Ghana: Second Urban Environmental Sanitation Project (UESPII)* (2009).

benefits.<sup>20</sup> Experience shows that the empowerment of project beneficiaries is key to the effectiveness and sustainability of any development project. I therefore recommend that the revised policy require that affected persons be provided not only with opportunities to participate in planning, implementing and monitoring resettlement, but with all necessary support and resources to enable them, or their freely chosen representatives, to actively participate in resettlement decision-making.

With the support of independent technical assistance funded as part of the project, affected persons should be given the opportunity to propose alternatives in order to avoid and minimize resettlement and, if resettlement is necessary, to choose, *inter alia*, (a) resettlement site(s) from a range of options, including sites that they themselves identify, (b) whether to receive full cash compensation to replace their housing and other assets or instead alternative housing and other replacement assets at the site (or a mix of both), (c) the type and form of basic services and facilities to be made available at the site, (d) site planning, such as the placement of houses, amenities and access roads as relevant, and (e) the forms of income restoration support most beneficial and suitable to them. The affected persons should also be given the opportunity to participate in decisions about the means by which they will receive information and community discussions and planning will be conducted during the process, as well as the timing of the resettlement process. Affected persons and communities must be guaranteed the right to full and prior informed consent regarding the terms of the resettlement.<sup>21</sup> They should also be afforded the opportunity to participate in the monitoring and evaluation of the resettlement process and its outcomes in terms of restoration and improvement of living standards.

## **F. Resettlement and the right to adequate housing, and all of its components**

The policy requires that the resettlement plan “include measures to ensure that displaced persons are provided prompt and effective compensation at full replacement cost for losses of assets ... assistance (such as moving allowances) during relocation; and ... residential housing, or housing sites, or, as required, agricultural sites for which a combination of productive potential, locational advantages, and other factors is at least equivalent to the advantages of the old site”.<sup>22</sup> The policy allows for the cost of alternative residential housing, housing sites, business premises, and agricultural sites provided to be set off against the compensation payable for the corresponding lost asset.<sup>23</sup> In addition to the above, other assistance is to be provided during the transition period, “based on a reasonable estimate of the time likely to be needed to restore their livelihood and standards of living”.<sup>24</sup> The policy requires that resettlement sites be equipped with infrastructure and public services “as necessary to improve, restore, or maintain accessibility and levels of service for the displaced persons and host communities”.<sup>25</sup> Alternative or similar resources are provided to compensate for the loss of access to community resources (such as fishing areas, grazing areas, fuel, or fodder).<sup>26</sup> The policy requires “adequate tenure arrangements” for alternative land, housing or business premises provided. I would like to stress that these provisions

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<sup>20</sup> OP 4.12, para. 2 (b).

<sup>21</sup> Basic principles and guidelines on development-based evictions and displacement, para. 56 (e).

<sup>22</sup> OP 4.12, para. 6 (a) (iii) and (b) (i) and (ii).

<sup>23</sup> *Ibid.*, para. 6 (b) (ii), footnote 13.

<sup>24</sup> *Ibid.*, para. 6 (c) (i).

<sup>25</sup> *Ibid.*, para. 13 (b).

<sup>26</sup> *Ibid.*, para. 13 (b).



constitute important protections against regressions in displaced peoples' access to adequate housing and an adequate standard of living.

However I believe that these provisions fall short of minimum human rights obligations because their application could result in the resettlement of people into inadequate shelter conditions, without access to the minimum levels necessary of essential services and facilities and without secure, fully recognized tenure. This is particularly the case for people who, prior to resettlement, lived in inadequate housing conditions and for whom the mere replacement of lost assets will prevent them from securing adequate housing after resettlement.

States parties to the International Covenant on Economic, Social and Cultural Rights have undertaken to take steps, individually and through international assistance and cooperation, to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant. As a specialized agency of the United Nations with a mandate to reduce global poverty, the Bank's policy should be revised to ensure that resettlement does not merely prevent the regression of living standards, but is treated as an opportunity to provide resources to borrower Governments to realize the right to an adequate standard of living, including the right to adequate housing, for resettled households previously living in inadequate conditions. This revision would give effect to the current policy objective of conceiving and executing resettlement as a sustainable development programme.

