Preventing Human Rights Violations "In the Public Interest": Recommendations for Development that Respects the Prohibition on Forced Evictions

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FROM ANGOLA TO BANGLADESH TO BRAZIL, development projects forcibly displace millions of people every year.[1] Despite the widespread recognition under international law that forced evictions,[2] including those resulting from development,[3] presumptively violate human rights,[4] governments in many instances have asserted the public interest as an "exceptional circumstance" to successfully circumvent the prohibition on forced evictions.[5] These forced displacements are often illegal under international law yet are "almost never officially referred to as cases of forced

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1. *See* U.N. HABITAT, LOSING YOUR HOME: ASSESSING THE IMPACT OF EVICTION 1 (2011) [hereinafter U.N. HABITAT, LOSING YOUR HOME]. Development programs forcibly displaced approximately ten million people each year, or 200 million people, globally during the 1980s and 1990s, and fifteen million people per year the following decade. *Id.* at 1 n.1.

2. The Committee on Economic, Social and Cultural Rights defines "forced eviction" as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection." U.N. COMM. ON ECON., SOC. & CULTURAL RIGHTS (CESCR), GENERAL COMMENT NO. 7: THE RIGHT TO ADEQUATE HOUSING (ART. 11(1)): FORCED EVICTIONS, ¶ 3, U.N. Doc. E/1998/22 (1997) [hereinafter CESCR, GENERAL COMMENT NO. 7], *available at* http://www.refworld.org/docid/47a70799d.html.

3. *Id.* ¶ 7.

4. *See generally* U.N. COMM. ON ECON., SOC. & CULTURAL RIGHTS (CESCR), GENERAL COMMENT NO. 4: THE RIGHT TO ADEQUATE HOUSING (ART. 11(1) OF THE COVENANT), ¶ 18, U.N. Doc. E/1992/23 (1991) [hereinafter CESCR, GENERAL COMMENT NO. 4], *available at* http://www.refworld.org/docid/47a7079a1.html ("[T]he Committee considers that instances of forced evictions are prima facie incompatible with the requirements of the Covenant . . . .").

5. *See id.* (Forced evictions "can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.").

eviction"[6]:

> They are, instead, elaborately justified in the name of the broader public good and given developmental process names such as "infrastructural development," "nature conservation," "rural development," "urban renewal," "slum upgrading," "eradication of slums" and "inner city regeneration." This is not to say that none of the projects are genuinely aimed at the public interest. However, even in such public interest projects, the methods of decision-making, design and implementation, and specifically the manner in which the affected people are treated, would in the majority of cases qualify as forced evictions as defined under international law, . . . and would, therefore, amount to gross violations of human rights.[7]

Existing obligations under international law make clear that, to overcome the prohibition on forced evictions, states must provide full justification and appropriate legal remedies when asserting an overriding public interest.[8] However, in practice, States have engaged in forced evictions based on an asserted public interest without guaranteeing these protections.[9]

Bank standards and United Nations ("U.N.") guidelines applicable to development projects in many instances already provide for measures, such as eviction-impact assessments, designed to help mitigate risks and costs associated with development-based eviction.[10] However, these standards and guidelines often do not require such measures until after a project has been determined to be in the public interest, and with little or no scrutiny of the

6. U.N. HABITAT, LOSING YOUR HOME, *supra* note 1, at 1.

7. *Id.*

8. *See* CESCR, GENERAL COMMENT NO. 4, *supra* note 4, ¶ 18; CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶¶ 11, 14, 15.

9. *See, e.g.*, HOUS. AND LAND RIGHTS NETWORK, HOW TO RESPOND TO FORCED EVICTIONS: A HANDBOOK FOR INDIA 3 (2014) ("[A]t least 65-70 million people have been displaced in India, as a result of . . . 'development' projects [in the public interest]. . . . The majority of those displaced have not received any resettlement of rehabilitation benefits from the state.").

10. *See, e.g.*, WORLD BANK, *OP 4.12: Involuntary Resettlement* ¶¶ 20, 26 (rev. 2013) [hereinafter WORLD BANK, *OP 4.12*], *in* THE WORLD BANK OPERATIONS MANUAL (rev. 2014), *available at* http://siteresources.worldbank.org/OPSMANUAL/Resources/EntireOM_External.pdf; WORLD BANK, *OP 4.12 – Annex A: Involuntary Resettlement Instruments* ¶ 14 (rev. 2011) [hereinafter WORLD BANK, *OP 4.12 – Annex A*], *in* THE WORLD BOOK OPERATIONS MANUAL, *supra*; IFC PERFORMANCE STANDARDS ON ENVTL. AND SOC. SUSTAINABILITY Standard 5, ¶ 19, at 17, ¶ 31, at 25–26, Standard 1, ¶ 14, at 9–10 (Int'l Fin. Corp. 2012) [hereinafter IFC PERFORMANCE STANDARDS], *available at* http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES; Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, ¶ 32, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (by Miloon Kothari) [hereinafter U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*], *available at* http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf.

basis for that determination.

This Article makes recommendations to better ensure compliance with international law when States assert the public interest to justify development-based eviction. Essentially, the public interest justifying eviction: (1) must be undertaken solely to ensure the human rights of the most vulnerable, consistent with states' international human rights obligations; (2) must be determined after considering all feasible alternatives, accounting for eviction impacts, in consultation with affected people; (3) should be reasonable and proportional, with a higher threshold where eviction threatens indigenous peoples or other vulnerable groups who depend on land for socioeconomic or cultural survival; (4) should not leave affected people vulnerable to human rights violations; and (5) should be accompanied by appropriate due process protections, including an effective opportunity to challenge the state's justification of the public interest and protection from eviction during the challenge. The Article then presents the recommendations in the context of existing international standards applicable to development projects[11] and illustrates how the recommendations could help ensure that development-based evictions premised on the public interest are consistent with international law.

I. To Justify Eviction, a State's Assertion of an Overriding Public Interest Must Be Consistent with International Law

As the U.N. Commission on Human Rights (now Human Rights Council) affirmed in 1993, "the practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing" enshrined in the International Covenant on Economic, Social and Cultural Rights ("ICESCR") as an element of the right to an adequate standard of living.[12] The right to adequate housing provides that "all persons should possess a degree of security of tenure which guarantees legal protection

11. The World Bank is developing a set of environmental and social standards that will replace the Operational Policies analyzed in this Article. *See* WORLD BANK, ENVIRONMENTAL AND SOCIAL FRAMEWORK: SETTING STANDARDS FOR SUSTAINABLE DEVELOPMENT (First Draft for Consultation 2014) [hereinafter WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK], *available at* http://documents.worldbank.org/curated/en/2014/07/19898916/environmental-social-framework-setting-standards-sustainable-development. Because the framework is still in draft form, this Article relies primarily on the standards currently in effect (the Operational Policies). In some places, the Article notes the applicability of the Environmental and Social Framework based on the July 2014 draft.

12. U.N. Comm'n on Human Rights Res. 1993/77, Forced Evictions, 67th mtg., U.N. Doc. E/C.4/RES/1993/77, ¶ 1 (Mar. 10, 1993); *see also* International Covenant on Economic, Social and Cultural Rights, art. 11(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

against forced eviction."[13] Forced eviction also violates the International Covenant on Civil and Political Rights's ("ICCPR") prohibition of and protection from arbitrary or unlawful interference with one's privacy, family, and home,[14] as well as internationally protected rights of women[15] and children.[16] Forced eviction is thus "prima facie incompatible" with requirements of international human rights law.[17]

Under international law, forced evictions "*can only be justified in the most exceptional circumstances* and in accordance with the relevant principles of international human rights law."[18] As examples of such "exceptional circumstances," the U.N. Committee on Economic, Social, and Cultural Rights has offered "the case of persistent non-payment of rent or of damage to rented property without any reasonable cause."[19] These examples differ markedly from development-based eviction, which occurs due to no fault of the displaced.

Even under "exceptional circumstances," "[e]victions require full justification given their adverse impact on a wide range of internationally recognized human rights."[20] Thus, evictions (1) must be authorized by law

13. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 1 (citing CESCR, GENERAL COMMENT NO. 4, *supra* note 4, ¶ 8(a)).

14. U.N. HUMAN RIGHTS COMMITTEE (HRC), GENERAL COMMENT NO. 16: ARTICLE 17 (RIGHT TO PRIVACY), THE RIGHT TO RESPECT OF PRIVACY, FAMILY, HOME AND CORRESPONDENCE, AND PROTECTION OF HONOUR AND REPUTATION ¶ 1 (1988) [hereinafter HRC, GENERAL COMMENT NO. 16], *available at* http://www.refworld.org/docid/453883f922.html.

15. *See* Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 14(2)(h), 1249 U.N.T.S. 13 (State parties "shall ensure to women [in rural areas] the right . . . [t]o enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."); CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 10 ("Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced evictions.").

16. *See* Convention on the Rights of the Child, Nov. 20, 1989, art. 27(3), 1577 U.N.T.S. 3 ("[States] shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."); CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 11.

17. CESCR, GENERAL COMMENT NO. 4, *supra* note 4, ¶ 18; CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 1; U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 6; *see also* HUMAN RIGHTS WATCH, "THEY PUSHED DOWN THE HOUSES": FORCED EVICTIONS AND INSECURE LAND TENURE FOR LUANDA'S URBAN POOR 17 (May 2007), *available at* http://www.hrw.org/reports/2007/angola0507/angola0507web.pdf.

18. CESCR, GENERAL. COMMENT NO. 4, *supra* note 4, ¶ 18 (emphasis added)*;* CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶¶ 5, 11, 14; U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 21.

19. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶11.

20. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-*

and solely for the purpose of promoting the general welfare; (2) must be carried out only after all feasible alternatives have been explored in consultation with the affected people; (3) should be consistent with general principles of reasonableness and proportionality; (4) should not leave the affected people vulnerable to human rights violations; and (5) should be accompanied by appropriate due process protections afforded to those affected.[21] This Section addresses these requirements with a view to when the public interest can constitute exceptional circumstances.

