



INTERNATIONAL
ACCOUNTABILITYPROJECT

Review of Laws and Policies on Land Acquisition and Resettlement in Malawi

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For

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Acknowledgements

I'm extremely grateful to Center for Human Rights and Rehabilitation (CHRR) and International Accountability Project (IAP) for entrusting me to conduct this review. I'd also like to extend my gratitude to Lydia Mkandawire, Participatory Monitoring Evaluation, Reflection and Learning Coordinator at CHRR for the technical and administrative support on this assignment. I must also thank Elias Jika, Program Coordinator for IAP and Dennis Mwafulirwa Programme, Officer at CHRR for the valuable comments on the drafts of this report. Lastly, I'd like to say thank you to Michael Kaiyatsa, Executive Director at CHRR and Thandizo Mphwiyo, Programs Manager at CHRR and all the teams that worked in the background to support this review. Without your support this report would not have been possible. Ultimately, the responsibility for any mistakes and shortcomings in this report rests with me.

Executive Summary

This report is the result of an attempt to understand issues of community displacement arising from large scale investment projects, known as Development-Induced Displacement and Resettlement (DIDR). Specifically, this study was undertaken with a view to understand why individuals and communities in Malawi continue to be victimized by implementers of these large-scale projects. The report finds that DIDR is an ever present and growing phenomenon in Malawi with the key drivers being urbanization, mining, large scale agriculture and large infrastructure projects such as power generation schemes. In far too many cases, land acquisition, compensation and resettlement processes have been done badly, unconstitutionally, unprocedurally, untimely and ended up with displaced people being cheated out of their rightful compensation, or worse off than they were before even when compensation is provided. In one case, land acquisition and compensation processes have not been completed over five years after villagers were notified that they will need to make way for a power generation project. This effectively means that the socioeconomic development of communities and households has been on hold for over five years.

This study reviewed the legal framework for handling community displacement and resettlement issues in Malawi, with a specific focus on the key legislation governing land acquisition and compensation in Malawi, the Land Acquisition Act (2016). This was done with the intent of finding out if this key piece of legislation is robust enough to uphold the rights of people and communities faced with displacement. In addition, the study reviewed the World Bank's Environmental and Social Framework (ESF) with a view to pick up best practices in land acquisition and resettlement work at the international level. To do this, the study reviewed in literature on development induced displacement and resettlement globally and within the Malawian context.

The study found that the legal framework that governs land acquisition and resettlement in Malawi is fragmented, fails to fulfill, promote and protect the rights of affected communities and there are loopholes in the key piece of legislation. The Land Acquisition Act (2016) provides no room for consultation between the Minister vested with power to acquire land for public purposes, and the communities that will be affected by his/her decision. Furthermore, communities often have little or no access to information on projects that will eventually lead to their displacement. The key recommendation is to amend the Land Acquisition Act to include provisions that will compel government and project implementing entities to adhere to human rights due diligence prior to any land acquisition and displacement including meaningful consultation with project affected communities and ensure public access to information. Because information disclosure is key to fulfilling development that benefits all and to ensuring community participation in development as it is required by Article 19 of the United Nations Universal Declaration of Human Rights for all to seek, receive and impart information and ideas, and Section 30 of the Malawi Constitution (1994) as well as article 5 of the Access to Information Act (2016) that guarantees people's right to access information, the brief provides a suggested model for engaging communities in order to facilitate sharing of information throughout the life of a project. In addition, this study recommends that civil society organizations (CSOs) lobby for a separate Community and Livelihoods Rehabilitation Bill to compel government and project implementers to go beyond providing compensation and assist communities rehabilitate their communities and livelihoods.

Table of Contents

Acknowledgements	1
Executive Summary	2
1.0 Introduction and Background	4
2.0 Rationale and Methodology	6
3.0 Displacement and Resettlement in the Malawian Context	7
4.0 Understanding Development Induced Displacement	10
5.0 Understanding Resettlement	12
6.0 Mitigating the Impacts of Development Induced Displacement and Resettlement: The Policy Instruments and the Key Actors	13
7.0 The Legal and Policy Framework on Land Acquisition and Resettlement in Malawi	15
8.0 The World Bank’s Environmental and Social Framework	19
9.0 Recommendations and Conclusion	26
Annex 1: Community Engagement and Information Disclosure Processes	28
Works Cited	30

1.0 Introduction and Background

This report reviews the legal and policy framework that guides land acquisition and resettlement processes in Malawi, with respect to human rights due diligence including access to information, community engagement and consultation of people and communities displaced by development projects. This is against a background of rising cases of large-scale capital development projects resulting in the displacement of large numbers of people in Malawi and reports of malpractice in resettlement processes and communities being left worse off than they were before. The hope is that such an exercise will help Malawi as a country begin to recognize, account for, and mitigate the negative impacts of development projects as they regard to the displacement of communities.

Following independence, many African countries regarded ‘development’ projects as a sure path for economic development and freedom. Development projects were considered essential panaceas in fostering growth and economically positioning Africa with the rest of the world (Adeola 2017). Development, generally and broadly conceived and applied, as the process through which the productive forces of economies and supporting infrastructures are improved through public and private investment (Oliver-Smith 2001), was therefore synonymous with nation building and was symbolized by grand infrastructure projects including highways, dams, power stations, airports and so on. Such large-scale capital development projects were often justified in terms of the economic growth and the social benefits that would accrue to society at large (Sikka 2020). Many of these projects are either financed through development aid or lending from multilateral and bilateral development institutions.

Now, after six decades and trillions of dollars’ worth of development assistance, there are growing voices questioning the impact of aid and development assistance (Ferguson 1990). Proponents of development assistance believe that it is a necessary tool to support developing

countries up on the ‘ladder’ of development (Sachs 2007). Critics argue that there is nothing much to show for all the trillions of dollars that have gone into development (Moyo 2009). Indeed, voices from scholars, activists and indigenous communities argue that development does not benefit everyone equally and for millions of people around the world, development has cost them their homes, their livelihoods, their health, and even their very lives (Robinson 2003). These ‘development discontents’ argue that the focus on economic benefits for the good of the nation often overshadow the economic and socio-cultural damage to the residents of the receiving communities. They note that pursuit of economic development has often led to the creation of ‘zones of sacrifice,’ areas mostly in the rural periphery that are endowed with key resources where industrial development projects such as mining operations, water and power supply installations and sometimes waste processing centers are sited. These areas, often home to some of the most marginalized communities, are subjected to extractive types of development involving forced land acquisition and displacement of local peoples, leading to environmental and social disturbances. Yet the people and communities never derive any benefit from such developments (International Accountability Project)¹.