I recommend that the current policy requirements be supplemented with a requirement on borrower Governments to put in place measures to ensure secure adequate housing, including all of its components, immediately and as a component of the project itself. Persons who are physically displaced, regardless of their previous situations and without discrimination, should be ensured access to secure, affordable, habitable housing that is culturally appropriate. In this regard, I recall the international human rights law requirements for relocation sites, affirmed in the basic principles and guidelines on development-based evictions and displacement. These include: "(a) Security of tenure; (b) services, materials, facilities and infrastructure such as potable water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services, and to natural and common resources, where appropriate; (c) affordable housing; (d) habitable housing providing inhabitants with adequate space, protection from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors, and ensuring the physical safety of occupants; (e) accessibility for disadvantaged groups; (f) access to employment options, health-care services, schools, childcare centers and other social facilities, whether in urban or rural areas; and (g) culturally appropriate housing. In order to ensure security of the home, adequate housing should also include the following essential elements: privacy and security; participation in decision-making; freedom from violence; and access to remedies for any violations suffered."<sup>27</sup>

Resettlement planning should be based on a comprehensive eviction impact assessment in order to ensure that anything – tangible and intangible – lost by displaced persons is restored.<sup>28</sup>

<sup>27</sup> Basic principles and guidelines on development-based evictions and displacement, para. 55.

<sup>28</sup> See United Nations Human Settlements Programme (UN-HABITAT) and Office of the United Nations High Commissioner for Human Rights, *Losing your Home – Assessing the Impact of Eviction* (Nairobi, 2011).

## **G. Eligibility for protections and entitlements**

One of the key strengths of the current policy is the provision of protections and entitlements to affected persons who have “no recognizable legal right or claim to the land they are occupying”.<sup>29</sup> This policy provision reflects the need to protect the vast numbers of persons that fall into this category from forced evictions, homelessness and deeper impoverishment. It also reflects the impracticability of attempting to remove residents who have no formally registered bond or claim to the land they are occupying from sources of livelihoods, particularly in the context of urban development, given the evidence that affected persons without alternatives are likely to resettle on other lands to which they do not have a legal claim. This provision is particularly important in countries in which there are plural systems of land tenure or legal ambiguities with respect to tenure or land rights. For all of these reasons, and consistent with the Bank’s President’s commitment to non-dilution, I am confident that the Bank will maintain the current requirement to protect the right to resettlement and other assistance to displaced persons whose rights to the land they are occupying have not been legally recognized by the Government.

However, the current policy stipulates that people who encroach on the area after a designated cut-off date are not entitled to compensation or any other form of resettlement assistance. While acknowledging the legitimate need to discourage rent-seeking behaviour, I would like to stress that the application of this exclusion could have the effect of leaving persons completely destitute and without basic shelter.

I therefore suggest the following modifications to the policy in this regard. First, greater emphasis should be placed on the due process requirements for effective public availability of information on the area delineated for the project, and subsequent systematic and continuous provision and dissemination of the information. Currently this requirement is relegated to a footnote in the policy and only applies to cases in which the cut-off is the date the project area is delineated, rather than the later date on which the census begins. Effective on-going dissemination of notice that new settlers in a clearly delineated area required for the project will not be eligible for resettlement assistance is both a due process right and an important practical measure to prevent encroachment and should thus be made a policy requirement. In the absence of effective notice, persons who settled in the area after the cut-off date should not be disqualified from receiving assistance. The borrower Government should be required to show evidence of both effective and continuous notice of the cut-off date, after which the disqualified person(s) settled in the area, before barring assistance entitlements.

Second, vulnerable persons who settled in the area after the cut-off date despite the provision of effective and continuous notice, if it transpires through an independent assessment that they are effectively and genuinely lacking housing, should receive protection and cannot simply remain homeless. I believe that these modifications to the policy can strike an appropriate balance between the need to avoid incentives for rent-seeking behaviour and the duty to protect the human right to adequate housing.