A. The public interest justifying eviction must be "solely for the purpose of promoting the general welfare."

In many cases forced evictions are "authorized by law"[22] because governments pass laws allowing expropriation in the public interest.[23] This comports with the Guiding Principles on Internal Displacement, which explain that the prohibition of arbitrary displacement from one's home includes "displacement . . . [i]n cases of large-scale development projects" unless they are "justified by compelling and overriding public interests."[24] Accordingly, States have invoked a commonly established limitation on the right to property—the principle of eminent domain—to justify forced eviction on the basis of a public interest.[25]

International law has provided some specificity as to what qualifies as "a compelling and overriding public interest." Even if a domestic law authorizes forced eviction under eminent domain, to be justifiable under

Based Evictions, *supra* note 10, ¶ 21.

21. *See id.*; ICESCR, *supra* note 12, art. 4; CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶¶ 3, 5, 11, 14; CESCR, GENERAL COMMENT NO. 4, *supra* note 4, ¶ 18.

22. *See* CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 3.

23. *See, e.g.*, CONST. OF THE REPUBLIC OF SOUTH AFRICA, 1996, ch. 1, art. 25; U.S. CONST. amend. V; CONST. OF THE REPUBLIC OF ANGOLA, Aug. 25, 1992, art. 12(4).

24. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, princ. 6 (Feb. 11, 1988) [hereinafter *Guiding Principles on Internal Displacement*], *available at* http://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx.

25. *See, e.g.*, Ley No. 6 de 3 de febrero de 1997 [Panama], "Por la cual se dicta el Marco Regulatorio e Institucional para la Prestación del Servicio Público de Electricidad," art. 117 (authorizing declaration of "all property necessary, convenient, and usually used for construction, installation, and activities of energy generation, connection, transmission, and distribution" as the public interest); Colombia, Mining Code (Law 685, Aug. 15, 2001), art. 13 (declaring "the mining industry in all its branches and stages" to be "of public service and social interest" and authorizing "expropriations of property of assets and all other rights constituted on them, that might be necessary for exercise and efficient development"); Peter Penz, *Development, Displacement and Ethics*, 12 FORCED MIGRATION REV. 4, 4 (2002) (noting "the statement of Jawaharlal Nehru, India's first Prime Minister, that people displaced by dams had to make such sacrifices for the good of the country").

international law, the eviction must be undertaken "solely for the purpose of promoting the general welfare."[26] This restriction comes from the ICCPR and ICESCR, both of which require that limitations on rights therein be "determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."[27] The U.N. Principles and Guidelines on Development-Based Evictions and Displacement (U.N. Guidelines on Development-Based Evictions) define "the purpose of promoting the general welfare" as "steps taken by States consistent with their international human rights obligations, in particular the need to ensure the human rights of the most vulnerable."[28] As those guidelines explain, "an eviction may be considered justified if measures of land reform or redistribution, *especially for the benefit of vulnerable or deprived persons, groups or communities*, are involved."[29] At the same time, as the CESCR explained in its general comment on forced evictions, "the lack of development may not be invoked to justify the abridgement of internationally recognized human rights."[30] The U.N. Guidelines on Development-Based Evictions instruct States to "refrain, to the maximum extent possible, from claiming or confiscating housing or land, and in particular when such action does not contribute to the enjoyment of human rights,"[31] and to apply appropriate penalties against anyone within its jurisdiction "that carries out evictions in a manner not fully consistent with applicable law and international human rights standards."[32] In other words, a State can only validly assert a public interest if it promotes the general welfare—especially the human rights of the most vulnerable—and if it

26. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 5 (internal quotation marks omitted); *see also* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 4, 999 U.N.T.S. 171 [hereinafter ICCPR]; ICESCR, *supra* note 12, art. 4; U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 21.

27. ICCPR, *supra* note 26, art. 4; ICESCR, *supra* note 12, art. 4; *see also* CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 5 (noting that this restriction applies even in situations in which it may be necessary to impose limitations on the right to adequate housing and not to be subjected to forced eviction).

28. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 21 & n.d.

29. *Id.* ¶ 22 (emphasis added).

30. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 18 (quoting U.N. World Conference on Human Rights: Vienna Declaration and Programme of Action, June 25, 1993, 32 I.L.M. 1661, Part I, ¶ 10); *see also* U.N. Declaration on the Right to Development, G.A. Res. 41/128, pmbl., U.N. Doc A/141/53 (Dec. 4, 1986) ("[T]he promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms.").

31. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 22.

32. *Id.*

accords with international human rights obligations. This includes refraining from taking land when that would threaten human rights and penalizing those who undertake unjustified eviction.

From beautification projects in Angola to infrastructure projects in Indonesia to urban renewal in Zimbabwe,[33] the declaration of a public interest has in many cases effectively legitimized projects that do not ensure the needs of the most vulnerable. Yet, "development-based evictions include evictions often planned or conducted under the pretext of serving the 'public good', such as those linked to development and infrastructure projects (including large dams, large-scale industrial or energy projects, or mining and other extractive industries); . . . and, ostensibly, environmental purposes."[34]

As Raquel Rolnik, former Special Rapporteur on the Right to Adequate Housing, observed, "[e]victions considered 'legitimate' shall always be related to works and projects that promote the public interest."[35] But a legitimate "public interest shall always be established by a participatory process that gives proper attention to, and takes into consideration, the views and interests of those living in the areas that would be impacted."[36] While it may be difficult to know exactly how to properly weigh those views and interests, a "public interest project should not render communities worse off than before."[37]

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33. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 17, at 6, 8; HUMAN RIGHTS WATCH, CONDEMNED COMMUNITIES: FORCED EVICTIONS IN JAKARTA (2006), *available at* http://www.hrw.org/reports/2006/09/05/condemned-communities; CTR. ON HOUS. RIGHTS & EVICTIONS, GLOBAL SURVEY ON FORCED EVICTIONS NO. 11: FORCED EVICTIONS: VIOLATIONS OF HUMAN RIGHTS 33 (2009), *available at* http://www.cohre.org/sites/default/files/global_survey_11_2009_-_no_pictures_0.pdf; U.N. HABITAT, FORCED EVICTIONS—TOWARDS SOLUTIONS: SECOND REPORT OF THE ADVISORY GROUP ON FORCED EVICTIONS TO THE EXECUTIVE DIRECTOR OF U.N.-HABITAT 13 (2007); U.N. SPECIAL RAPPORTEUR ON THE RIGHT TO ADEQUATE HOUSING, HOW TO DEAL WITH PROJECTS THAT INVOLVE FORCED EVICTIONS AND DISPLACEMENT (2010) [hereinafter U.N. SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, FORCED EVICTIONS AND DISPLACEMENT], *available at* http://issuu.com/unhousing/docs/guide_forced_eviction.

34. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 8; *see also* CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 7 ("[I]nstances of forced eviction occur in the name of development.").

35. U.N. SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, FORCED EVICTIONS AND DISPLACEMENT, *supra* note 33, at 11; [*European*] *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature March 20, 1952, 213 U.N.T.S. 262, art. 1 (entered into force May 18, 1954) ("Every natural or legal person is entitled to the peaceful enjoyment of his [or her] possessions. No one shall be deprived of his [or her] possessions *except in the public interest and subject to the conditions provided for by law and by the general principles of international law*." (emphasis added)).

36. U.N. SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, FORCED EVICTIONS AND DISPLACEMENT, *supra* note 33, at 9 (internal quotation marks omitted).

37. *Id.*; *see also* WORLD BANK, *OP 4.12*, *supra* note 10, ¶ 2(c) ("Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them,

B. Before determining whether an overriding public interest justifies forced eviction, all feasible alternatives, taking into account for eviction impacts, must be considered in consultation with affected people.

To validly assert that the public interest justifies forced eviction, a state must first "explore fully all possible alternatives to evictions" in consultation with affected persons.[38]

Regarding exploration of alternatives, before reaching a decision to evict, the State "must demonstrate that the eviction is unavoidable"[39] and "must give priority to exploring strategies that minimize displacement."[40] As the architect of World Bank policy on involuntary resettlement, Michael Cernea, explained:

> Recognizing risks upfront and their financial implications is often a powerful stimulus to search for an alternative that will eliminate the need for displacement or cut down its size. This is technically possible in some cases, for instance, by changing the site of a dam or by re-routing a highway around (rather than through) a village. Many other technical options can be found through creative search.[41]

As Cernea noted with respect to the Impoverishment Risks and Reconstruction (IRR) model, which he developed to assess these kinds of risks, "[i]t does not add new tasks on top of the existing ones in preparing projects entailing resettlement. Instead, it saves efforts and increases effectiveness by (a) moving risk discovery upstream in project presentation, and (b) by helping reduce displacement, guiding early risk-elimination or risk-reduction actions."[42]

One way to evaluate these risks is the eviction impact assessment.[43] To

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in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.").

38. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 38; *see also* CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 13.

39. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 40.

40. *Id.* ¶ 32.

41. U.N. HABITAT, LOSING YOUR HOME, *supra* note 1, at 28 (quoting Michael Cernea, *IRR: An Operational Risks Reduction Model for Population Resettlement*, 1 HYDRO NEPAL: J. WATER, ENERGY & ENV'T 1, 39 (2007)).