A large body of literature has emerged focusing on the displacement caused by development projects. Among the first studies on the social consequences of development-induced displacement were the works of applied anthropologists such as Elizabeth Colson, Thayer Scudder who studied the impacts of displacement and resettlement on the livelihoods, social ties, and wellbeing on the displaced peoples in the context of such projects the Kariba Dam on the Zambezi (Colson 1971, Scudder 1972). These and other studies have revealed the severe suffering of those displaced by development projects, and they have shown that the numbers of those displaced by development are as large as those displaced either

¹ <https://accountabilityproject.org/work/>

internally or internationally by conflict and violence (Robinson 2003). This report uses a human rights lens to examine the often-overlooked phenomenon of development-induced displacement in Malawi to highlight the implications of displacement on the civil and political rights of affected communities. The report further reviews the efficacy of the legal and policy framework for fulfilling, promoting and protecting the rights of displaced people applicable in the Malawian context.

2.0 Rationale and Methodology

This brief seeks to review the legal and policy framework on land acquisition and resettlement in Malawi with a view to understand how this framework either upholds or fails to protect the rights of affected communities. In this regard, the brief will review key laws related to land and environmental management in Malawi, including the Land Act (2016), Land Acquisition Act (2016), the Environmental Management Act (2016) and a host of other laws. The review also seeks to determine if the Malawi legal and policy framework is consistent with internationally accepted policies, procedures and best practices. This brief will therefore also review the Environmental and Social Framework of the World Bank (ESF) as a point of reference for internationally accepted practices, notwithstanding civil society criticisms and concerns for improvement². The brief further seeks to highlight provisions in the Malawi and World Bank frameworks which communities under threat of displacement and CSOs could leverage with government and project implementers in order to ensure land acquisition and resettlement processes respect the rights of the affected people and their communities. Ultimately, this review seeks to identify gaps within Malawi laws and policies, and provide recommendations for filling the gaps and enhancing Malawi's laws and policies on land acquisition and resettlement. Going forward this report is organized as follows:

Section 3.0 discusses the cases of displacement and resettlement in the Malawian context in order to explore the key causes and key challenges with land acquisition processes in Malawi. A note on use of terminology: While the terms 'displacement' and 'resettlement' may be used to denote the same event or human experience, they describe technically different processes. Displacement refers to the forcible removal of people from their habitual homeland without adequate compensation, guarantees or mechanisms of social support; whereas resettlement refers to the comprehensive process of planning for and implementing the relocation of people, households and communities from one

place to another for some specific reason, together with all associated activities. These associated activities include the provision of compensation for lost assets, resources and the inconvenience, and the provision of support for livelihood restoration. Section 4.0 puts Development-Induced Displacement and Resettlement (DIDR) in its broader context at the global level, and it discusses the magnitude as well as the human, social and legal challenges posed by DIDR. Section 5.0 is devoted to Resettlement as the consequence of displacement and it attempts to answer the question: why is resettlement still done poorly despite the large body of scholarship on the impacts of development-induced displacement? Section 6.0 outlines the relevant policies and frameworks at global, continental and regional levels put in place to prevent, minimize and mitigate against the impacts of Development-Induced Displacement and Resettlement. Section 7.0 reviews Malawi's legal and policy framework with a focus on the Land Acquisition Act (2016). The section highlights the strengths and weaknesses of the Act and makes recommendations on how provisions in the Act can be enhanced to safeguard the rights of people facing displacement. Section 8.0 reviews the World Bank's Environmental and Social Framework (ESF) to highlight its strengths and weaknesses. The section makes recommendations on what strengths of the ESF could be adopted to enhance Malawi's framework. Section 9.0 briefly discusses the role of CSOs and highlights provisions in both the Malawi framework and the ESF which can be leveraged by advocates for affected people. The brief ends with recommendations and a conclusion in Section 10.0.

² [Suggested footnote] See for example, Coalition for Human Rights in Development – civil society concerns regarding World Bank Safeguards: <https://rightsindevelopment.org/our-work/worldbank/>

3.0 Displacement and Resettlement in the Malawian Context

People and communities in Malawi have experienced their share of displacement and relocation although much of this has not been documented. As a country, Malawi has invested in major projects including urbanization projects, large-scale agriculture, and other infrastructure projects including roads, water supply plants, and hydro power plants. This section briefly examines a few documented cases of displacement and resettlement in Malawi to discern the key causes of displacement, the experiences of the displaced people and the challenges associated with the processes.

In a country largely dependent on agriculture, it should not come as a surprise that large-scale farming has been a key factor in the displacement of people and communities. For a long time, Malawi has sought to promote commercial agriculture by putting in place investor-friendly policies. It is these policies that have spurred interest in large-scale farming resulting in displacement of local communities. Zamchiya and Gausi (2015) have documented large scale land deals involving as much as 15,000–20,000 hectares in sugarcane growing schemes in Chikwawa and Nkhotakota districts where an estimated 14,612 farm families lost their land between 2006 and 2010. Chinsinga (2016) has also documented the expropriation of smallholders' farm land in the context of the expanding sugarcane outgrower schemes in Dwangwa, Nkhotakota. In his work with communities of Kalimkhola village in Nkhotakota, Yuh Jin Bae (2019) interviewed six elders who related that they were initially forcibly moved from Matiki village in 1976, to make way for a large-scale sugarcane cultivation run by Dwangwa Sugar Corporation (DSC). They moved to Group Village Kalimkhola's area and settled near Kazilira dambo, only to be forcibly evicted again to make way for the expanding sugarcane growers company. Yuh Jin Bae notes that the introduction of the Green Belt Initiative, a government of Malawi initiative to improve food production and diversify crop production by irrigating 1 million ha of land located within 20–30 km of Malawi's three lakes and 13 perennial rivers by 2020, contributed to the increasing number of farmers partici-

pating in the Dwangwa Outgrowers Scheme (DOS) and the expansion of land under cane production. The Green Belt Initiative emphasizes the promotion and enhancement of agricultural commercialization via out grower schemes and contract farming. In addition, the launch of the New Alliance for Food Security and Nutrition in Africa (NAFSN) in 2012 with the European Union as the main donor, with support from the African Development Bank, also contributed to the expansion of Malawi's sugar industry. The expropriation of land by the Dwangwa Outgrower Scheme has resulted in disintegration of communities as people were scattered and moved to different places, and disrupted ties between traditional leaders and their subjects. Further to this, displaced people reported experiencing loss of identity as people moved and were absorbed in new communities where they could not carry on with some of their important traditional practices. Displacement has also resulted in food insecurity as the new farming plots had poor soils and inadequate water such that the displaced people could not grow enough food to feed their families (Yuh Jin Bae, 2019).

