

**Revision of European Bank for Reconstruction and Development (EBRD)
2008 Environmental and Social Policy
Amnesty International comments**

Amnesty International (AI) welcomes the consultation process for the European Bank for Reconstruction and Development's (EBRD) revision of its Environmental and Social Policy (ESP) and the opportunity to comment on the existing policy. The update of the EBRD's policy provides both an opportunity and a responsibility for EBRD to take a leading role in promoting respect for human rights within projects EBRD funds and supports. It is crucial that the revised policy takes into account an analysis of the lessons learned from EBRD's own evaluation of past projects, external evaluations made by impacted communities, individuals and civil society actors and also legal and policy developments in relevant multi-lateral processes and agreements related to human rights.

In this document Amnesty International is highlighting the centrality of human rights due diligence processes in strengthening EBRD's capacity to ensure the effective implementation of its ESP and ensure that activities it supports do not cause or contribute to human rights abuses.

Amnesty international is therefore calling on the EBRD to

- 1) Include in the revised ESP a policy statement that will make clear that EBRD will undertake human rights due diligence as well as require due diligence by its recipients in line with recent developments in international human rights standards.
- 2) Ensure all systems related to the implementation and monitoring of the ESP and its Performance Requirements (PR) are overhauled, including the oversight of project impacts on human rights.
- 3) All PRs should be revised to bring them in line with relevant international human rights law and standards.

Basis for Amnesty International's call on EBRD to consider revisions to its ESP:

1. Amnesty International's research documenting failures of current EBRD's ESP and monitoring and implementation mechanisms to ensure that forced evictions do not result from the projects it funds

Amnesty International researched and documented the forced eviction of Roma families on 31 August 2009 from an informal settlement under the Gazela Bridge in Belgrade. This eviction was done in advance of refurbishment works on the bridge and the project was funded by EBRD.¹ Our research exposed human rights gaps in the ESP² and a lack of effectiveness in EBRD's monitoring³ and implementation mechanisms. The Gazela Bridge Rehabilitation project resulted in the second largest forced eviction of Roma from settlements in Belgrade to

¹ See, for example, *Serbia: Stop the Forced Evictions of Roma Settlements*, <http://www.amnesty.org/en/library/asset/EUR70/003/2010/en/13963dee-414d-4311-897b-57b0540dde75/eur700032010en.pdf>

Serbia: Home is more than a roof over your head: Roma denied adequate housing in Serbia

<http://www.amnesty.org/en/library/info/EUR70/001/2011/en>

Serbia: After Belvil, Serbia needs new laws against forced evictions.

<http://www.amnesty.org/en/library/asset/EUR70/015/2012/en/d97ae40c-0701-452a-b9b8-d2491a7322e1/eur700152012en.pdf>

² For example the lack of an explicit prohibition of forced eviction.

³ Following an audit by EBRD, detailed measures and timelines relating to the resettlement process were agreed with the City of Belgrade and the Government of Serbia, under which subsequent disbursements by the bank remained conditional on the implementation of these measures. Monitoring continued into 2012, however, agreed measures were not always implemented by the city and municipal authorities.

date.⁴ Amnesty International's research highlighted the need for EBRD to ensure that it incorporates stronger safeguards and human rights due diligence processes throughout the project cycle, and for EBRD policies to be fully aligned with international law and standards. Amnesty International's work provides clear evidence that EBRD policies are not fit to adequately protect the rights of communities and individuals affected by projects funded by EBRD.

2. The emergence of international standards since the adoption of the current EBRD's ESP calling for multilateral banks to conduct human rights due diligence

Albeit slowly, over the past few years there has been a development in the understanding of the human rights responsibility of businesses and international financial institutions. Two important concepts, human rights due diligence and human rights impact assessments, have also gained international recognition within the context of public and private finance. The primary obligation to ensure respect for human rights when acting multilaterally rests with States, as referenced in the "Guiding Principles on Business and Human Rights"(GPs) endorsed in 2011 by the UN Human Rights Council.⁵ However, given that multilateral banks play a significant role in development projects, which are likely to have an adverse impact on human rights, a number of UN Special Procedures and Human Rights Treaty Bodies have increasingly been addressing the human rights responsibilities of multilateral development banks.⁶ For example, in her recent report the UN Special Rapporteur on Adequate Housing, "recommends that the World Bank commit to undertake (and require borrowers to undertake) human rights due diligence in all of its activities. [...] The Bank should also ensure that effective mechanisms are in place to implement these policies and identify, prevent, mitigate and account for how to address actual and potential adverse human rights impacts".⁷ Furthermore in a very recent report issued in March 2013, the UN Working Group on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (UN Working Group) calls upon all States to "ensure integration, as appropriate, of the GPs into the work of [...] public financial institutions [...]".⁸