42. Cernea, *supra* note 41, at 35.

43. *See, e.g.*, U.N. SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, FORCED EVICTIONS AND DISPLACEMENT, *supra* note 33, at 14. Despite the development of some tools for eviction impact assessment, such as the Housing and Land Rights Network loss matrix and the Impoverishment Risks and Reconstruction (IRR) model, U.N. Habitat observed that "there appears to be growing concern amongst experienced practitioners in the areas of development-caused displacement that there is a massive gap between theory and practice." U.N. HABITAT, LOSING YOUR HOME, *supra* note 1, at 58; *see also Housing Rights Violation Loss Matrix*, HABITAT INT'L

be effective, an eviction-impact assessment should explore alternatives and strategies for minimizing harm; should be "[c]omprehensive and holistic"; and "should be carried out prior to the initiation of any project that could result in development-based eviction and displacement, with a view to securing fully the human rights of all potentially affected persons, groups and communities, including their protection against forced evictions."[44]

With these objectives in mind, the eviction impact assessment necessitates establishment of "[c]lear criteria" to assess the impact of a project and the resulting eviction, considering "economic, . . . social and cultural aspects," including "community interaction, . . . living conditions, and other non-material impacts such as psychological trauma and loss of services such as education and healthcare."[45] Given the differential impacts of forced evictions on women, children, the elderly, and marginalized sectors of society,[46] impact assessments "should be based on the collection of disaggregated data, such that all differential impacts can be appropriately identified and addressed."[47] In addition, the criteria for eviction impact assessment "must be developed through a genuine consultative process . . . and must be carried out with the participation of the affected population."[48]

Because forced evictions raise issues of serious human rights violations, the people charged with assessing eviction impacts should be well versed in relevant human rights law.[49] To that end, "[a]dequate training in applying international human rights norms should be required and provided for relevant professionals, including lawyers, law enforcement officials, urban and regional planners and other personnel involved in the design, management and implementation of development projects."[50] In light of the

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COAL.–HOUS. & LAND RIGHTS NETWORK (HIC–HLRN), http://www.hic-mena.org/documents/Loss%20Matrix.pdf (last visited Nov. 19, 2014).

44. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 32.

45. U.N. SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, FORCED EVICTIONS AND DISPLACEMENT, *supra* note 33, at 14 (internal quotation marks omitted).

46. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 33; *see also* CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 10.

47. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 33.

48. U.N. SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, FORCED EVICTIONS AND DISPLACEMENT, *supra* note 33, at 14.

49. *See* U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 34.

50. *Id.*; *see also* U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK princ. 8, at 8–10 (2011) [hereinafter U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS], *available at* http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf ("States

disproportionate effects evictions have on women,[51] "[t]his must include training on women's rights, with an emphasis on women's particular concerns and requirements pertaining to housing and land."[52]

Exploration of alternatives must occur with the participation of affected people. Generally speaking, "[p]rojects that result in involuntary displacement without the involvement of affected parties in the planning and decision-making processes do not comply with international human rights standards."[53] To be sure, international law recognizes the public's right to participate in decision-making on environmental matters and that "[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level."[54]

In the context of forced eviction, the U.N. Guidelines explain that all potentially affected groups and persons, as well as others working on behalf of the affected, "have the right to . . . propose alternatives that authorities should duly consider," as well as to "relevant information, full consultation and participation throughout the entire process."[55] After the impact assessment study is complete, the results "must be publicized and used to decide whether to go ahead with the project or not."[56] A State must not inform the affected people of the project, and resulting eviction, as a *fait accompli*.[57]

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should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.").

51. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 10.

52. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 34.

53. U.N. SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, FORCED EVICTIONS AND DISPLACEMENT, *supra* note 33, at 9.

54. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 10, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter Rio Declaration]; *see generally* U.N. Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

55. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 38; *see also* U.N. SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, FORCED EVICTIONS AND DISPLACEMENT, *supra* note 33, at 9.

56. U.N. SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, FORCED EVICTIONS AND DISPLACEMENT, *supra* note 33, at 14.

57. *See* Centre for Minority Rights Dev. and Minority Rights Grp. Int'l v. Kenya, African Comm'n on Human and Peoples' Rights, Commc'n No. 276/2003, May 2009, ¶ 281 ("The African Commission . . . is convinced that community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve." (footnote omitted)).

Timing is important. In many instances in which eviction-impact assessment requirements exist, they do not take effect until after a decision to allow the forced eviction, thereby failing to ensure that alternatives were fully explored in consultation with the communities.[58] This defeats eviction-impact assessments' purpose of helping to demonstrate whether the state "explor[ed] strategies that minimize displacement" and whether eviction was indeed "unavoidable."[59]

Timely, comprehensive, participatory eviction impact assessments can inform the determination of whether the public interest is compelling. For instance, often when evictions are justified "in the name of a public interest or purpose, such as . . . the reduction of pollution and congestion of a river," "[t]he impact of the eviction on the affected communities is presented as justifiable in light of the benefits of a cleaner river to a broader community and the city as a whole." [60]

> However if an [eviction-impact assessment] is conducted and the findings illustrate just how severely the residents will be affected . . . , while complementary research illustrates that the perceived public gains (such as reduction of pollution) will be less significant than previously thought, the argument for a policy shift and change of the development plan can become compelling.[61]

C. The public interest justifying forced eviction should be consistent with general principles of reasonableness and proportionality under international law.

For the public interest to justify forced eviction, the eviction should be reasonable and proportional in the given circumstances.[62] When indigenous peoples' rights are implicated, limitations must be "strictly necessary" to meet "the just and most compelling requirements of a democratic society."[63]

Both the Committee on Economic, Social and Cultural Rights and the U.N. Human Rights Committee (the bodies that oversee the ICESCR and

58. *See* WORLD BANK, *OP 4.12*, *supra* note 10, ¶¶ 20, 26; WORLD BANK, *OP 4.12 – ANNEX A*, *supra* note 10, ¶ 14; IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 19, at 36, ¶ 31, at 38–39, Standard 1, ¶ 14, at 9–10.

59. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶¶ 32, 40.

60. U.N. HABITAT, LOSING YOUR HOME, *supra* note 1, at 48.

61. *Id.*

62. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 14; *see also Guiding Principles on Internal Displacement*, *supra* note 24, Annotation, at 13, 17 (clarifying that for "compelling and overriding public interests" to "justify [development-related displacement] . . . the requirements of necessity and proportionality [must be] met.").

63. *See* U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 46(2), U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

ICCPR, respectively) have noted that "interference with a person's home can only take place in cases envisaged by the law," and that "the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, *reasonable in the particular circumstances*."[64] Thus, regardless of whether national law might allow the state's expropriation power to supersede other interests[65] and force eviction, the eviction should be "reasonable and proportional" in light of the asserted public interest.[66]

Regional human rights bodies have upheld this principle. For instance, the right to property under the American Convention on Human Rights provides that "[t]he law may subordinate" the right to use and enjoy property "to the interest of society" and deprive people of their property "for reasons of public utility or social interest."[67] According to the Inter-American Court of Human Rights (Inter-American Court), "[t]he necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest," which the court views as requiring more than proof of "a useful or timely purpose."[68] Regarding proportionality, the restriction must be "closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right."[69] "Finally," the restrictions "must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right."[70] Following this reasoning, when faced with "conflicting interests in indigenous claims" to land, the Inter-American Court has determined that "it must assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society (public purposes and public benefit), to impose restrictions on the right to property, on the one hand, or the right to

64. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 14 (quoting HRC, GENERAL COMMENT NO. 16, *supra* note 14, ¶¶ 3–4, 8 (emphasis added) (internal quotation marks omitted)).

65. *See, e.g.*, CONST. OF THE REPUBLIC OF PANAMA (2004), art. 50 ("Cuando de la aplicación de una ley expedida por motivos de utilidad pública o de interés social, resultaren en conflicto los derechos de particulares con la necesidad reconocida por la misma ley, *el interés privado deberá ceder al interés del público o social*." ["When the application of a law enacted for reasons of public utility or social interest results in a conflict between private rights and the need recognized by that law itself, *the private interest must yield to the public or social interest.*"] (emphasis added)).

66. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 21.

67. American Convention on Human Rights "Pact of San Jose, Costa Rica," Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, art. 21(1)–(2).

68. Yakye Axa Indigenous Cmty. v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 145 (June 17, 2005).

69. *Id.* (citations omitted).

70. *Id.*

traditional lands, on the other."[71] This assessment is consistent with the U.N. Declaration on Indigenous Peoples' Rights's provision for limitations on its rights only when "strictly necessary" to secure due recognition and respect for others' rights and freedoms and to meet "the just and most compelling requirements of a democratic society."[72]

The African Commission on Human and Peoples' Rights has taken a similar approach. Under the African Charter on Human and Peoples' Rights, any restriction on a right therein "must be proportionate to a legitimate aim that does not interfere adversely on the exercise of" the right.[73] In the landmark case *Centre for Minority Rights Development and Minority Rights Group International v. Kenya*, the African Commission on Human and Peoples' Rights held that Kenya violated the rights of the indigenous Endorois peoples by taking their land for the asserted public interest of creating a game reserve.[74] There, the African Commission found that "encroachment [wa]s not proportionate to any public need and [wa]s not in accordance with national and international law."[75] In reaching this conclusion, the African Commission held:

> The "public interest" test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to ancestral land rights of indigenous peoples.[76]

Quoting the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights, the African Commission continued:

> Limitations, if any, on the right [of] indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights,

71. Sawhoyamaxa Indigenous Cmty. v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 138 (Mar. 29, 2006) (finding that the expropriation of land for restitution to indigenous people from whom the land had been taken in violation of international law constituted a valid public purpose) (citation omitted); *see also* Yakye Axa Indigenous Cmty. v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 217 ("If the traditional territory is in private hands, the State must assess the legality, necessity and proportionality of expropriation or non-expropriation of said lands to attain a legitimate objective in a democratic society.").

72. UNDRIP, *supra* note 63, art. 46(2).

73. Centre for Minority Rights Dev. and Minority Rights Grp. Int'l v. Kenya, African Comm'n on Human and Peoples' Rights, Commc'n No. 276/2003, May 2009, ¶ 249.

74. *Id.* ¶¶ 214, 238.

75. *Id.* ¶ 238.

76. *Id.* ¶ 212.

> including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.[77]

Thus, while there is no bright-line test for whether a forced eviction is "reasonable and proportional," in some circumstances, such as forced eviction of indigenous peoples and other vulnerable groups whose socioeconomic and cultural survival often depends on access to their ancestral lands,[78] international law supports subjecting the state's asserted justification of the public interest to heightened scrutiny.[79]

D. The public interest cannot justify forced eviction where the affected people will be vulnerable to human rights violations.