Besides agriculture, the construction of power plants has also resulted in significant displacement and impoverishment of communities in Malawi. The Center for Human Rights and Rehabilitation (CHRR) working jointly with the International Accountability Project (IAP) uncovered through discussions with the affected communities the land acquisition and resettlement processes of the Salima Solar Project and the Mpatamanga Hydro Power station. The Salima Solar Project, located within Traditional Authority Kalonga in Group Village Headmen (GVHs) Kanzimbe, Mayambo and Sadzu, has acquired 183.3 hectares of land for the construction and operation of a 60 megawatt solar photovoltaic plant (CHRR, 2020). The people displaced by this project lost their productive land, and land-dependent people such as agricultural laborers lost their jobs. The communities surrounding the project are now exposed to health hazards and environmental pollution including emanating from poor sewage disposal. Even more disheartening, the communities

reported signs of psycho-social trauma resulting from gender-based violence sexual exploitation of women and girls, and increasing prevalence of unplanned pregnancies and STIs including HIV. The Mpatamanga Hydro power Project will acquire land in Chikira and Chaswanthaka villages in Blantyre District, and Kambalame village in Neno District for the construction of a hydro power plant (IAP and CHRR 2020). Plans for this project have been in the works since 2015 and this delay has disrupted community development projects, as well as the livelihoods of the people in the affected villages. The construction of critical infrastructure, including Mpatamanga bridge, was halted and as a result 350 pupils from Kambalame village have not been able to attend Chikira School across the river. Furthermore, villagers were told to halt personal development projects including construction of new houses or extension of old ones, and they were told not to grow long-term crops such as bananas and sugarcane. This has negatively impacted the villagers' access to quality and diversified food diets.

Although not well documented, urbanization projects should be put on record as a key factor in forcible relocation of people. To begin with, anecdotal evidence suggests that some communities had to be relocated to make way for urban settlements when the capital of Malawi was moved from Zomba to Lilongwe. Secondly, Malawi is one of the fastest urbanizing countries in the world with an annual urban growth rate higher than five percent and an urban population of 20% of its entire population³. Indeed, in recent times urbanization is proceeding at a breakneck speed such that large swathes of rich agricultural land adjacent to urban centers in Lilongwe are being bought by real estate companies to be turned into up-scale residential units.

The Keyerekera uranium mine in Karonga was Malawi's first large scale mining, and although relatively few people were displaced, the mining operations resulted in environmental damage including contamination of water sources, and a host of other social and health risks (Human Rights Watch n.d).⁴ Mining in Karonga district resulted in some families being resettled, often without adequate warning, decent resettle-

ment conditions, or compensation. Upon entering the area, the mining company cut the community's existing drinking water supply by destroying the water pipes running through the mining area. This forced villagers, especially women to make the arduous journey down to the river about four times a day to fetch water. Farmers complained that dust in the air, coal on the road, and poor water quality impacted their crops and decreased the harvest of their fields, threatening economic ruin. They worried that the river may be polluted from the mine, and they were uncertain if water from the river was safe to drink. Dispossessed of the land the community had used as farms and upon which they had built their homes for several generations, the communities found themselves homeless and without adequate money to buy new land and replace their houses. As a result, families were forced to sell their cows to cover the expenses needed to build new homes. While Malawi's mining sector is still in its nascent stages, these initial experiences have served to expose the fragility and shortfalls of current frameworks for handling community displacement and resettlement in that they failed to compel the government and investors to uphold human rights due diligence and minimize the risks faced by communities and natural ecosystems.

The record of displacement and resettlement in Malawi has shown that displacement is also taking place in the context of donor-funded projects in key sectors such as agriculture, mining and power generation. Scholarly studies and documentation from journalists and activists have revealed accounts of highly flawed processes of land acquisition and compensation that are shrouded in secrecy and corruption, and stories of investors, bureaucrats and political elites acting with impunity in total disregard for the affected communities. Among other things, affected communities reported: (i) lack of meaningful prior consultations about the project; (ii) failure by the project implementers to provide adequate and timely information; (iii) lack of access to a grievance redress mechanism; (iv) irregular resettlement process; (v) flawed land acquisition process; (vi) lack of transparency in how compensation was assessed; (vii) lack of alternatives to

³ UN Habitat, Malawi, <https://unhabitat.org/malawi#:~:text=Appeal%20%2B%20Join%20us-,Overview,20%25%20of%20its%20entire%20population>

⁴ Human Rights Watch, *They Destroy Everything: Mining and Human Rights in Malawi*, <https://www.hrw.org/report/2016/09/27/they-destroyed-everything/mining-and-human-rights-malawi>

cash compensation; and (viii) manipulation, intimidation and coercion. In some cases, traditional chiefs have been known to connive with ‘investors’ to sell land behind the backs of their subjects, and use the police to forcibly evict people from their homes and farm plots.

These growing contestations around land acquisition, displacement and relocation are taking place in a context where demographic and economic pressure on land are increasing by the day. Malawi is a densely populated country at 203 people per Km² (526 people per mi²)⁵, and 80%⁶ of Malawians are dependent on land for agriculture and other forms of livelihoods. However, land holdings are small and the average of land holding is 0.5 Hectares per household (FAO n.d)⁷. The Malawi government has continued to push the narrative that Malawi has plenty of arable land for large scale agriculture. For example, as part of its commitment to the NAFSN, the government pledged to improve large-scale investor access to land and water by releasing 200,000 ha of land for large-scale commercial agriculture (Zamchiya and Gausi 2015). But what is not clear is if Malawi has this much land that is not under occupation.

Ultimately, all these contestations are happening in a legal and policy environment around land that is still in a flux. In recent years there have been debates about land tenure and Malawi has enacted at least ten bills related to land. Even then, there are constant interventions from the state on land transactions, and yet calls for more reform remain.