The 2008 UN endorsed "Protect, Respect and Remedy Framework" and the GPs provide the basis from which EBRD must move forward. According to these, it is essential that (1) EBRD create a robust human rights due diligence mechanism to become aware of risks to human rights and, when risks to human rights are identified, (2) require clients to carry out due diligence and disclose impact assessments that cover environmental, social and human rights impacts. This requirement should be expressly incorporated in the revised ESP. These assessments should be carried out in consultation with potentially affected groups. In order for the human rights due diligence mechanism to be effective EBRD must also ensure that its policies reflect and are in line with international human rights law and standards.

⁴ AI in its report '*Serbia: Home is more than a roof over your head*' acknowledged the particular difficulties faced given the City of Belgrade's refusal to comply with the EBRD's requirements for a Resettlement Action Plan, including the provision of "adequate alternative housing".

⁵ Guiding Principle 10: States, when acting as members of multilateral institutions that deal with business-related issues, should: (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights; (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising; (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights.

⁶ 1) The Special Rapporteur on adequate housing in her addendum report to her mission to the World Bank A/HRC/22/46/Add.3 2) Committee on the rights of the Child General comment n16 (2013) On State Obligations of regarding the impact of the private sector on children's rights 3) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/118/72/PDF/G1111872.pdf?OpenElement> 98. International financial institutions have played a vital role in providing financial and institutional support to many developing countries during the crises and in their aftermath; however, onerous conditionality raise several human rights challenges.

⁷ A/HRC/22/46/Add4

⁸ A/HRC/23/32, para 71.

Recommendations for revising and adequately incorporating human rights into EBRD ESPs

The following sections of this submission outline Amnesty International's main recommendations for revising EBRD's ESP and incorporating adequate human rights due diligence processes /mechanisms. It also lays out the main elements of robust human rights due diligence process for both EBRD and its clients.

1. Revise EBRD's ESP to include the main elements of an adequate Human Rights due Diligence Process.

(a) The Revised Policy Statement should reflect EBRD's commitment to respect human rights and adequately identify and prevent potential adverse impacts on human rights. EBRD Policy currently states on page 4 section 10 that *"The EBRD will not knowingly finance projects that would contravene country obligations under relevant international treaties and agreements related to environmental protection, human rights, and sustainable development, as identified during project appraisal."* While this statement is a step in the right direction, it alone is not enough. The policy needs to explicitly state that project appraisal processes are subject to human rights due diligence processes being adequately conducted. Human rights due diligence should be at the centre of any serious effort by EBRD to adequately identify and address risks to the human rights of communities affected by projects it supports. Therefore this policy statement should be revised to incorporate a commitment by EBRD to undertake (and require its clients to undertake) adequate human rights due diligence. The statement should more or less say *"The EBRD will strive to become aware of all potential adverse impacts on human rights that the activities it intends to support might cause, incorporating robust HR due diligence processes fit to identify all risks to human rights and put measures in place to address them."*

Furthermore, the policy statement should indicate the department, team or individual within EBRD who will be in charge of its oversight and implementation.

(b) All EBRD project appraisal processes should include **a preliminary human rights risk assessment carried out by EBRD directly**, which will aim to identify and assess adverse human rights impacts. Risks to human rights should be assessed in light of relevant international human rights laws and standards. The preliminary assessment **should be made public** and if risks to human rights are identified, EBRD should design and implement a strategy to respond to them. This should trigger the requirement for a full human rights impact assessment carried out either within social and environmental management processes or separately, as well as within ongoing monitoring of and accountability for adverse human rights impacts of projects and policies supported by the EBRD. The preliminary assessment should also be used as the basis upon which to categorize projects – i.e. if they are high risk in relation to causing adverse human rights impacts. Where risks to human rights are identified, the EBRD should create and adopt a risk management plan. This should clearly state how it plans to proceed i.e. if it plans to continue to support the project, then on what terms, and what assurances it will require from the recipient that potential and actual negative human rights impacts are addressed. The risk management plan should be disclosed.