Even where the public interest may appear reasonable and proportional to justify eviction, it "should not result in individuals being rendered homeless or vulnerable to the violation of other human rights."[80] This recognition is important given that "forced evictions frequently violate other human rights"[81]—or, as the U.N. Guidelines on Development-Based Evictions explain, "constitute gross violations of a range of internationally recognized human rights, including the human rights to adequate housing, food, water, health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement."[82]

At the most basic level, forced eviction is incompatible with the right to adequate housing, which requires States, at a minimum, to "refrain from forced evictions"; to ensure enforcement of the law against its agents or third parties who carry out forced evictions;[83] and not to introduce any deliberately

77. *Id.* (quoting Erica-Irene Daes, *Indigenous Peoples' Right to Land and Natural Resources*, *in* MINORITIES, PEOPLES AND SELF-DETERMINATION 75, 89 (Nazila Ghanea & Alexandra Xanthaki eds. 2005) (emphasis omitted)).

78. *See, e.g.*, Xákmok Kásek Indigenous Cmty. v. Paraguay, 2010 Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 171–82 (Aug. 24, 2010) (recognizing indigenous peoples' close ties to their lands and natural resources and the significant adverse impacts evictions have on their identity and cultural survival); Kichwa Indigenous People of Sarayaku v. Ecuador, 2012 Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 146–47 (June 27, 2012).

79. *See* Centre for Minority Rights Dev. and Minority Rights Grp. Int'l v. Kenya, African Comm'n on Human and Peoples' Rights, Commc'n No. 276/2003, May 2009, ¶ 212; UNDRIP, *supra* note 63, art. 46(2).

80. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 16.

81. *Id.* ¶ 4.

82. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 6; *see also* GENERAL COMMENT No. 7, *supra* note 2, ¶ 4.

83. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 8; *see also* U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 58

retrogressive measures regarding protection against forced evictions.[84] Forced eviction can also infringe on the right to adequate food,[85] which prohibits States from taking any measures that result in preventing "existing access to adequate food."[86] As former Special Rapporteur on the Right to Food, Olivier de Schutter, has recognized, "where [forced eviction] leads to depriving [affected] families from their means of producing food, it also is a violation of the right to food."[87] Beyond responsibility for its own actions, States must take "measures . . . to ensure that enterprises or individuals do not deprive individuals of their access to adequate food."[88]

Where development displaces indigenous peoples, concerns arise about violations of indigenous peoples' rights. Because indigenous peoples often depend on their land for socioeconomic and cultural survival,[89] where a project would forcibly displace indigenous peoples, eviction will almost invariably leave the affected people vulnerable to human rights violations. This is especially true because international human rights law provides heightened protection of indigenous peoples' rights.[90] For example, sources in international law establish that relocation of indigenous peoples cannot occur without their free, prior, and informed consent.[91] Thus, where indigenous peoples do not consent to relocation, the prohibition on forced

("Persons, groups or communities affected by an eviction should not suffer detriment to their human rights, including their right to the progressive realization of the right to adequate housing.").

84. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 18.

85. *See* OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, U.N. HABITAT, FORCED EVICTIONS: FACT SHEET NO. 25 REV. 1, at 11, 47 (2014) [hereinafter FACT SHEET NO. 25], *available at* http://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf.

86. S*pecial Rapporteur on the Right to Food*, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, http://www.ohchr.org/EN/issues/food/Pages/FoodIndex.aspx (last visited Nov. 19, 2014).

87. Special Rapporteur on the Right to Food, *Rep. of the Special Rapporteur on the Right to Food, Addendum – Mission to Nicaragua*, U.N. Doc. A/HRC/13/33/Add.5 (Dec. 8, 2009) (by Olivier De Schutter).

88. *Special Rapporteur on the Right to Food*, *supra* note 86.

89. *See, e.g.*, Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).

90. *See, e.g.*, Saramaka People v. Suriname, 2007 Inter-Am. Ct. of Human Rights (ser. C) No. 172, ¶¶ 90, 96 (Nov. 28, 2007).

91. *See* UNDRIP, *supra* note 63, art. 10; Int'l Labour Org., Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, art. 16(1)–(2), 1650 U.N.T.S. 383 [hereinafter ILO Convention]; Saramaka People v. Suriname, 2007 Inter-Am. Ct. of Human Rights (ser. C) No. 172, ¶ 134; INTER-AM. COMM'N ON HUMAN RIGHTS, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: NORMS AND JURISPRUDENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM ¶ 334 (2009), *available at* http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf.

evictions should be especially hard to overcome even for a compelling public interest. As noted in Section I.B.3, the African Commission on Human and People's Rights applied "a much higher threshold" to "the 'public interest' test" when indigenous peoples faced eviction from their land, given their dependence on the land for socioeconomic or cultural survival.[92] Nonetheless, States have bypassed the requirement to obtain free, prior and informed consent when they have declared projects to be in the public interest.[93]

One example illustrating development-based eviction that would leave affected people vulnerable to human rights violations is the Barro Blanco dam project in western Panama. This project threatens to forcibly evict indigenous Ngöbe families who never consented to leave their land,[94] and who depend on their land for subsistence and culture.[95] The government of Panama declared the project in the "public interest" and "of an urgent character to satisfy basic needs of the community" pursuant to a summary procedure,[96] without informing the affected peoples of how the Barro Blanco project meets this standard[97] and without adequately considering the resulting impacts on the affected Ngöbe people's physical, economic, and cultural survival.[98] This is not a case in which the government was unaware of the project's impacts on indigenous peoples. Although in the project's initial environmental impact assessment in 2008, the project proponent averred that the dam would have no impacts in indigenous lands and that no

92. *See* Centre for Minority Rights Dev. and Minority Rights Grp. Int'l v. Kenya, African Comm'n on Human and Peoples' Rights, Commc'n No. 276/2003, May 2009, ¶ 212.

93. *See, e.g.,* Ngöbe Indigenous Cmtys. and Their Members in the Changuinola River Valley v. Panama, Pet. No. 286-08, Inter-Am. C.H.R., Rep. No. 75/09, ¶ 34 (Aug. 5, 2009) (noting the petitioners' *amparo petition* alleging constitutional violations of the Ngöbe's fundamental rights due to "several alleged facts *inter alia*: the approval of the [c]oncession . . . which allowed the resettlement of the Ngöbe communities without having produced a Relocation Plan for the Chan-75 Project and without the free, prior and informed consent of the communities"); Ley No. 6 de 3 de febrero de 1997 [Panama], "Por la cual se dicta el Marco Regulatorio e Institucional para la Prestación del Servicio Público de Electricidad," arts. 117 ("Utilidad Pública), 122 ("Traslado").

94. *See* Brief for Interamerican Ass'n for Envtl. Def. (AIDA) et al. as Amici Curiae, Demanda Contencioso Administrativa de Nulidad contra la Resolución DIEORA IA-332-2008 de 9 de mayo de 2008, de la Autoridad Nacional del Ambiente (Aug. 29, 2013) [hereinafter AIDA Brief], *available at* http://earthjustice.org/sites/default/files/files/BARROBLANCO-AMICUS13029.pdf.

95. U.N. DEV. PROGRAMME (UNDP), INFORME DE LA MISIÓN DE VERIFICACIÓN: REALIZADA DEL 23 AL 28 DE SEPTIEMBRE DE 2012 [MISSION VERIFICATION REPORT, CONDUCTED FROM SEPTEMBER 23–28, 2012] 18–30, 37 (2012).

96. Resolución AN No. 6103-Elec de 22 de abril de 2013, "Resuelve," ¶ 1 [Panama] (citing Ley 18 de 26 de marzo de 2013, art. 138-A).

97. *See id.*

98. AIDA Brief, *supra* note 94, at 21–22.

one would be relocated,[99] the reality of these impacts are no longer in dispute.[100] As documented by a UNDP expert assessment, the flood area encompasses indigenous Ngöbe's land, houses, and natural resources.[101] These impacts threaten a number of the Ngöbe's rights, including to housing, food, water, and culture. Given the lack of adequate consultation and free, prior, and informed consent, eviction will also violate the Ngöbe's land rights.[102] Panama has nonetheless allowed dam construction to continue and has notified affected families of taking of their land for this project. Panama thus has failed to ensure that eviction of these indigenous Ngöbe people will not leave them vulnerable to violations of their human rights.

E. States should ensure appropriate due process protections regarding its assertion that the public interest justifies forced eviction.

If—under the most exceptional circumstances, after the consideration of all feasible alternatives, in accordance with relevant international law, and without leaving affected people vulnerable to human rights violations—forced evictions appear to be justified by a public interest that promotes the general welfare, even then, the State has a duty to ensure the affected people are afforded due process protections before evictions can take place. As the Committee on Economic, Social and Cultural Rights noted, "[a]ppropriate

99. *See* Demanda Contencioso Administrativa de Nulidad contra la Resolución DIEORA IA-332-2008 de 9 de mayo de 2008, de la Autoridad Nacional del Ambiente, ¶¶ 2, 17 (on file with author).