⁵ WorldOMeters, Population of Malawi, <https://www.worldometers.info/world-population/malawi-population/#:~:text=The%20population%20density%20in%20Malawi,526%20people%20per%20mi2>

⁶ World Bank, <https://www.worldbank.org/en/country/malawi/overview>

⁷ Food and Agriculture Organization of the United Nations, <https://www.fao.org/3/i8912en/i8912EN.pdf>

4.0 Understanding Development Induced Displacement

Development-induced Displacement and Resettlement (DIDR) refers to the forcible removal of people from their habitual homeland without adequate compensation, guarantees or mechanisms of social support. The term ‘displacement’ therefore is associated with the loss of land, which is a fundamental point of economic, social and cultural reference (Terminski 2013). On the other hand, the term ‘eviction’ refers to the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon (OHCHR).⁸

Literature also categorizes human displacement according to specific causes including conflict-induced displacement, disaster-induced displacement, environment-induced displacement. Types of displacement according to cause may manifest different characteristics and variable impacts on the affected people. For example, disaster-induced displacement is the single most important cause of displacement globally but disruption is usually relatively short-term and survivors are in many cases able to return to their homes.

i Prevalence and Key Contributors

It is estimated that over 15 million people are affected by development-induced displacement each year (Cernea and Mathur 2008) and the construction and operation of dams is considered to be the single greatest cause of displacement worldwide. In China alone, dams displaced 10.2 million people between 1950 and 1990 (WCD 2000), and in Brazil alone, their construction has flooded 3.4 million ha of productive land and displaced more than 1 million people (Randell 2017)⁹. Development of transportation infrastructure including the construction of roads, highways, railroads, ports and airports is currently, along with construction of

dams, one of the causes of development-induced displacement on the largest scale. Urbanization and transformation of urban space, and mining and transportation of resources are also key factors (Vanclay 2017 Patel et al 2015). The need to control areas for resource exploitation, extraction and transportation of resources have become a growing cause of internal displacement (Terminski 2013). This is key considering that most of the world’s natural resources are located on indigenous lands. History has shown that indigenous peoples are never meaningfully engaged either by governments regarding investments and exploitation of these resources, rendering them voiceless and marginalized, and as a result indigenous peoples all over the world have been subjected to the worst forms of abuse including forcible displacement (Convention on Biological Diversity 2004). Other key contributors to human displacement include expansion of agricultural areas, creation of national parks and reserves.

ii DIDR as a Human, Humanitarian, Social, Legal and Ethical Problem

Anthropologists and other social scientists now recognize human displacement as a serious human and social problem with significant, sometimes irreversible and generational consequences. Michael Cernea, the foremost authority on development-induced displacement, describes the magnitude of the problem as follows:

“When people are displaced, production systems are dismantled, kinship groups are scattered, and long-established residential settlements are disorganized. People’s lives are affected in very painful ways. Many jobs and assets are lost. Health levels tend to deteriorate. Links between producers and their customers often are severed, and local labor markets

⁸ UN OHCHR, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/Guidelines_en.pdf

⁹ National Library of Medicine, *The short-term impacts of development-induced displacement on wealth and subjective well-being in the Brazilian Amazon*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5354122/>

are disrupted. Informal social networks that are part of daily sustenance systems – providing mutual help in child care, food security, revenue transfers, short-term credit, labor exchanges, and other basic sources of socioeconomic support – are dissolved. Local organizations and formal and informal associations disappear because of the dispersion of their members. Traditional community and authority systems can lose their leaders. Symbolic markers, such as ancestral shrines and graves, are abandoned, breaking links with the past and with peoples' cultural identity. The cumulative effect can tear apart the social fabric and local economy, and is profoundly disruptive to large numbers of people. The main risk is impoverishment – through landlessness, joblessness, food insecurity, deteriorating health, or the loss of access to community assets” (Cernea 1996).

Besides being a human and social problem, DIDR is a legal and ethical dilemma. Scholars note that displacement constitutes a violation or assault on basic human rights (Chaudry 2016). International treaties and many national laws stipulate some basic human rights and freedoms to be accorded to all peoples, including the freedom of movement, choice of residence, and ownership of property including land. Development-induced displacement curtails these basic freedoms. In addition, the failure to provide alternatives for entitlements such as a livelihood, food security, home or socio-cultural heritage lost as a result of displacement amounts to negligence on the part of the state and a violation of human rights (van der Ploeg et al. 2017). In this regard, development-induced displacement puts into question the relationship between human rights and development. Scholars of the theory and practice of development argue that development should include the ability to enjoy all the basic freedoms, and that the ultimate goal of human development, including economic development, should be the expansion of individual and collective freedom (Sen 1999). Subsequently, economic ‘development’ that comes at a price of lessening the human rights of the affected people does not qualify as development (Terminski 2013).

DIDR and the resulting forcible relocations also present an ethical dilemma for the state. Starting from the premise that all citizens are held to be equal, it is an aberration that

the people who are displaced do not enjoy equal rights nor derive benefits from development projects. On the contrary, mainstream society continues to hold as expedient that some should suffer for the collective good when a development project such as a dam brings electricity to large cities. However, by adopting a human rights perspective in development, it should be clear that dismissing the negative social impacts of resettlement as being acceptable because it will lead to more economic growth and generate benefits for the mainstream of society is inexcusable (Mathur 2008, Bugalski 2016). The problems with development-induced displacement arise largely because the affected communities generally do not participate in the decisions to carry out a development project, nor do they share in the profits from its operation. Chris De Wet, another notable authority on the subject contends that “until genuine local-level participation is achieved, for all stages of the development project as a whole, and not just its resettlement component, local complexities will not be properly articulated, understood or taken into account. Local tensions and conflicts will be exacerbated and access to resources compromised” (De Wet 2005).

5.0 Understanding Resettlement

Resettlement is understood as a comprehensive process of planning for and implementing the relocation of people, households and communities from one place to another for some specific reason, together with all associated activities. Such activities include, the provision of compensation for lost assets, resources and the inconvenience, the provision of support for livelihood restoration and enhancement, re-establishment of social networks, and for restoring or improving the social functioning of the community, social activities and essential public services (Vanclay 2017). Ideally, a successful resettlement is one where the resettled people are economically better off and living in socially stable communities that allow them to recreate social networks and societal political institutions (De Wet 2005). However, experience has shown that any involuntary resettlement, even if conducted according to the best standards, is an unsettling experience and is likely to cause some anxiety and stress in the people being relocated (Bisht 2009). Forced resettlement impoverishes people, in part because it takes away their power to make decisions about where and how they are to live, the conditions under which they are to have access to and use productive resources, and the autonomy they are to exercise over the running and reproduction of their own socio-political institutions (De Wet 2005).