## **H. Procedural requirements during evictions**

A notable gap in OP 4.12 is the lack of procedural requirements for carrying out evictions. I therefore recommend that the new policy should contain requirements, consistent with international law and the basic principles and guidelines on development

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<sup>29</sup> OP 4.12, para. 15 (c).

based evictions and displacement, to be followed if affected persons do not agree to the compensation and resettlement package, even after the provision of all legal and other protections described above.

Adequate notice prior to the pending eviction must be provided. During an eviction, safeguard requirements should include: (a) the mandatory presence of Government officials or their representatives, who must identify themselves to the persons being evicted and present legal authorization for the eviction action; (b) granting access to neutral observers, including international observers, upon request; (c) ensuring that evictions are not carried out in a manner that violates the dignity and human rights of to life and security of affected people, including by taking steps to ensure that women are not subject to gender-based violence and discrimination in the course of evictions, and that the human rights of children are protected; (d) ensuring that any legal use of force respects the principles of reasonableness and proportionality; (e) ensuring that evictions do not take place in bad weather, at night, during festivals or religious holidays, prior to elections or during or just prior to school examinations; (f) taking steps to ensure that no one is subject to direct or indiscriminate attacks or violence, especially against women and children, or arbitrarily deprived of property or possessions as a result of the eviction; (g) allowing affected persons to demolish their own dwellings or other structures, but never requiring or forcing them to so.<sup>30</sup>

In addition, I recommend maintaining the current provision in BP 4.12 to place compensation entitlements in an escrow account that the affected household can access. It should also be specified that a plot at the resettlement site will be reserved, if relevant. I also suggest including in BP 4.12 reference to the option of return to the area of habitual residence, when return is possible, and the obligation to provide assistance to the affected communities in the return process.

#### IV. Extending the scope of the safeguards framework: land tenure

Security of tenure is an essential element of the right to adequate housing.<sup>31</sup> The Committee on Economic, Social and Cultural Rights defines tenure security as a legal guarantee against forced eviction, harassment and other threats and notes that tenure takes a variety of forms and is not limited to ownership. It places an obligation on States to “take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups”.<sup>32</sup> The duty upon States to confer and solidify legal security of tenure becomes most pertinent when particular groups will otherwise be put at risk by development projects.

I congratulate the Bank for its commitment to examine new areas not currently covered by its safeguards framework, including land tenure, as a part of the review process and I suggest that the new safeguard policy framework contain provisions to ensure that tenure rights are not weakened or infringed as a result of Bank-financed operations (particularly land and agricultural sector development programmes). Particular attention should be paid to potentially vulnerable groups whose tenure bonds are not individual registered freehold, such as renters; people with plural, hybrid and informal tenure

<sup>30</sup> Basic principles and guidelines on development-based evictions and displacement, paras. 45–51.

<sup>31</sup> Committee on Economic, Social and Cultural Rights, general comment No. 4, para. 8. See also A/HRC/22/46.

<sup>32</sup> Ibid.

rights; those with secondary use and access rights; and those subject to communal, collective and customary tenure arrangements. In addition, women's rights should be promoted, with concerted efforts to reverse discriminatory gender patterns in tenure systems.<sup>33</sup>

Land sector programmes that seek to formalize land rights can have unintended adverse consequences on some groups by weakening their pre-existing tenure status and thereby increasing their vulnerability to forced eviction.<sup>34</sup> I therefore believe there is an urgent need for the Bank to adopt a human rights approach to its land sector development operations. Such an approach would emphasize improving security of tenure for all, in particular those most insecure, and include measures to safeguard against exclusionary treatment of vulnerable groups.

Agricultural development programmes that promote large-scale commercial farming could also put at risk rural households with tenure arrangements that are not fully recognized and protected by law or in practice.<sup>35</sup> The danger is particularly acute when there is intense competition over land and natural resources and multiple tenure systems. Heightened commercial interest and speculative investments in land (more common since the 2008 rise in food prices) pose substantial risks for households and communities with informal, secondary, communal, collective or customary tenure rights. In such contexts, safeguarding against increased vulnerability of these groups during the implementation and as a result of agricultural development programmes is vital.