100. *See generally* UNDP Expert Assessment Reports: LUIS LÓPEZ GARCÍA & INGENIERO, UNDP, PERITAJE INDEPENDIENTE DE LA PRESA DE BARRO BLANCO, PANAMÁ: INFORME FINAL DE LA COMPONENTE DE INGENIERÍA HIDRÁULICA [INDEPENDENT EVALUATION OF THE DAM OF BARRO BLANCO, PANAMA: FINAL REPORT OF THE HYDRAULIC ENGINEERING COMPONENT] (2013) [hereinafter UNDP, PERITAJE—HIDRÁULICA], *available at* http://media.gestorsutil.com/PNUD_web/651/centro_informacion_documentos/docs/0910718001378499234.pdf; GONZALO CASTRO DE LA MATA, UNDP, PERITAJE AL PROYECTO HIDROELÉCTRICO BARRO BLANCO: ANÁLISIS DE LOS ASPECTOS ECOLÓGICOS Y ECONÓMICOS [EVALUATION OF THE BARRO BLANCO HYDROELECTRIC PROJECT: AN ANALYSIS OF THE ECOLOGICAL AND ECONOMIC IMPACT] (2013) [hereinafter UNDP, PERITAJE—ECOLÓGICO Y ECONÓMICO], *available at* http://media.gestorsutil.com/PNUD_web/651/centro_informacion_documentos/docs/0981925001378498682.pdf; GONZALO CASTRO DE LA MATA, PNUD, PERITAJE AL PROYECTO HIDROELECTRICO BARRO BLANCO: RESULTADOS DEL DIAGNOSTICO RURAL PARTICIPATIVO [EVALUATION OF THE BARRO BLANCO HYDROELECTRIC PROJECT: RESULTS OF THE PARTICIPATORY RURAL APPRAISAL] (2013), *available at* http://media.gestorsutil.com/PNUD_web/651/centro_informacion_documentos/docs/027698200137849910 9.pdf.

101. *See, e.g.*, UNDP PERITAJE—ECOLÓGICO Y ECONÓMICO, *supra* note 100, ¶ 16.

102. *See* UNDRIP, *supra* note 63, art. 10; ILO Convention, *supra* note 91, art. 16(1); Saramaka People v. Suriname, 2007 Inter-Am. Ct. of Human Rights (ser. C) No. 172, ¶ 134 (Nov. 28, 2007); INTER-AM. COMM'N ON HUMAN RIGHTS, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES, *supra* note 91, ¶ 107.

procedural protection and due process . . . are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights."[103] Those protections include an opportunity for genuine consultation with those affected; adequate and reasonable notice[104]—announced in writing in the local language[105]—to all affected persons prior to the eviction date; information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; provision of legal remedies; and provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.[106] These protections accord with States' duties regarding access to information, public participation in decision-making processes, and access to justice in environmental matters outlined in Principle 10 of the Rio Declaration and in treaties such as the Aarhus Convention.[107]

Given that "[a]ll persons threatened with or subject to forced evictions have the right of access to timely remedy, . . . includ[ing] a fair hearing,"[108] people affected by a state's determination that the public interest justifies taking of their land have a right to challenge that determination and the justification for it. The fact that "relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted" should promote the ability of affected people to challenge a state's justification based on the public interest.[109] Similarly, given that "[t]he eviction notice should contain a detailed justification for the decision, including on: (a) absence of reasonable alternatives; (b) the full details of the proposed alternative; and (c) where no alternatives exist, all measures taken and foreseen to minimize the adverse effects of evictions,"[110] affected people could use that information to challenge the government's purported justification.

103. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 15 (referring to the ICCPR and ICESCR).

104. *Id.* ¶15(a)–(b).

105. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 41.

106. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 15(b–c), (g–h).

107. *See* Rio Declaration, *supra* note 54, princ. 10; *see generally* Aarhus Convention, *supra* note 54.

108. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 59.

109. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 14 (quoting HRC, GENERAL COMMENT NO. 16, *supra* note 14, ¶¶ 3–4, 8) (internal quotation marks omitted).

110. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 41.

In "ensur[ing] that adequate and effective legal or other appropriate remedies are available to all those who undergo, remain vulnerable to, or defend against forced evictions,"[111] States have a duty "to ensure an effective remedy for persons whose rights have been violated" and to "enforce such remedies when granted."[112] This means that "States must ensure that individuals, groups and communities are protected from eviction during the period that their particular case is being examined before a national, regional or international legal body."[113] In practice, however, evictions often occur pursuant to a summary procedure, through which governments need not provide a detailed justification to the affected people.[114] Governments in many instances have proceeded with eviction even when a decision is pending before a judicial body.[115]

II. Recommendations for Project Finance Standards to Ensure that Evictions Based on Public Interest Are Consistent with International Law

Forced evictions concern human rights obligations of states, businesses, and financial institutions.[116]

Under international law, States have duties to respect, protect, and fulfill human rights, including extraterritorially.[117] For example, as the Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights make clear, "States must desist from

111. *Id.* ¶ 22; *see also id.* ¶ 17 ("States must ensure that adequate and effective legal or other appropriate remedies are available to any person claiming that his/her right to protection against forced evictions has been violated or is under threat of violation.").

112. CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 13 (quoting ICCPR, *supra* note 26, art. 2.3).

113. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 36.

114. *See, e.g.*, CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: India*, ¶ 31, U.N. Doc. E/C.12/IND/CO/5 (May 2008) (The Committee "remains deeply concerned about the reports of displacement and forced evictions in the context of land acquisition by private and state actors for the purposes of development projects, [and] . . . that the members of disadvantaged and marginalised groups . . . are adversely affected by such displacement."); Ngöbe Indigenous Cmtys. and Their Members in the Changuinola River Valley v. Panama, Pet. No. 286-08, Inter-Am. C.H.R., Rep. No. 75/09, ¶ 34 (Aug. 5, 2009); *see also* HOUS. AND LAND RIGHTS NETWORK, HOW TO RESPOND TO FORCED EVICTIONS, *supra* note 9, at 3.

115. Ngöbe Indigenous Cmtys. and Their Members in the Changuinola River Valley v. Panama, Pet. No. 286-08, Inter-Am. C.H.R., Rep. No. 75/09, ¶ 34; *see also* FACT SHEET NO. 25, *supra* note 85, at 30 ("In many cases, houses are destroyed without a court order or without giving residents enough time to appeal against the decision to evict.").

116. *See generally* U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, *supra* note 50 (describing human rights obligations of states, businesses, and financial institutions).

117. *See, e.g.*, ICESCR, *supra* note 12, art. 2(1).

acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially."[118] Beyond States' duty to "refrain from violating human rights domestically and extraterritorially,"[119] in the context of forced eviction the U.N. Guidelines on Development-Based Evictions instruct States to "ensure that other parties within the State's jurisdiction and effective control do not violate the human rights of others; and take preventive and remedial steps to uphold human rights and provide assistance to those whose rights have been violated."[120]

Although "States bear the principal obligation for applying human rights," this does not "absolve other parties, including project managers and personnel, international financial and other institutions or organizations, transnational and other corporations, and individual parties, including private landlords and landowners, of all responsibility."[121] Specifically, "[t]ransnational corporations and other business enterprises must respect the human right to adequate housing, including the prohibition on forced evictions, within their respective spheres of activity and influence."[122] Similarly, "[i]nternational 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."[123]

In light of these duties, States, businesses, and international financial institutions should take measures to ensure compliance with international law with respect to forced evictions. States' laws, businesses' codes of conduct, and international financial institutions' policies all offer a means to

118. ETO CONSORTIUM, MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATION OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 7–10 (2013), *available at* http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

119. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 12; *see also* U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, *supra* note 50, princ. 1–3.

120. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 12; *see also* U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, *supra* note 50, princ. 3.

121. U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 11.

122. *Id.* ¶ 73.

123. *Id.* ¶ 71; *see also* U.N. SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, FORCED EVICTIONS AND DISPLACEMENT, *supra* note 33, at 32 ("Financing agencies—the World Bank, Inter-American Development Bank, Asian Development Bank, international financial institutions, international cooperation agencies, central and local governments: should use these guidelines in their projects to minimise displacement and protect human rights, and also as a criteria for allocation of resources for housing purposes.").

impose requirements related to forced evictions.

In the context of development, conditions and requirements tied to international financial assistance can provide leverage over funding recipients to meet requirements to respect international law. International financial institutions, such as the World Bank and its private-lending arm, the International Finance Corporation ("IFC"), as well as climate finance mechanisms, such as the Green Climate Fund, can provide sources of finance-tied obligations, *e.g.*, through safeguards against social and environmental harm.

This Article focuses on policies and standards of international financial institutions ("IFIs")—specifically those of the World Bank and IFC—because they are in practice the most influential in safeguards standard-setting.[124]

> Through their financing relationships, the IFIs exert enormous influence over policy-makers in lending and borrowing countries alike, shaping development norms and paradigms—including definitions of what constitutes "development." The role that IFIs play in shaping standards and policies is particularly critical for [development-induced displacement and resettlement (DIDR)], because few borrower countries have a national resettlement law or policy framework governing DIDR and national frameworks that do exist are often inadequate. This absence of domestic law means that the policies and guidelines generated by IFIs serve as the de facto standard or model for many private sector companies operating in the Global South.[125]

This weighty influence manifests itself in the sense that failure to certain meet requirements can mean, from the financial institution's standpoint, the project does not proceed.[126]

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124. *See* KATE HOSHOUR & JENNIFER KALAFUT, INT'L ACCOUNTABILITY PROJECT, A GROWING GLOBAL CRISIS: DEVELOPMENT-INDUCED DISPLACEMENT & RESETTLEMENT 2 (2010), http://accproject.live.radicaldesigns.org/downloads/IAP%208.10%20Briefer.pdf; *id.* at 7 n.9 ("[I]n many cases private corporations, acting with the cooperation of national governments and seeking financing from public financial institutions or private banks, are the drivers of forced displacement.").

125. *Id.* at 3.

126. *See* WORLD BANK, *OP 4.10: Indigenous Peoples* ¶¶ 2, 20 (rev. 2013) [hereinafter WORLD BANK, *OP 4.10*], *in* THE WORLD BANK OPERATIONS MANUAL, *supra* note 10; *id.* ¶ 11 (Where indigenous communities' support is required, "[t]he Bank does not proceed further with project processing if it is unable to ascertain that such support exists."); *see also* INT'L FIN. CORP., GUIDANCE NOTES: PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY, Guidance Note 5, ¶ GN68, at 26 (2012) [hereinafter IFC GUIDANCE NOTES], *available at* http://www.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_

The World Bank has developed environmental and social safeguards in its Operational Policies (OPs),[127] which provide a benchmark for environmental and social policies of multilateral development banks, national development banks, and other international financial institutions.[128] The IFC has developed environmental and social safeguards through its Performance Standards on Environmental and Social Sustainability (Performance Standards).[129] World Bank policies and IFC standards have helped shape project finance standards in developing countries and among private banks, including the Equator Principles.[130]

Both the World Bank and the IFC have policies specific to forced eviction. World Bank OPs address forced eviction in OP 4.12: Involuntary Resettlement.[131] IFC Performance Standards address forced eviction in Performance Standard 5: Land Acquisition and Involuntary Resettlement.[132]

In the following Sections, this Article reviews existing World Bank OPs[133] and IFC Performance Standards (World Bank and IFC policies) on forced eviction and shows how the recommendations discussed in Part I can enhance those policies' ability to ensure compliance with international law when a state asserts the public interest to justify forced eviction.