Despite the large body of scholarship on the impacts of displacement and resettlement, and despite having established frameworks and guidelines on the same, resettlement is often not done well because governments don't understand the complexity of local communities. Vanclay (2017) outlines some of the problematic aspects of resettlement practice and these include: (i) unrealistic timeframes and inadequate budgets for undertaking the resettlement; (ii) inadequate compensation arrangements and the payment of compensation in cash rather than land-based resettlement; (iii) inadequate composition of resettlement teams (too few members, lack of capacity and experience, inappropriate gender balance, etc.); (iv) poor assessment of the project's land requirements, complicated by changing project plans; (v) inadequate baseline data and poor assessment of the number of people and structures affected; (vi) poor

management of the cut-off date; (vii) poor engagement with impacted communities; (viii) poor awareness and (poor) addressing of the legacy issues arising from past projects and the local social-political history; and (ix) failure to manage land speculation and the opportunistic behavior of various actors including the affected communities.

It is worth highlighting that most of the issues around resettlement arise due to misunderstandings around compensation. Most resettlement programs face the challenge of inadequate compensation arrangements. Often the compensation amounts scheduled to be paid per household are so little such that displaced people are unable to purchase land of equal or better quality. In addition, compensation is paid out too late (Cernea 2008). The form in which the compensation is received by displaced or affected communities is also critical. Compensation in the form of cash is not always an optimal solution and may become the cause of serious social problems such as landlessness and joblessness. This is because compensation in cash often leads to improper expenditure by individuals who are unaccustomed to handling large amounts of it. Practice has shown that it is better to exchange land for land. In such cases, compensation for lost assets must be clearly distinguished from other forms of material support and social assistance (Reddy et al 2015). Further to this, governments in the Global South often don't compensate people who have no legal right to the land they live on, such as illegal settlers. In general, resettlement programs often fail because they pay little attention to restoring livelihoods. Most governments and project implementers think that compensation alone will enable people to re-establish their lives and livelihoods, and yet this is not true because the cost of re-establishment far exceeds the compensation amounts (Cernea 1999).

6.0 Mitigating the Impacts of Development Induced Displacement and Resettlement: The Policy Instruments and the Key Actors

In practice, resettlement takes place in a multi-layered regulatory environment with overlapping and sometimes competing jurisdictions which involves global level human rights declarations, multilateral institutions, continental and regional bodies. In addition, national laws and jurisdictions often shape the practice of resettlement. This section outlines the mechanisms that regulate resettlement at global and continental levels.

As a starting point, Declaration on the Right to Development¹⁰ adopted in 1986 by the United Nations General Assembly provides for rights and freedoms that should be accorded to all peoples, and should thus guide the resettlement and rehabilitation processes. The Declaration states that “every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. Among other important rights in the context of people displaced or affected by development projects are the right to land and access to common resources, the right to cultural identity, the right to environmental protection and to more suitable forms of development. Rights directly associated with the resettlement process include: the right not to be displaced, the right to participation in the decision-making process concerning resettlement, the right to access information on any matters that affect their interests and needs, and the right to rehabilitation.

In addition to this global framework, the African countries came up with the *Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, also known as the Kampala Convention. This is a treaty of the African Union

(AU) that addresses internal displacement caused by armed conflict, natural disasters and large-scale development projects in Africa. A key objective of the Convention is to promote and strengthen regional and national measures to prevent or mitigate, prohibit and eliminate root causes of internal displacement, as well as provide for durable solutions. Among some notable provisions, the Convention compels member states to refrain from, prohibit and prevent arbitrary displacement of populations and to prevent political, social, cultural and economic exclusion and marginalization, that are likely to cause displacement of populations or persons by virtue of their social identity, religion or political opinion. Also importantly, the Convention places the burden of accountability on non-state actors, including multinational companies and private military or security companies, for acts of arbitrary displacement or complicity in such acts. The Convention further places the burden of accountability on non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement.

International Financial and Development Institutions, such as the World Bank and other multilateral development banks, have developed their own policies and procedures to guide resettlement processes in public and private sector projects. As the world’s largest lender with considerable financing towards infrastructure development projects, the World Bank was the first major development agency to formulate a comprehensive policy on involuntary resettlement. Key instruments include the World Bank’s Operational Policy on Involuntary Resettlement (OP 4.12) (World Bank 2001)¹¹ and the accompanying handbook (World Bank 2004)¹². These two instruments were replaced with the new

¹⁰ UN OHCHR, *Declaration on the Right to Development*, <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-development>

¹¹ World Bank, *Policy and Procedural Framework*, <https://policies.worldbank.org/en/policies/all/ppfdetail/1572>

¹² World Bank, *Involuntary Resettlement Sourcebook: Planning and Implementation in Development Projects*, <https://openknowledge.worldbank.org/handle/10986/14914>

Environmental and Social Framework (World Bank 2016), which is reviewed in more detail in this report. Regional Banks have also published policies on resettlement. The African Development Bank (AfDB) published an involuntary resettlement policy in 2015¹³. Like the World Bank policy, the AfDB policy seeks to avoid involuntary resettlement, if possible, minimize displacement where it is unavoidable, and ensure that the displaced people receive adequate assistance to restore their living conditions.

In addition to policies from multilateral institutions, there is a range of global sector specific initiatives to minimize the adverse impacts of displacement and resettlement. The World Commission on Dams Report of 2000 (WCD 2000) acknowledged the contribution of dams to human development, but it also noted the severe and often unnecessary impacts including the fact that the environment and the people replaced or living downstream often have to cope with destroyed livelihoods and ecosystems. The report provided values and guidelines for the construction and operation of dams within an approach to development that incorporates both a “recognition of rights” and an “assessment of risks.” The Extractive Industries Transparency Initiative (EITI) tracks investments in mining industries while the African Union Commission released the *Guiding Principles On Large Scale Land Based Investments in Africa* to safeguard livelihoods and ecosystems of communities affected by large scale land and agricultural projects.

In addition to all these, national governments have developed legislation and policies to guide the resettlement and rehabilitation processes. The next section reviews the legal and policy framework for land acquisition and resettlement in Malawi.

¹³ African Development Bank, *Safeguards and Sustainability Series*, https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Safeguards_and_Sustainability_Series_-_Involuntary_Resettlement_-_En_web.pdf

7.0 The Legal and Policy Framework on Land Acquisition and Resettlement in Malawi

Resettlement processes must be consistent with national laws and policies, legislation which is referred to in this report as the legal and policy framework. This section reviews Malawi's legal and policy framework on land acquisition and resettlement with a view to determine if it is consistent with internationally accepted best practices. Ultimately, this review seeks to determine if Malawi's legal and policy framework is robust enough, and if it contains the requisite provisions in order to fulfill, promote and protect the rights of citizens facing displacement and resettlement.