In light of the Bank's support of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, endorsed by the Committee on World Food Security in May 2012, I suggest that the Bank incorporate relevant aspects of the Guidelines into the new safeguard policy framework.<sup>36</sup>

The Bank should be commended for its commitment not to "support speculative land investments or acquisitions which take advantage of weak institutions in developing countries or which disregard principles of responsible agricultural investment".<sup>37</sup> I recommend that this commitment also be incorporated into policy.

## V. Safeguards implementation

### A. Country systems and ownership

The notion promoted by country systems, of placing greater emphasis on strengthening capacities of country institutions to identify, assess and manage social and environmental risks associated with development is welcomed. While recognizing the need to strengthen country systems to sustainably improve the human rights situation in countries beyond what is done through individual World Bank-financed projects, I wish to underscore the continuing importance of the application and enforcement of the

<sup>33</sup> See report of the Special Rapporteur on adequate housing to the nineteenth session of the Council, A/HRC/19/53.

<sup>34</sup> World Bank Inspection Panel, *Investigation Report, Cambodia: Land Management and Administration Project*, (2010), para. 263.

<sup>35</sup> See report of the Special Rapporteur on the right to food on large-scale land acquisitions and leases, A/HRC/13/33/Add.2.

<sup>36</sup> See <http://go.worldbank.org/S0D96SZZT0> (accessed February 2013). Similar guidelines are necessary for urban land governance. See A/HRC/22/46.

<sup>37</sup> *Ibid.*

Bank's safeguard system (especially the involuntary resettlement safeguard) unless and until country systems are equipped to guarantee human rights protections for people affected by development projects.

The necessary conditions to guarantee protections are not present in many countries in which the World Bank operates. In many cases, legal and regulatory frameworks governing land acquisition, eviction and resettlement are incomplete or fall far short of both Bank policy and international law; institutional capacity to plan and implement resettlement is weak; and judicial and administrative accountability and review systems are unable to protect the rights of affected people owing to corruption, political interference or low capacity. Several countries in which the Bank operates have poor track records on evictions and weak implementation practices on resettlement in the context of development. I caution that placing greater emphasis on the discretion of Governments of countries lacking the necessary conditions to guarantee protections heightens the risk of forced evictions and other violations of the right to adequate housing caused by Bank-financed projects.

Therefore, while encouraging greater support for strengthening country systems and institutions, I caution against the reliance on incomplete and inadequate country systems. Until the preconditions have been achieved, I encourage the Bank to ensure, through the enforcement of the safeguard system, that affected communities are protected from the negative impacts of projects, programmes and policies supported by the Bank. I also highlight possible negative effects on the World Bank's reputation in cases when the Bank has actual or constructive knowledge of serious risks or of actual violations of human rights and takes no mitigating, remedial or other actions. In such cases, the Bank may be conceived as being complicit in human rights violations, despite the delegation of responsibility to the State borrower through the country system.

I also note the Bank's related decision to move away from a compliance-based supervision approach to a greater emphasis on implementation support and managing for results.<sup>38</sup> While appreciating the need for greater support of implementation to achieve positive outcomes, not least with regard to safeguard policies, through, for example, capacity-building and technical assistance, I am concerned that the recently adopted OP 10.00 on Investment Project Financing limits the Bank's role in ensuring that the borrower is using project funds only for the purposes for which the financing was granted and in compliance with covenanted safeguard policy requirements.

Revisions to the Bank's policies on project appraisal and supervision through the adoption of OP 10.00 have eliminated some robust process requirements that were critical to the successful implementation of the Bank's safeguards framework, such as those relating to project appraisal and especially social and cultural aspects;<sup>39</sup> consideration of alternatives;<sup>40</sup> risk assessment during appraisal and implementation phases;<sup>41</sup> risk management strategies;<sup>42</sup> supervision and monitoring planning;<sup>43</sup> the clear delegation of supervision responsibilities;<sup>44</sup> and the identification and resolution of problems as they arise.<sup>45</sup> Although recognizing that the elimination of these

<sup>38</sup> Operations Policy and Country Services, "Investment Lending Reform: Modernizing and Consolidating Operational Policies and Procedures" (World Bank, 2012), para. 10.

<sup>39</sup> OMS 2.2, paras 55–63.