English_2012_Full-Document.pdf?MOD=AJPERES ("Where the client ascertains that the outcome of the government-managed resettlement is unlikely to meet the requirements of Performance Standard 5, and the client is unable or not permitted to fill the gaps required to meet those requirements, consideration should be given to not proceeding with the project.").

127. THE WORLD BANK OPERATIONS MANUAL, *supra* note 10.

128. HOSHOUR & KALAFUT, *supra* note 124, at 5.

129. IFC PERFORMANCE STANDARDS, *supra* note 10.

130. HOSHOUR & KALAFUT, *supra* note 124, at 5 ("[O]ver 60 private banks have formally adopted a set of World Bank environmental and social standards known as the Equator Principles."); *see also* EQUATOR PRINCIPLES, THE EQUATOR PRINCIPLES: A FINANCIAL INDUSTRY BENCHMARK FOR DETERMINING, ASSESSING, AND MANAGING SOCIAL AND ENVIRONMENTAL RISK IN PROJECT FINANCING (2013), *available at* http://www.equator-principles.com/resources/equator_principles_II.pdf.

131. WORLD BANK, *OP 4.12*, *supra* note 10.

132. IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, at 31–39.

133. As noted above, the World Bank is developing an Environmental and Social Framework, which will replace its Operational Policies, and has released a draft of those standards. *See* WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11. In the following section, this Article notes the applicability of the draft framework in some places where relevant.

A. Project finance standards should ensure that the public interest justifying eviction is undertaken solely for the purpose of promoting the general welfare, *i.e.*, the human rights of the most vulnerable.

Under international law, to justify forced eviction based on the public interest, it must be undertaken solely for the purpose of promoting the general welfare. World Bank and IFC policies thus should ensure the public interest asserted to justify eviction in a World Bank- or IFC-financed project achieves this purpose. Although neither the World Bank nor the IFC currently provides for much, if any, scrutiny of a public interest asserted to justify a project,[134] both already require the provision of information that would enable scrutiny of that justification.[135] World Bank and IFC policies on involuntary resettlement both require the borrower or client to provide a comparative analysis of applicable national law on expropriation vis-à-vis the applicable World Bank or IFC provision.[136] Both then establish that additional measures may be required to bridge any gap between the applicable government's measures and the World Bank or IFC's requirements, respectively.[137]

For example, Annex A to World Bank OP 4.12 requires an analysis of the scope of the power of eminent domain and the nature of associated compensation; the applicable legal and administrative procedures, including a description of available judicial remedies and possibly relevant alternative

134. IFC guidance makes provision for review of the expropriation process, but not of the validity of the determination itself. *See* IFC GUIDANCE NOTES, *supra* note 126, Guidance Note 5, ¶ GN69, at 26 (stating that the client will review the government's expropriation process against IFC requirements if it becomes protracted and compensation is depressed).

135. *See* WORLD BANK, *OP 4.12 – Annex A*, *supra* note 10, ¶ 7; IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 31, at 38–39, Standard 1, ¶ 5, at 7, ¶ 7–12, at 7–9; WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, ¶ 22 ("The Borrower will document all transactions to acquire land rights, provision of compensation and other assistance associated with relocation activities."), WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, ¶ 27 ("The Borrower will not resort to forced evictions of affected persons." (footnote omitted)).

136. *See* WORLD BANK, *OP 4.12*, *supra* note 10, ¶ 7; IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 31, at 38–39 (requiring description of regulated activities, including the entitlements of displaced persons provided under applicable national law and regulations, and providing for client's review thereof); IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 2, at 5.

137. *See* WORLD BANK, *OP 4.12 – Annex A*, *supra* note 10, ¶ 7; IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 31, at 38–39; WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, ¶ 33 ("If the procedures or performance standards of other responsible agencies do not meet the relevant requirements of this [standard], the Borrower will prepare supplemental arrangements or provisions for inclusion in the resettlement plan to address identified shortcomings.").

dispute resolution mechanisms; and "gaps, if any, between local laws covering eminent domain and resettlement and the Bank's resettlement policy, and the mechanisms to bridge such gaps."[138]

As for the IFC, Performance Standard 5 provides for the client to collaborate with governments to help achieve environmental and social outcomes consistent with the Performance Standards even where the client may have no direct control over the decision.[139] As the IFC explains, "[a]t times, the assessment and management of certain environmental and social risks and impacts may be the responsibility of the government or other third parties over which the client does not have control or influence."[140] For instance, "this may happen . . . when early planning decisions are made by the government or third parties which affect the project site selection and/or design."[141] Yet, the Performance Standards do not view the client's lack of direct control over these decisions as a reason to eliminate the client's role in helping to mitigate environmental and social risks.

> While the client cannot control these government or third party actions, an effective [Environmental and Social Management System] should identify the different entities involved and the roles they play, the corresponding risks they present to the client, and opportunities to collaborate with these third parties in order to help achieve environmental and social outcomes that are consistent with the Performance Standards.[142]

Thus, both the World Bank and IFC have established provisions for the borrower or client to take measures to ensure that the government's expropriation of land conforms to World Bank and IFC policies. To ensure consistency with international law, in their respective provisions on the analysis of applicable law on expropriation and early planning decisions, each institution should specify that a valid public purpose that could justify forced eviction must be "undertaken solely for the purpose of promoting the general welfare, . . . *i.e.*, to ensure the human rights of the most vulnerable, consistent with states' international human rights obligations."[143] Failure to meet this requirement should mean that the project "does not proceed."[144]

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138. WORLD BANK, *OP 4.12 – Annex A*, *supra* note 10, ¶ 7.

139. *See* IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 30, at 38.

140. *Id.* Standard 1, ¶ 2, at 5.

141. *Id.*

142. *Id.*

143. *See* U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 21.

144. *See, e.g.*, WORLD BANK, *OP 4.10*, *supra* note 126, ¶ 11 (Where indigenous communities' support is required, "[t]he Bank does not proceed further with project processing if it is unable to ascertain that such support exists."); OXFAM AUSTRALIA, BANKING ON SHAKY GROUND: AUSTRALIA'S BIG FOUR BANKS AND LAND GRABS 52 (2014) (directing banks to require, before

B. Project finance standards should require eviction impact assessment for evaluating alternatives, and proof that eviction costs were taken into account in evaluating alternatives.

To ensure compliance with international law, World Bank and IFC policies should ensure that any determination that the public interest justifies forced eviction considered alternatives and took into account eviction impacts. World Bank and IFC policies on involuntary resettlement both encourage outcomes that would minimize displacement[145] and require assessment of eviction impacts and inclusion of those results in evaluating total project costs.[146] However, neither policy requires eviction-impact assessment until occur after the determination has been made to proceed with the project. Requiring assessment of eviction impacts as part of the alternatives assessment would better promote outcomes that minimize displacement.[147]

The key is thus timing. World Bank Operational Policy 4.01 on Environmental Assessment, recognizes the value of beginning environmental assessment "as early as possible in project processing" so that it can be "integrated closely with the economic, financial, institutional, social, and technical analyses of a proposed project.[148] Indeed, the environmental assessment (EA) informs the Bank's decision to fund a project: "The Bank does not finance project activities that would contravene [certain] country obligations, as identified during the EA."[149] Likewise, identifying *eviction* impacts early in the process, particularly during the consideration of alternatives, would further the Bank's ability to make informed decisions about the projects it funds and enable it to abandon a project if the impacts

provision of a product or service to a client, that the client "[r]efrain from cooperating with any host governments' illegitimate use of eminent domain, in order to acquire farmland").

145. *See* WORLD BANK, *OP 4.12 – Annex A*, *supra* note 10, ¶ 4; IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 3, at 32 (stating an objective "[t]o avoid, and when avoidance is not possible, minimize displacement by exploring alternative project designs"); WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, Standard 5, ¶¶ 1–2, at 55, ¶ 7, at 59.

146. *See* World Bank, *OP 4.12*, *supra* note 10, ¶¶ 17, 20, 26; WORLD BANK, *OP 4.12 – Annex A*, *supra* note 10, ¶¶ 4, 6, 14; IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 19, at 36, ¶ 31, at 38–39; IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 1, ¶ 14, at 9–10; WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, Standard 5, ¶ 7, at 59, ¶ 16, at 60–61.

147. *See* Cernea, *supra* note 41, at 35.

148. WORLD BANK, *OP 4.01: Environmental Assessment* ¶ 19 (rev. 2013), *in* THE WORLD BANK OPERATIONS MANUAL, *supra* note 10.

149. *Id.*

appear to be more severe than initially anticipated.[150] World Bank OP 4.12 should thus require eviction-impact assessments as early as possible, and certainly before assessment of alternatives.

For its part, IFC Performance Standard 5 requires consideration of "feasible alternative project designs to avoid or minimize physical and/or economic displacement, while balancing environmental, social, and financial costs and benefits, paying particular attention to impacts on the poor and vulnerable."[151] Yet it does not require assessment of eviction impacts until later in the process.[152] Requiring an eviction-impact assessment at the alternatives assessment stage would improve accuracy in balancing environmental, social, and financial costs and benefits, and in determining whether an asserted public interest is justified.[153]

To better ensure that projects ostensibly justified by a public interest are consistent with international law, World Bank and IFC policies should require assessment of eviction impacts as part of the alternatives assessment, and proof that the alternatives assessment took into account the costs of eviction. Given that total project costs include the "full costs of resettlement activities necessary to achieve the objectives of the project,"[154] in the interest of accuracy, the consideration of alternatives should take into account those costs in determining whether the public interest promoted by the proposed development project in fact justifies forced eviction.