The legal, and policy framework that governs land acquisition and resettlement in Malawi is first and foremost drawn from the Constitution of the Republic of Malawi. As the supreme law of the land, the Constitution contains a number of provisions which need to be followed when it comes to displacement and resettlement. These include provisions on the right to development and participation, the right to property, the right of access to information, gender equality and management of the environment, among others. It is worth highlighting that Section 30 of the Constitution provides for the right to development for all citizens and places responsibility on the State to take all necessary measures for the realization of the right to development. Section 28 establishes the right to property, and it provides that "every person shall be able to acquire property alone or in association with others, and that no person shall be arbitrarily deprived of property". With reference to gender equality, Section 24 of the Constitution states that:

"Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes (a) to be accorded the same rights as men in civil law, including equal capacity to (i) enter into contracts, (ii) acquire and maintain rights in property, independently or in association with others, regardless of their marital status...and any law that discriminates against women on the basis of gender or marital status is invalid..."

These provisions are noted here to highlight the rights of displaced people in general, but more especially women and other marginalized groups who are usually victimized the most due to displacement.

In addition to the constitution, Malawi's legal and policy framework on land acquisition and resettlement is made up of a number of pieces of legislation, and the key ones include the Malawi National Land Policy, the Land Act, 2016, Customary Land Act, 2016, Land Survey Act, 2016, the Lands Acquisition and Compensation Act, 2016, Physical Planning Act, 2016, the Forestry Act, (amended) 2016, Malawi Housing Corporation (amendment no 2) Act, 2016, Registered Land (amendment) Act, 2016, Public Roads (amendment) Act, 2016, the Environmental Management Act, 2016, and Local Government (amendment) Act, 2016. These are too many to review in one report, but a summary with brief points on how each of these pieces of legislation affect displacement and resettlement processes is appended in the Annex. The bulk of this report is devoted to the key piece of legislation which is the Land Acquisition Act (2016).

For now, suffice to say that by just looking at this array of pieces of legislation, one can immediately deduce that the processes of land acquisition and resettlement in Malawi will neither be uniform nor straightforward. These processes will be shaped by any combination of legislations that come into play in a specific situation depending on, among other things, the type of land, whether or not there are environmental considerations, and the type of envisaged development projects. This has potential to bring confusion for project-affected persons as it would be difficult to know which laws apply in a particular situation. One key recommendation from this report is that *for a separate Resettlement and Rehabilitation Bill* that will be used alongside the Land Acquisition Act. Such a Bill would consolidate and align all these pieces of legislation to allow for smooth and transparent resettlement and rehabilitation processes.

i. Review of the Land Acquisition Act of 2016

With regard to displacement and resettlement, the Land Acquisition Act (2016) is the most important piece of legislation. This section reviews the key provisions in the Act with a view to determine the effectiveness of this Act in safeguarding the rights of people displaced by development projects. The Act was amended in 2016 to make several adjustments to the previous 1974 Act. The following are the key clauses in the Act:

Power to Acquire Land: Section 5 of the amended act (repeals section 3 of previous act) invests the power to acquire land in the Minister (responsible for Lands) as follows; “Subject to the Provisions of this Act, *the Minister may acquire land for public utility either compulsorily or by agreement, and pay compensation as may be agreed or determined by this Act.*”

Preliminary Investigation: Section 6 of the amended act (repeals section 4 of previous act) allows agents authorized by the Minister to enter a piece of land and conduct investigations as follows: “where there is need to acquire land under this Act for public utility, it shall be lawful for any person authorized by the Minister...and for his servants and agents, to—enter upon any land in question or any land in the vicinity thereof.” The section further states that, “any such entry shall be *preceded by a notice of not less than seven days* to the occupier. ... and the Minister shall pay for any damage done by persons entering the land pursuant to this section.”

Compensation: Part II A of the amended Act provides for compensation for the dispossessed, including criteria for assessing compensation. Section 8 (1) states that “subject to the provisions of this Act, where land is acquired by the Minister under this Act, the Minister shall pay in respect thereof, appropriate compensation agreed or determined in accordance with the provisions of this Act”. Section 8 (2) states that “any compensation paid under this act shall be paid in one lump sum.”

Assessment of Appropriate Compensation: Section 9 of the amended Act provides criteria for assessing compensation. Section 9(1) states that “unless otherwise agreed between parties, appropriate compensation shall be assessed by an independent valuer appointed by the Minister.”

Section 9 (2) states that “an assessment for compensation shall be calculated based on the following grounds (i) Loss of occupational rights, (ii) Loss of land, (iii) Loss of structure, (iv) Loss of business, (v) Relocation costs, (vi) Cost of professional advice, (vii) Loss of goodwill, (viii) Nuisance, (ix) Loss or reduction of tenure; or (x) Disturbances if it is not too remote and is a natural consequence of the disposition of land. In addition to these, Section 10 A stipulates matters to be taken into consideration in the valuation of the land and these include (i) Market value of the land, (ii) Damage sustained by interested persons, (iii) Any increase in value of land.

Part III: Reversion to Government (Returning Repossessed Land to Government): Section 11 of the amended Act prescribes the manner in which ownership of land may revert back to the government: Subsection 1 states that “where a notice to acquire land has been published in terms of section 5, such land shall revert back to Government as public land within two months of publication of such notice.”

ii Discussion of Malawi’s Land Acquisition and Resettlement Framework

The amended Land Acquisition Act (2016) has some positives. For example, the Act acknowledges albeit indirectly, that displacement leads to dislocated livelihoods including loss of business and income. In this regard, the Act makes it explicit that persons disposed of land must be compensated, and it outlines some extensive criteria for assessing compensation. In addition, the Act alludes to compensation for disturbance and nuisance which could be interpreted to mean that the Act acknowledges the fact that some developments may bring disturbances including noise, pollution, etc. Interestingly, the Act also offers compensation for the cost of professional advice.

Having said this, the Land Acquisition Act (2016) has some major flaws and as a result, it doesn’t go far enough to create a conducive environment that allows for meaningful consultations between project implementers and project-affected people, and neither does it entirely safeguard the rights of all categories of people affected by displacement.