<sup>40</sup> OP 10.04, para. 3.

<sup>41</sup> Ibid., para. 6; OP 13.05 – Project supervision, para. 2; and BP 13.05 – Project supervision, para. 9.

<sup>42</sup> OP 13.05, para. 2.

<sup>43</sup> BP 13.05, paras. 2–6.

<sup>44</sup> Ibid., paras. 1 and 26.

<sup>45</sup> OP 13.05, para. 2; and BP 13.05, paras. 12–15.

requirements has the intention of reducing bank costs and long bureaucratic procedures, OP 10.00 appears to create an overreliance by the Bank on self-monitoring by the borrower of its progress and compliance with contractual obligations. The Bank's implementation support role appears to be limited to reviewing the borrower's own monitoring of performance, compliance, results, risks and implementation status, rather than validating the credibility, accuracy and degree of candour of the borrower's self-assessment through independent investigations.<sup>46</sup> This apparent diminution of the Bank's due diligence responsibilities could have adverse implications for the right to adequate housing.

I therefore recommend that requirements to ensure (a) comprehensive social and environmental risk assessment, mitigation and management; and (b) robust implementation support, supervision and monitoring by the Bank to ensure that project funds are used in a manner consistent with project objectives, without arbitrary or discriminatory exclusions from project benefits, and in full compliance with safeguard policies, be incorporated into the consolidated safeguards framework and/or inserted through amendment to OP 10.00. It is essential that such requirements are subject to compliance review by the Inspection Panel to guarantee accountability of the Bank to people affected by its investment lending operations.

## **B. Applying the safeguards to new financing instruments**

The past decade has seen a shift towards greater use of new financing instruments by the Bank in response to changing contexts and client demand, such as Development Policy Loans (DPLs) (2004) and Program-for-Results Loans (2012).<sup>47</sup> I would like to raise several concerns about the potential adverse implications of the use of these instruments on the enjoyment of the right to adequate housing.

While I appreciate that proposed activities that are likely to have "significant adverse impacts that are sensitive, diverse, or unprecedented on the environment and/or affected people" are not eligible for Program-for-Results Financing,<sup>48</sup> nonetheless, the assessment of those impacts requires specific operational policies from the Bank.

With regard to DPLs, OP 8.60 on Development Policy Lending does not put in place a sufficiently robust risk management system for all instances and contexts in which the instrument is engaged. The policy relies on borrowers' systems for "reducing adverse [poverty and social] effects", requiring only that the Bank describe in programme documentation how any shortcomings identified in the borrower's system would be addressed.<sup>49</sup>

Of particular concern are DPLs that promote policy and institutional reforms in the provision of housing, water, land governance, urban management and infrastructure, which can impact upon several of the elements of the right to adequate housing, such as affordability, location, tenure security and the availability of services, among others. In some cases, these policy reforms had a detrimental impact on several aspects of the right to adequate housing, especially the habitability, location, affordability and access to services.

<sup>46</sup> Draft OP 10.00 – Investment Project Financing, para. 19; draft BP 10.00, paras. 36 and 37.

<sup>47</sup> IEG, *Safeguards and Sustainability Policies*, p. xi.

<sup>48</sup> BP 9.00 – Program-for-Results Financing, para. 5.

<sup>49</sup> OP 8.60, para. 10.

Although OP 8.60 does not mandate the use of any particular analytical approach, it refers Bank staff to guidance on poverty and social impact analysis (PSIA).<sup>50</sup> Yet, according to the *2009 Development Policy Lending Retrospective*, over a third of prior actions identified as likely to have significant negative effects on poor and vulnerable groups were not underpinned by any form of PSIA.<sup>51</sup> PSIA is defined by the Bank as “analysis of distributional impact of policy reforms on the well-being of different stakeholder groups, with particular focus on the poor and vulnerable”.<sup>52</sup> Analysis of this kind should inform the design and content of all Bank operations. IEG has found, however, that PSIAs have generally had a moderate effect on Bank operations for several reasons, including ambiguity of the PSIA concept and insufficient buy-in from country directors and operational staff.<sup>53</sup> This highlights the need for a detailed and overarching human rights due diligence assessment of DPLs policy reforms.