C. Project finance standards should ensure that public interest justifying eviction is "reasonable and proportional" to the public interest, and subject to a higher threshold where eviction threatens rights of indigenous peoples or other vulnerable, natural resource-dependent groups.

World Bank and IFC policies should ensure forced eviction is reasonable and proportional to—and where indigenous people are involved, necessary to achieve—the asserted public interest. World Bank and IFC

150. *See id.*; *see also* U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, *supra* note 50, princ. 19 ("[T]o prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.").

151. IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 8, at 33.

152. *See id.* Standard 5, ¶ 19, at 36, ¶ 31, at 38–39.

153. *See* U.N. HABITAT, LOSING YOUR HOME, *supra* note 1, at 29; Cernea, *supra* note 41; U.N. SPECIAL RAPPORTEUR ON ADEQUATE HOUSING, FORCED EVICTIONS AND DISPLACEMENT, *supra* note 33, at 14.

154. WORLD BANK, *OP 4.12*, *supra* note 10, ¶ 20.

policies both impose some requirements in proportion to the level of risk or impact.[155]

As a clear example, World Bank and IFC policies on involuntary resettlement each impose an additional set of requirements when a project could forcibly displace indigenous peoples[156] because of the distinct types of risks and levels of impacts forced eviction can have on indigenous peoples,[157] including loss of identity, culture, and customary livelihoods, and exposure to disease.[158] Thus, where indigenous peoples face eviction, the World Bank and IFC impose stricter requirements for project preparation, including those related to exploring alternative project designs to avoid physical displacement.[159] Both impose heightened requirements related to consultation ("free, prior, and informed consultation" for World Bank projects and "free, prior, and informed consent" for IFC projects).[160]

155. *See, e.g.*, WORLD BANK, *OP 4.10*, *supra* note 126, ¶ 7(noting the detail necessary to meet specified requirements is proportional to the proposed project's complexity); IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 1, ¶ 15, at 10 ("The level of detail and complexity of this collective management program and the priority of the identified measures and actions will be commensurate with the project's risks and impacts, and will take account of the outcome of the engagement process with Affected Communities as appropriate."); IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 14, at 35 ("The extent of monitoring activities [regarding implementation of a Resettlement Action Plan or Livelihood Restoration Plan] will be commensurate with the project's risks and impacts."); IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 15, at 35 ("It may be necessary for the client to commission an external completion audit of the Resettlement Action Plan or Livelihood Restoration Plan to assess whether the provisions have been met, depending on the scale and/or complexity of physical and economic displacement associated with a project."); WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, Standard 5, ¶¶ 17, 19, at 61, ¶ 21, at 62.

156. *See generally* WORLD BANK, *OP 4.10*, *supra* note 126; IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 7, at 47–52; WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, Standard 7, at 74–83.

157. WORLD BANK, *OP 4.10*, *supra* note 126, ¶¶ 2, 20; IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 7, ¶ 1, at 47; *see also* WORLD BANK, *OP 4.12*, *supra* note 10, ¶ 8 ("[P]articular attention is paid to the needs of vulnerable groups among those displaced, especially those below the poverty line, the landless, the elderly, women and children, indigenous peoples, ethnic minorities, or other displaced persons who may not be protected through national land compensation legislation." (footnote omitted)); IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 10, at 34.

158. WORLD BANK, *OP 4.10*, *supra* note 126, ¶¶ 2, 20; IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 7, ¶ 1, at 47.

159. *See* WORLD BANK, *OP 4.10*, *supra* note 126, ¶ 7; *id.* ¶ 10 (requiring additional measures related to consultation and participation for projects involving indigenous peoples). *Compare* WORLD BANK, *OP 4.12*, *supra* note 10, ¶ 9 ("[T]he Bank satisfies itself that the borrower has explored all viable alternative project designs to avoid physical displacement of [indigenous] groups."), *with id.* ¶ 2 ("[As an] overall objective[], . . . (a) [i]nvoluntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs."). *Compare* IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶¶ 8–10, at 33–34, *with* IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 7, ¶¶ 14–17, at 50–51.

160. WORLD BANK, *OP 4.10*, *supra* note 126, ¶ 20; IFC PERFORMANCE STANDARDS, *supra*

In addition, the World Bank's policy on indigenous peoples (OP 4.10) establishes that "[t]he level of detail necessary to meet [certain] requirements . . . is proportional to the complexity of the proposed project and commensurate with the nature and scale of the proposed project's potential effects on the Indigenous Peoples, whether adverse or positive."[161] For instance, regarding the social assessment to evaluate the project's potential effects on indigenous peoples and to examine project alternatives, "[t]he breadth, depth, and type of analysis in the social assessment are proportional to the nature and scale of the proposed project's potential effects on the Indigenous Peoples, whether such effects are positive or adverse . . . ."[162]

Given the World Bank's and the IFC's recognition of the heightened effects of displacement on indigenous peoples,[163] and each institution's imposition of stricter requirements in certain circumstances depending on the gravity of the risk, each should require that eviction be reasonable and proportional—and where indigenous peoples face eviction, necessary—to the asserted public interest.

D. Project finance standards should ensure that public interest justifying eviction do not leave the affected people vulnerable to human rights violations.

To achieve compliance with international law, the World Bank and IFC policies should refrain from financing projects for which eviction will leave people vulnerable to human rights violations even where the public interest is asserted to justify eviction. Both the World Bank and IFC recognize the need to respect human rights in relation to projects they finance.[164] Although

note 10, Standard 5, ¶ 10, at 34; *see also* IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 7, ¶ 2, at 47–48, ¶ 10–17, at 49–51. The World Bank Draft Environmental and Social Framework include circumstances that require free, prior, and informed consent before a project can proceed. WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, Standard 7, ¶¶ 19–27, at 78–81.

161. WORLD BANK, *OP 4.10*, *supra* note 126, ¶ 7. The requirements referred to above pertain to preparation of a social assessment; free, prior, and informed consultation at each stage of the project; and preparation of an Indigenous Peoples Plan or an Indigenous Peoples Planning Framework. *Id.*

162. *Id.* ¶ 9.

163. *See id.* ¶¶ 2, 20; IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 7, ¶ 1, at 47 (recognizing indigenous peoples' close ties to their lands and natural resources and the significant adverse impacts evictions have on their identity and cultural survival).

164. *See* Ana Palacio, Senior Vice President and General Counsel of the World Bank Group, *The Way Forward: Human Rights and the World Bank*, WORLD BANK, 36 (Oct. 27, 2006), *available at* http://go.worldbank.org/RR8FOU4RG0 ("'[I]t is now evident that human rights are an intrinsic part of the Bank's mission.'" (quoting Roberto Dañino, former Senior Vice President and General Counsel of the World Bank Group, *Legal Opinion on Human Rights and the Work of the World Bank*,

World Bank policy does not condition its funding on compliance with human rights law,[165] Senior Vice President and General Counsel of the World Bank Group Ana Palacio has acknowledged the "need for recognition of the role of human rights as *legal principles*, which may inform a broad range of activities, . . . and provide a normative baseline against which to assess development policies and programming."[166] As she explained,

> in certain cases and under certain circumstances, human rights generate *actionable legal obligations*. Such obligations may arise from international treaties, or from rights enshrined in national laws. Here the Bank's role is to support its Members to fulfill those obligations where they relate to Bank projects and policies.[167]

Although historically the World Bank had regarded human rights as a domestic political affair into which it should not meddle,[168] in the words of Ms. Palacio, "[i]t is now clear that the Bank can and sometimes should take human rights into consideration as part of its decision-making process."[169] Furthermore, Ms. Palacio acknowledged the need for collective monitoring and enforcement of human rights obligations, "against which the concept of state sovereignty is no longer an absolute shield."[170]

WORLD BANK (Jan. 27, 2006)); IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 1, ¶ 3, at 6; WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, ¶ 3, at 5 ("[T]he Bank's operations are supportive of human rights and will encourage respect for them in a manner consistent with the Bank's Articles of Agreement.").

165. Nor does the World Bank expressly reference human rights obligations in its Operational Policy on Involuntary Resettlement. *See* WORLD BANK, *OP 4.12*, *supra* note 10. The outset of World Bank's Operational Policy on Indigenous Peoples does highlight 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." WORLD BANK, *OP 4.10*, *supra* note 126, ¶ 1 (footnote omitted); *see also* WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, Standard 7, ¶ 3, at 74 (using similar language).

166. Palacio, *supra* note 164, at 36.

167. *Id.*

168. "Political human rights in particular have traditionally been considered to lie beyond the permitted range of considerations under the Articles of Agreement, which bar decisions based on political considerations or political systems, as well as interference in domestic political affairs of its members. The World Bank's role is a facilitative one, in helping our members realize their human rights obligations. In this sense, human rights would not be the basis for an increase in Bank conditionalities, nor should they be seen as an agenda that could present an obstacle for disbursement or increase the cost of doing business." *Id.* (citations omitted).

169. *Id.* ("[The 2006 document from then-World Bank's General Counsel] marks a clear evolution from the pre-existing restrictive legal interpretation of the Bank's explicit consideration of human rights. It is 'permissive': allowing, but not mandating, action on the part of the Bank in relation to human rights. It clarifies 'the state of the law,' and gives the Bank the necessary leeway to explore its proper role in relation to human rights, updating the legal stance adopted internally to accord with the Bank's practice and the current international legal context. It facilitates a more comprehensive understanding of human rights in development, and enables the Bank to take these issues into account where they are relevant." (quoting Dañino, *supra* note 164)).