Power to Acquire Land vs Public Consultation: The Land Acquisition Act (2016) does not provide for consultations with persons losing land, and neither does it require the Minister to get the consent of the private owners before the acquisition. As it currently reads, the subsection does not compel the Minister to engage in meaningful dialogue and consultations with the project affected persons. Even if the Minister were to make an effort to consult the land owners purely out of goodwill, the balance of power puts the land owners in a subservient position, such that the consultations would not be meaningful. Land owners would not be free to express their views with the knowledge that the Minister might as well just take their land if they resisted. To buttress this point, the Act stipulates that land shall revert back to Government ownership as public land two months after publication of the notice. This is too short a time for an individual or a household to uproot themselves and establish a home and a livelihood somewhere else. *The Act needs to be amended to stipulate that the Government can only take control of the land after compensation has been paid and the displaced people have been provided with relocation support.* In the spirit of engendering consultative and participatory processes, new amendments to the Act need to explicitly stipulate the role of local authorities considering that provisions of this Act may be applied on customary lands and yet the Act makes no provisions for the involvement of Traditional leaders, Area Development Committees (ADCs) and Village Development Committees (VDCs).

Rationale for Land Acquisition – interrogating ‘Public Utility’: As it is currently worded, the Minister does not need to explain to project-affected communities why s/he needs to acquire a particular piece of land, and for what reason. The Minister only needs to decide that s/he needs a particular piece of land, whether or not other alternatives were considered. This speaks to the need to define the provisions of the term ‘public utility’ for which land may be acquired under this Act to avoid abuse of power by the Minister. *A new amendment is needed which will compel the Minister to show that s/he has engaged with the affected community, and that together they have considered other alternatives. In addition, the Act needs to delineate the specific land uses that are covered under the term ‘public utility.’ A related question to ask is, would acquisition of land on behalf of private sector enterprises be considered ‘public utility’?*

Eligibility for Compensation: The Act recognizes those whose land claims can be verified to receive monetary compensation, and it includes compensation for loss of structure, business, reduced tenure, which is in line with globally recognized best practices. However, it is not so clear on compensation for other categories of land-dependent people such as agricultural laborers, tenants, squatters, etc. *Best practice at the global level stipulates that compensation should be availed to all affected by displacement including the land dependent people who have no verifiable ownership of the land.*

Forms of Compensation: The current Act makes no provision for alternatives to compensation by cash. International best practices recommend that the best form of compensation is to swap land with land. As shown by examples from the Salima Solar Project, land dispossessed villagers were unable to find land of similar quality at the prevailing market rates. *The Act needs to make provisions for the Government to provide land that is of equal or better quality than the original one.*

Rehabilitation of Livelihoods: Further to the above, the Act does not provide for rehabilitation and reconstruction of livelihoods of the displaced and dispossessed farmers and land dependent families such as landless agricultural laborers, tenants, etc. This is another key reason underscoring the need for a Resettlement and Rehabilitation Bill to accompany the Land Acquisition Act. Such a Bill would compel either government or project implementers to make provisions not just for relocation support, but also rehabilitation of livelihoods and ensure that the displaced people can rebuild functional communities.

In conclusion, it is quite clear that the framers of the Land Acquisition Act did not have in mind resettlement and preserving livelihoods of the land dispossessed people. This is a glaring omission and there is a need for a separate Bill to correct things. In addition, the Act does not provide for meaningful dialogue and consultation with land owners, especially smallholder land owners on customary land. These are some of the vulnerable people and voiceless people in society. As it stands the Act is essentially an instrument that allows the government to use the principle of eminent domain of the state to dispossess land from vulnerable people ostensibly for the good of mainstream society. In

line with the other recommendations from this study, the Land Acquisition Act needs to be amended to ensure that it is grounded within the core values of Access to Information and human rights due diligence. Access to information, defined as the right to seek, receive and impart information held by public bodies is a fundamental right in and of itself, but it can be considered as an enabler of other human rights including the right of communities to development and the right to be consulted on matters that affect their interests and livelihoods.

8.0 The World Bank's Environmental and Social Framework

The World Bank is the single largest source of development finance, including financing for major infrastructure projects with far reaching implications on physical and economic displacement for millions of people. Adopted in 2018 the Environmental and Social Framework (ESF) consolidates formally stand-alone policies into a single framework. It starts with a statement on the Bank's vision for development and proceeds in two parts, the World Bank Environmental and Social Policy for Investment Project Financing – requirements applying to the Bank, and the Environmental and Social Standards (ESSs) which are requirements imposed on borrowers.

The Bank's stated vision is to end extreme poverty and promote shared prosperity in all its partner countries, and secure the long-term future of the planet, its people and its resources. In this regard the Bank's vision is grounded on two key values; environmental sustainability and social inclusion. By focusing on environmental sustainability, the Bank is committed to stronger collective action to support climate change mitigation and adaptation, recognizing this as essential in a world of finite natural resources. For the Bank, social inclusion means empowering all people to participate in, and benefit from, the development process, and limiting the economic burdens on future generations. The World Bank Environmental and Social Framework provides a way to operationalize these ideals at project level and help the Bank achieve its vision.

The World Bank Environmental and Social Policy for Investment Project Financing (IPF) which sets out the requirements the Bank must follow regarding projects it supports through investment project financing. The Environmental and Social Standards (ESS) outline the Borrower's responsibilities for assessing, managing and monitoring environmental and social risks and impacts associated with each stage of a project in order to achieve environmental and social outcomes consistent with the Bank's vision.

Scope of application: The ESSs apply to all projects supported by the Bank through project financing and the Bank undertakes

to support only the projects that are expected to meet requirements of the ESSs. Where the Bank is jointly financing a project with other multilateral or bilateral funding agencies, the Bank will cooperate with such agencies and the Borrower in order to agree on a common approach for the assessment and management of environmental and social risks and impacts of the project. Further to this, in cases where the Bank is providing support to a project involving a Financial Intermediary (FI), and other multilateral or bilateral funding agencies, the Bank may agree to rely on the requirements of such other agencies for the assessment and management of environmental and social risks and impacts of the project, including the institutional arrangements already established by the Financial Intermediary. In some cases, upon agreement, the Bank may opt to use the Borrower(country)'s Environmental Safeguards framework for the assessment and implementation of projects. This is done with the purpose of strengthening the Borrower's safeguard frameworks. Before this can be done, the Bank undertakes to conduct an overview assessment of the Borrower's existing policy, legal and institutional framework for addressing environmental and social risks and impacts, and related implementation capacity. The overview assessment will identify aspects of the existing framework that can be strengthened, and the capacity-building needed to support this. There are ten Environmental and Social Standards each dealing with a sector or theme with environmental and social implications. For this review our main focus will be on Environmental and Social Standard 5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement; and Environmental and Social Standard 10: Stakeholder Engagement and Information Disclosure.

i. Environmental and Social Standard 5 (ESS5): Land Acquisition, Restrictions on Land Use and Involuntary Resettlement