I also note that, in a recent retrospective of DPLs, the Bank identified the need to assess more consistently the poverty and social impacts of prior actions and improve linkages between analysis and design of operations.<sup>54</sup> I urge the Bank to systematically conduct both *ex ante* and *ex post* impact assessments of all DPLs as a part of its due diligence, particularly with regard to projects or activities that involve a higher degree of social risk. While cognizant of the need to maintain a level of flexibility in formulating the appropriate modes of analysis for each operation, I recommend that OP 8.60 be amended to mandate impact assessments of proposed reforms as a prerequisite to accurately determining the breadth and depth of poverty and social consequences. Measures to address gaps or shortcomings in country systems should be clearly and logically linked to determinative factors identified in the assessment.

The Bank should explicitly take into account the assessment tools that are based on the normative framework of international human rights law, to which borrower Governments are bound. Human rights impact assessments explore the legal, institutional, social and political economy factors that impede or facilitate transparent and accountable decision-making and administration; participation and empowerment of stakeholders; equality, inclusiveness and effectiveness of both process and outcomes and the right to an effective remedy.

The circumstances of groups subjected to discrimination or exclusion, and who thus may suffer from policy reform, should be analysed with particular emphasis (for example, in the context of the obligation for free prior and informed consent of indigenous peoples and the prohibition of direct and indirect discrimination). In the context of housing policy reforms, an assessment based on the right to adequate housing framework provides the tools to analyse the possible impact of reforms on the various components of the right to adequate housing (i.e., habitability, affordability, accessibility, location, availability of services, materials, facilities and infrastructure, security of tenure, cultural adequacy and the principle of equality and non-discrimination) of the affected communities.

<sup>50</sup> OP 8.60, footnotes 7 and 9.

<sup>51</sup> Operations Policy and Country Services, *2009 Development Policy Lending Retrospective: Flexibility, Customization, and Results*, para. 102.

<sup>52</sup> IEG, *Analyzing the Effects of Policy Reforms on the Poor: An Evaluation of the Effectiveness of World Bank Support to Poverty and Social Impact Analyses* (Washington, D.C., 2010), p. xii.

<sup>53</sup> IEG, *Analyzing the Effects of Policy Reforms on the Poor*, pp. xiv and 33.

<sup>54</sup> “2012 Development Policy Lending Retrospective: Emerging Findings and Issues”, presentation of the Operations Policy and Quality Department given in July 2012, slide 31.

The exploration of such factors and circumstances and their projected interplay with proposed policy and institutional reforms and alternatives can result in enhanced programme design and results, and assist the World Bank in mitigating the risk of complicity in human rights violations and minimizing its reputational risk. Analyses of the likely regressive and progressive impacts on a range of interrelated human rights, as defined in international law instruments, can help refine reform programmes to reverse (predicted) negative effects or discriminatory outcomes for particular groups and ensure the maximum flow of appropriate types of benefits to the most vulnerable groups. The adoption of mitigation measures, such as a national resettlement policy to accompany a land reform programme, should be included as prior actions where risks of adverse impacts on human rights are identified. Immitigable weak governance or political economy factors that are likely to thwart successful implementation of the safeguard measures should preclude the approval of a DPL.

I would also like to highlight that DPLs, and especially single-tranche operations, drastically limit the opportunity of affected persons to access the Inspection Panel to seek accountability for alleged harms. Pursuant to BP 17.55 on Inspection Panel Resolution, a request for inspection is ineligible if it is filed after the closing date of the loan or after at least 95 per cent of the loan has been disbursed.<sup>55</sup> DPLs can be approved, disbursed and closed within a very short time period, sometimes in just a few days. In conjunction with the inadequate risk management system for DPLs, this situation creates an alarming accountability deficit. I therefore suggest that Bank policy be amended to extend the time period for which the Inspection Panel can accept requests for inspection from people claiming they have suffered in connection with DPLs. Requests should be accepted at least for the duration of the period covered by the DPL Performance Assessment Framework (approximately two-three years).<sup>56</sup>