170. Palacio, *supra* note 164 (citing HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL

Given the World Bank's recognition that human rights are relevant to its decision-making and generate "actionable legal obligations," the World Bank should refrain from supporting projects for which a State justifies forced eviction based on a public interest that leaves affected people vulnerable to human rights violations.[171]

The IFC, for its part, acknowledges that forced evictions should not lead to human rights violations. For instance, in its commentary on its resettlement policy, the IFC recognizes that, to be justified, forced evictions must be carried out "in accordance with the law and in conformity with the provisions of the [ICCPR and ICESCR]"[172] As explained above, forced evictions that leave affected people vulnerable to human rights violations are not consistent with obligations under the ICCPR and ICESCR.[173]

Furthermore, in relation to all of its Performance Standards, the IFC recognizes businesses' duty to respect human rights, along with the value of human rights due diligence.[174] Performance Standard 1 proclaims, "Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to."[175] Noting that "[e]ach of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations," the IFC explained that "[d]ue diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project."[176] The IFC further noted that "[i]n limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business"[177]—recommending, in this respect, an IFC guide on human rights impact assessments.[178]

HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 573 (2d ed. 2000)) (citations omitted).

171. *See* Palacio, *supra* note 164 (emphasis omitted); OXFAM AUSTRALIA, *supra* note 144, at 52 (directing banks to require, before provision of a product or service to a client, that the client "[r]efrain from cooperating with any host governments' illegitimate use of eminent domain, in order to acquire farmland").

172. IFC GUIDANCE NOTES, *supra* note 126, Guidance Note 5, ¶ GN55, at 21 (citing CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 3); *see also* IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 24, at 37 ("Forced evictions will not be carried out except in accordance with law and the requirements of this Performance Standard." (footnote omitted)).

173. *See* CESCR, GENERAL COMMENT NO. 7, *supra* note 2, ¶ 16.

174. IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 1, ¶ 3, at 6.

175. *Id.*

176. *Id.*

177. *Id.* ¶ 7 n.12.

178. *See* IFC GUIDANCE NOTES, *supra* note 126, Guidance Note 1, ¶ GN47, at 16, (citing INT'L FIN. CORP., GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT (2010),

Additionally, among the objectives of IFC's Performance Standard on indigenous peoples are "[t]o ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples."[179] In its Guidance Notes, the IFC refers to international treaties on indigenous rights as a source of responsibilities not only for States, but also for the private sector:

> [I]t is increasingly expected that private sector companies conduct their affairs in a way that would uphold these rights and not interfere with states' obligations under these instruments. . . . [Accordingly,] private sector projects are increasingly expected to foster full respect for the human rights, dignity, aspirations, cultures, and customary livelihoods of Indigenous Peoples.[180]

Given the numerous human rights implicated by forced eviction, and the IFC's recognition of the duty to respect human rights, it would serve the IFC's objectives to instruct businesses as part of their human rights due diligence to ensure that a public interest ostensibly justifying forced evictions will not lead to human rights violations.

E. Project finance standards should ensure that the public interest justifying eviction is accompanied by appropriate due process protections, including an effective opportunity to challenge a State's assertion of the public interest, and protection from eviction during the challenge.

Both the World Bank and IFC policies call for due process protections. The World Bank requires that "[d]isplaced persons and their communities, and any host communities receiving them, are provided timely and relevant information, consulted on resettlement options, and offered opportunities to participate in planning, implementing, and monitoring resettlement," and that "[a]ppropriate and accessible grievance mechanisms are established for these groups."[181] The IFC recognizes provision of legal remedies among the key safeguards to prevent unjustified involuntary evictions.[182] As the IFC

available at http://www.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES).

179. IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 7, ¶ 2, at 47.

180. IFC GUIDANCE NOTES, *supra* note 126, Guidance Note 7, ¶ GN1, at 2.

181. WORLD BANK, *OP 4.12*, *supra* note 10, ¶ 13(a); *see also* WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, Standard 5, at 56 n.5 (To be justified, forced eviction must, among other requirements, be "conducted in a manner consistent with basic principles of due process (including provision of adequate advance notice, meaningful opportunities to lodge grievances and appeals, and avoidance of the use of unnecessary, disproportionate or excessive force).").

182. *See* IFC GUIDANCE NOTES, *supra* note 126, Guidance Note 5, ¶ GN55, at 21.

explains in its Guidance Notes, "Performance Standard 5 contains many of the substantive and procedural safeguards necessary for involuntary resettlement to be carried out without resort to forced evictions" and notes that when forced eviction is unavoidable, it should conform to those requirements.[183] The Guidance Notes cite "key procedural protections" noted by the U.N. Office of High Commissioner, including "adequate and reasonable notice for all affected persons prior to the scheduled date of eviction" and "provision of legal remedies."[184] The Guidance Notes also point to "the international human rights principles laid out in the U.N. Guiding Principles on Internal Displacement" as a source of "useful guidance regarding rights and protections for internally displaced persons."[185] Those principles require States, among other things, to take adequate measures "to guarantee to those to be displaced full information on the reasons and procedures for their displacement."[186] This information is crucial to ensuring affected people's ability to seek an effective remedy against unlawful eviction, particularly where the public interest is the basis for the eviction. Consistent with a displaced person's right to a remedy, including a fair hearing, both the World Bank and IFC policies instruct financing recipients to establish a grievance mechanism.[187] World Bank OP 4.12 calls for the establishment of "[a]ppropriate and accessible grievance mechanisms" for displaced persons and their communities[188] to allow for third-party settlement of disputes arising from resettlement.[189] Similarly, IFC Performance Standards call for the establishment of a "recourse mechanism designed to resolve disputes in an impartial manner" as a means to "address specific concerns about compensation and relocation raised by displaced persons or members of host communities in a timely fashion."[190]

IFC Performance Standard 1 "supports the use of an effective grievance mechanism that can facilitate early indication of, and prompt remediation for those who believe that they have been harmed by a client's actions."[191] Noting that "the assessment and management of certain environmental and

183. *Id.*

184. *Id.*

185. *Id.* Guidance Note 5, ¶ GN6, at 3 (citing *Guiding Principles on Internal Displacement*, *supra* note 24).

186. *Guiding Principles on Internal Displacement*, *supra* note 24, princ. 7(3)(b).

187. *See* WORLD BANK, *OP 4.12*, *supra* note 10, ¶ 13(a); IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 5, ¶ 11, at 34; WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, Standard 5, ¶ 15, at 60.

188. WORLD BANK, *OP 4.12*, *supra* note 10, ¶ 13(a).

189. WORLD BANK, *OP 4.12 – Annex A*, *supra* note 10, ¶ 17.

190. IFC PERFORMANCE STANDARDS, *supra* note 10, Standard 7, ¶ 11 at 49.

191. *Id.* Standard 1, at 1.

social risks and impacts may be the responsibility of the government or other third parties over which the client does not have control or influence," the IFC implies that its grievance mechanism could consider "early planning decisions . . . , which affect the project site selection and/or design," even though the client lacks direct control over the decision.[192] A government's expropriation in the public interest could be considered an "early planning decision[] . . . which affect[s] the project site selection and/or design" and thus should be subject to review of a grievance mechanism—even where a client may have had no control or influence over the government's decision.[193]

At present, neither the World Bank nor IFC calls for review of public interest justifications to determine consistency with international law obligations. However, World Bank and IFC policies already provide for establishment or use of a forum to review grievances, including those related to forced evictions. To ensure the provision of appropriate due process protections and effective remedies, World Bank and IFC policies should ensure that affected people have an effective opportunity to challenge the justification for the eviction, and are protected from eviction during the challenge.[194]

CONCLUSION: Recommendations to Ensure that Public Interest Determinations Are Justified and Consistent with International Law

Despite the establishment of more and better models, assessment techniques, policy frameworks and statutory requirements, and an "increasing tone of urgency and even exasperation" in academic and practitioners' literature on development-induced displacement, "capital-intensive, high-technology, large-scale development projects have nevertheless continued to wreak havoc in the lives of up to 15 million displaced people per year, leaving impoverishment and misery in their wake."[195] Many of these projects are ostensibly justified based on a State's assertion of the public interest. Acknowledging that justifications for forced evictions to serve a public interest are invariably authorized by law, and that

192. *Id.* Standard 5, ¶ 30, at 38; *id.* Standard 1, ¶ 2, at 5.

193. *See id.* Standard 1, ¶ 2, at 5.

194. *See* U.N. Special Rapporteur on Adequate Housing, *Principles and Guidelines on Development-Based Evictions*, *supra* note 10, ¶ 36.

195. U.N. HABITAT, LOSING YOUR HOME, *supra* note 1, at 56–57.

the fact of legality under domestic law does not ensure that forced evictions will comply with international human rights law, this Article recommends increasing scrutiny of public interest determinations such that the public interest justifying eviction:

1) is undertaken solely for the purpose of promoting the general welfare, *i.e.*, to ensure the human rights of the most vulnerable, consistent with states' international human rights obligations;
2) is determined after considering all feasible alternatives, accounting for eviction impacts, in consultation with affected people;
3) is reasonable and proportional, with a higher threshold where eviction threatens indigenous peoples or other vulnerable groups who depend on land for socio-economic or cultural survival;
4) does not leave the affected people vulnerable to human rights violations; and
5) is accompanied by appropriate due process protections, including an effective opportunity to challenge the validity of the public interest justification and protection from eviction during judicial challenge.

Project finance standards can be an effective tool to ensure that projects comply with international law. Indeed, the World Bank's July 2014 draft of its Environmental and Social Framework state that the Bank will "support Borrowers in achieving good international practice relating to environmental and social sustainability" and that "[t]he Borrower will not resort to forced evictions of affected persons."[196] Taken together, these statements illustrate how project finance standards are an appropriate place to establish requirements that uphold the prohibition under international law on forced evictions. As discussed in this Article, World Bank and IFC policies have some relevant provisions, but need to increase their scrutiny of public interest determinations, for instance, by incorporating this Article's five recommendations into their policies and standards. These protections not only serve to implement international law obligations applicable to development projects, but also aim to prevent human rights violations in the pursuit of sustainable, responsible development.

196. WORLD BANK, DRAFT ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 11, at 1, ¶; *id.* ¶ 27, at 10.