As part of the preliminary risk assessment process, EBRD must ensure alignment of its Performance Requirements with relevant international human rights laws and standards. EBRD should map out all the gaps in human rights protection that exist with respect to the current ESP and make them public. Following on from this study, all of the EBRD Performance Requirements should be revised and brought in line with relevant international human rights laws and standards. While EBRD's ESP already explicitly refers to some existing human rights standards, it should be updated to reflect relevant human rights developments. Furthermore, EBRD should require its clients to disclose their human rights impact assessments, and to assess risks in light of relevant international human rights laws and standards. These assessments should be carried out in genuine

consultation with potentially affected groups.

EBRD should refer to and use the language of international human rights instruments in order to avoid any confusion or misunderstanding with regard to the content of rights. Failing to fully reflect relevant international standards and existing human rights guidance could encourage different interpretations of rights.

(c) Furthermore, EBRD should monitor projects for which a potential or actual risk of human rights harm is identified. This may require that it undertake additional fact and risk assessments for human rights risks requiring mitigation, or after a change of circumstances.

2. Need to address current gaps in EBRD's Performance Requirement (PR), such as PR 5: Land acquisition, Involuntary Resettlement and Economic Displacement

This section provides an example of one specific human rights protection gap, which exists in PR 5 and suggests ways in which it can be made consistent with international human rights laws and standards using guidance that already exists.

Forced Evictions: As noted by the UN Special Rapporteur on Adequate Housing: “Involuntary resettlement amounts to a forced eviction when it occurs without the provision of, and access to, appropriate forms of legal or other protection.”⁹ The effects of forced evictions can be very serious, especially for people who are already living in poverty. The former UN Commission on Human Rights described forced evictions as a “gross violation of human rights, particularly the right to adequate housing.”¹⁰ In light of the above it is essential that the revised PR contains an explicit commitment to ensure that EBRD funded projects do not directly or indirectly result in or contribute toward forced evictions and that all evictions carried out in the context of projects supported by EBRD comply with international human rights standards, particularly with the UN Basic Principles and Guidelines on Development-based Evictions and Displacement (Basic Principles). The protection measures that should be applied to all evictions have been clearly articulated in this document developed by the former UN Special Rapporteur on Adequate Housing.¹¹ The Basic Principles reflect existing standards and jurisprudence on this issue and include detailed guidance on steps that should be taken prior to, during and following evictions in order to ensure compliance with relevant principles of international human rights law. The revised PR should clearly state that EBRD will only support projects where mandatory requirements, as specified in international human rights standards, are in place and have been followed before such evictions are undertaken. PR 5 should also clarify that EBRD will not support a project if its human rights due diligence and preliminary impact assessment uncover that forced evictions have taken place in advance of the project or in situations where there is a risk of forced evictions, unless suitable preventive action is taken.

Amnesty International recognizes that PR5 contains useful elements, such as ensuring that resettlement activities are carried out in consultation and with the informed participation of affected persons and communities. However, PR5 does not include all the protections necessary to ensure that involuntary

⁹ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik; Mission to the World Bank; 15th February 2013, A/HRC/2/46/Add.3, Para.16.

¹⁰ Commission on Human Rights, Resolution 1993/77, para 1.

¹¹ Basic Principles and Guidelines on Development-Based Evictions And Displacement, Annex 1 of the report A/HRC/ 4/18 of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, were considered by the Human Rights Council in 2007, available at http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf

resettlement does not result in human rights violations. For instance, the 2008 PR does not specify that all resettlement sites must comply with *all* seven criteria for adequacy of housing under international law.¹² This is a significant omission and exposes EBRD to the risk that Bank-funded projects result in forced evictions (and other human rights violations resulting from such evictions) as occurred in Serbia in the case documented by AI.

3. Systems related to the implementation of EBRD's ESP and oversight of the impact of projects should be overhauled to ensure effective prevention of human rights abuses

In particular the EBRD's systems for receipt and assessment of critical information on project impacts, engagement by the Bank with affected communities and individuals, and the Bank's current monitoring mechanism should all be reviewed in light of the objective to prevent human rights abuses.

4. Direct engagement by EBRD with communities likely to be affected.

Delegating all responsibilities regarding consultation with communities to the recipients has proved not to work, as reflected in AI's submission to the IFC in the context of the IFC's latest review¹³. It is essential that international financial institutions oversee, take responsibility and are accountable for the consultation process to guarantee it is genuine and participatory. Furthermore EBRD should also ensure communities have access to information regarding (a) involvement of EBRD in the project funded (b) requirements placed by EBRD on clients (c) the existence of project compliance mechanisms.