In addition, certain types of investment lending operations, such as sector-wide and programmatic lending, while subject to safeguard policies, raise difficulties in their application.<sup>57</sup> In effect these operations vest in the borrower a comparative amount of discretion with respect to project implementation and places a similar level of trust in country systems as development policy operations. As such, the Bank faces similar challenges in assessing distributional impacts and social risk and applying safeguard policies as it does with DPLs. In such circumstances, a thorough human rights due diligence process is critical in order to analyse, for instance, how the project will interplay with prevailing ethnic, religious or political cleavages, entrenched discrimination and social and economic inequities. When such risks are identified, Bank projects should be modified to apply relevant safeguard policies, enhance distributional benefits and improve accountability to disadvantaged groups. I therefore recommend that the new Bank safeguards framework be formulated so that it is better suited to apply to the various types of financing instruments employed by the Bank.

### **C. Ensuring effective implementation of the safeguards framework**

In line with the Safeguards Review objective to increase effectiveness, efficiency and timeliness, I would like to suggest the following:

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<sup>55</sup> OP 17.55, annex A, para. 14 (c).

<sup>56</sup> Operations Policy and Country Services, *2009 Development Policy Lending Retrospective*, para. 77.

<sup>57</sup> See IEG, *Safeguards and Sustainability Policies*, p. 3.



**(i) Bank incentive structure**

Bank's staff performance is currently measured according to loan approval rates rather than the effectiveness of the project or compatibility with safeguards policies. Therefore there seems to be little structural incentive for staff to adhere to safeguard policies. Cases coming before the Inspection Panel point to the existence of "paper compliance" phenomena – i.e., projects in which the Bank follows safeguard procedures on the face of documentation, but below the surface, the project reports are inadequate for policy compliance and procedures required may have been followed superficially or not at all.<sup>58</sup> I thus suggest that the current review process examine alternative staff performance and incentive structures in order to ensure greater adherence to the safeguards in all project phases.

**(ii) Implementation, monitoring and accountability**

Although almost all safeguards include supervision requirement, it is well recognized that supervision after project approval remains a major weakness in the World Bank's safeguard policy framework.<sup>59</sup> Of particular concern is the deepening gap between the safeguards rhetoric and the implementation of the policy framework. The IEG found that more than one third of Bank projects had "inadequate environmental and social supervision, manifested mainly in unrealistic safeguards ratings and poor or absent monitoring and evaluation".<sup>60</sup> These weaknesses can be attributed to a lack of specificity of monitoring indicators, underinvestment in client's monitoring capacity and poor follow-up during supervision.<sup>61</sup> IEG further noted that "too often, safeguards activities are considered an add-on, and left to environmental and social specialists who are under-resourced and not well integrated into supervision teams".<sup>62</sup>

In light of the above I call on the Bank to systematically integrate clear indicators of social performance and explicit standards for compliance with the safeguard framework during project supervision. I also call on the Bank to budget the cost of evaluation and monitoring in the project planning and recommend that the Bank expand the use of third-party and community participation in the project supervision and evaluation. I would also like to stress the need to increase State accountability vis-à-vis the Bank in the implementation stages.

Finally, I would like to welcome the commitment by the World Bank President Kim at the October 2012 Annual General Meeting in Tokyo not to dilute the Bank's safeguard policies, but I stress the importance of incorporating human rights standards and obligations into the safeguards framework of the Bank. I recommend that the World Bank utilize the review process to bring its safeguard policies into line with international human rights standards and strengthen its capacity to ensure effective implementation.

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<sup>58</sup> Ibid., pp. 1030–1031.

<sup>59</sup> IEG, *Safeguards and Sustainability Policies*, p. 10. Dana L. Clark, "The World Bank and human Rights: The Need for Greater Accountability", *Harvard Human Rights Journal*, vol. 15, No. 205 (2002); Caroline Low and Hope Harrison, "The World Bank, Human Rights and Development" in Ann Hershkowitz (ed.) *The Elegant Report* (2004), p. 52.

<sup>60</sup> IEG, *Safeguards and Sustainability Policies*, p. xvii.

<sup>61</sup> Ibid., p. 31.

<sup>62</sup> Ibid., p. 31.