5. Requirements that should be imposed on state and non-state clients should include the following:

A) Human Rights Policy. Clients seeking EBRD support should be required to have a human rights policy in which the company (whether private or state) commits to respect all human rights consistent with international human rights law and standards.

B) Human Rights Impact Assessment. EBRD should require clients to carry out a human rights impact assessment (HRIA). "A HRIA is an instrument for examining policies, legislation, programmes and projects to identify and measure their effects on human rights".¹⁴ Human rights impact assessment and a number of key principles guiding them are now well established internationally and increasingly accepted. These Principles are the following:

i) Explicit application of the human rights framework. As previously stated in No. 2, the process of assessing risks to human rights must be explicitly based on relevant (i.e. pertinent to the projects, policy or activity the Bank intends to fund) human rights standards. As noted in this paper, failure to properly reflect human rights standards can result in errors and standards that are inconsistent with state's legal obligations under international law.

ii) Adapt to different circumstances and phases of the projects. The potential and actual human rights impact of each project will vary. Therefore indicators of human rights impact must be selected in order to best reflect the likely consequences of the specific project. A generic tool is likely to lack the specificity needed to assess the actual human rights impact of a specific project. A process, which genuinely sought to identify and prevent adverse human rights impact, would seek to identify both direct and indirect human rights impacts. Many factors and different circumstances, such as potential changes to the overall legal framework in a country

¹² Committee on Economic, Social and Cultural Rights General Comment No. 4.

¹³ AI submission to IFC add link.

¹⁴ Executive Summary of Human Rights Impact Assessment – A review of the Literature, Differences with other forms of assessments and relevance for development Commissioned by the Nordic Trust Fund to the World Bank.

with implications for the effective protection of human rights, or the impact on the rights of a community downstream of a project may not be effectively addressed if the impact assessment's focus is limited (e.g. in the latter example, the scope of the impact assessment is geographically limited to the immediate area of the project).

iii) Ensure genuine consultation participation and information. For participation to be meaningful and respect rights, people must be consulted and informed sufficiently in advance of the process. The information needs to be provided in a manner and through mediums that fully respect the principles of accessibility of information and non-discrimination. Where necessary, assistance should be provided to support people's participation. A commitment to disclose all relevant information to people whose rights may be affected, should be incorporated in policies (in some cases people whose rights are affected will be wider than "local communities"). Clients should not have too great a degree of discretion in deciding what will be disclosed and when. Affected people should be part of the process to identify what, if any, negative impacts a project may have.

iv) Ensure non-discrimination and equality. Equality and non-discrimination should be ensured throughout the impact assessment process. From a human rights perspective there must be consideration of both procedural and substantive issues in relation to non-discrimination and equality. All persons likely to be affected by the project should be enabled to participate in the assessment process on a non-discriminatory basis, including those individuals or groups that may be differently or disproportionately affected. They should be part of the process to identify potential impacts and should be able to participate in decisions about which measures are appropriate to address adverse impacts and thereby ensure the project does not result in, contribute to or exacerbate discrimination or inequality. Applying non-discrimination and equality principles to the process of identification and management of risks will ensure that all different interest groups directly or indirectly affected by EBRD's activities are included into the development plan.

v) The management program and action plan. An impact assessment is not an end in itself and should form part of a holistic human rights centered process of project development and implementation. An Action Plan is required where the client identifies specific mitigation measures and actions necessary for the project / policy to comply with applicable laws and regulations and to meet the requirements of all the Performance Requirements. Affected people should be involved in decisions on how potential negative impacts will be managed. The process of developing the Management Program and Action Plan should also fully reflect requirements of consultation in cases of interference with or threats of interference with the exercise of rights. An Action or Management Plan should include ongoing monitoring against agreed benchmarks. It should also have sufficient scope for new or unexpected risks to or impacts on human rights that emerge during the project's lifetime so that these can also be identified and addressed.

vi) Complaint mechanisms. All EBRD activities should have in place mechanisms to allow affected communities to raise issues with and make complaints to the government body involved in the implementation of the project. Such mechanisms must operate in a manner that is fully consistent with principles of accessibility, non-discrimination and transparency. They must ensure fair and predictable processes, and should operate in a rights-compliant manner.