This is the standard that guides Bank staff, governments and project implementers navigate processes related to displacement and relocation as a result of development-induced

land acquisition¹⁴, restrictions on land use¹⁵, and involuntary resettlement. Through ESS5, the Bank recognizes that project-related land acquisition and restrictions on land use can have adverse impacts on communities and persons, and as such, involuntary resettlement should be avoided. Where involuntary resettlement is unavoidable, ESS5 demands that resettlement be minimized, and appropriate measures to mitigate adverse impacts on displaced persons (and on host communities receiving displaced persons) should be carefully planned and implemented. ESS5 applies to permanent or temporary physical and economic displacement resulting from the following types of land acquisition or restrictions on land use undertaken or imposed in connection with project implementation: (a) Land rights or land use rights acquired or restricted through expropriation or other compulsory procedures in accordance with national law; (b) Land rights or land use rights acquired or restricted through negotiated settlements with property owners or those with legal rights to the land, if failure to reach settlement would have resulted in expropriation or other compulsory procedures; (c) Restrictions on land use and access to natural resources that cause a community or groups within a community to lose access to resource usage where they have traditional or customary tenure, or recognizable usage rights. This may include situations where legally designated protected areas, forests, biodiversity areas or buffer zones are established in connection with the project; and (d) Relocation of people without formal, traditional, or recognizable usage rights, who are occupying or utilizing land prior to a project specific cut-off date.

Key Provisions of the Environmental and Social Standard 5

Eligibility classification: ESS5 classifies the following affected persons as individuals who are eligible to receive compensation and these include persons:

- (a) Who have formal legal rights to land or assets;
- (b) Who do not have formal legal rights to land or assets, but have a claim to land or assets that is recognized or recognizable under national law;
- (c) Who have no recognizable legal right or claim to the land or assets they occupy or use.

Project Design and Planning for Physical Displacement:

Where physical displacement is unavoidable, ESS5 requires the Borrower to develop a plan that covers the applicable requirements of this ESS regardless of the number of people affected. Environmental and Social Standard 1 (Assessment and Management of Environmental and Social Risks and Impacts) provides a full outline of the steps and tools for identifying, assessing and managing social and environmental risks and impacts that apply here. Following the identification of environmental and social risks, the borrower is required to come up with an Environmental and Social Commitment Plan (ESCP), which is a legally binding document that sets out the measures and actions required for the project to address or otherwise mitigate the risks in order to comply with a particular ESS. With regard to land acquisition and resettlement, the ESCP would include a resettlement budget and implementation schedule, and establish the entitlements of all categories of affected persons (including host communities). The ESCP would also outline how issues of gender, and the needs of the poor and the vulnerable would be addressed. ESS5 further demands that Borrower carefully document all transactions to acquire land rights, provision of compensation and other assistance associated with relocation activities. The following must be borne in mind.

Compensation and benefits for affected persons: When land acquisition or restrictions on land use (whether permanent or temporary) cannot be avoided, the Borrower

¹⁴ “Land acquisition” refers to all methods of obtaining land for project purposes, which may include outright purchase, expropriation of property and acquisition of access rights, such as easements or rights of way. Land acquisition may also include: (a) acquisition of unoccupied or unutilized land whether or not the landholder relies upon such land for income or livelihood purposes; (b) repossession of public land that is used or occupied by individuals or households; and (c) project impacts that result in land being submerged or otherwise rendered unusable or inaccessible

¹⁵ “Restrictions on land use” refers to limitations or prohibitions on the use of agricultural, residential, commercial or other land that are directly introduced and put into effect as part of the project. These may include restrictions on access to legally designated parks and protected areas, restrictions on access to other common property resources, and restrictions on land use within utility easements or safety zones.

must offer affected persons compensation at replacement cost¹⁶, and other assistance as may be necessary to help them improve or at least restore their standards of living or livelihoods. The following points must be borne in mind with regard to assessment and forms of compensation:

- i. *Offer of replacement land*: Where livelihoods of displaced persons are land-based, or where land is collectively owned, the Borrower will offer the displaced persons an option for replacement land unless it can be demonstrated to the Bank's satisfaction that equivalent replacement land is unavailable. As the nature and objectives of the project may allow, the Borrower will also provide opportunities to displaced communities and persons to derive appropriate benefits.
- ii. *Offer choices*: If people living in the project area are required to move to another location, the Borrower will: (a) offer displaced persons' choices among feasible resettlement options, including adequate replacement housing or cash compensation; and (b) provide relocation assistance suited to the needs of each group of displaced persons. New resettlement sites will offer living conditions at least equivalent to the original site.
- iii. *Distribution of development benefits*: ESS5 notes that in addition to offering displaced people replacement land, they must also be offered the opportunity to derive appropriate development benefits from the project.
- iv. *Security of tenure*: In the case of physically displaced persons, the Borrower must offer the choice of replacement property of equal or higher value, with security of tenure, equivalent or better characteristics, and advantages of location, or cash compensation at replacement cost. Compensation in kind should be considered in lieu of cash.
- v. *Compensate for assets and improvements*: In the case of physically displaced persons and where these displaced persons own structures, the Borrower must compensate them for the loss of assets other than

land, such as dwellings and other improvements to the land, at replacement cost.

- vi. *Disclosure of compensation standards*: Compensation standards for categories of land and fixed assets will be disclosed and applied consistently. Compensation rates may be subject to upward adjustment where negotiation strategies are employed. In all cases, a clear basis for calculation of compensation will be documented, and compensation distributed in accordance with transparent procedures.
- vii. *Forced evictions*: ESS5 explicitly prohibits Borrower countries from using resorting to use of force to evict project affected persons. "Forced eviction" is defined as the permanent or temporary removal against the 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 and other protection, including all applicable procedures and principles in this ESS.
- viii. *Transfer of land*: ESS5 guides that the Borrower will take possession of acquired land and related assets only after compensation in accordance with this ESS has been made available and, where applicable, displaced people have been resettled and moving allowances have been provided to the displaced persons in addition to compensation.
- ix. *Economic displacement*: In the case of projects affecting livelihoods or income generation, the Borrower's plan must include measures to allow affected persons to improve, or at least restore, their incomes or livelihoods. Economically displaced persons who face loss of assets or access to assets must be compensated for such loss at replacement cost, and affected business owners will be compensated for the cost of identifying a viable alternative location; for lost net income during the period of transition; for the cost of the transfer and reinstallation of the plant, machinery, or other equipment; and for reestablishing commercial activities. Affected employees

¹⁶ "Replacement cost" is defined as a method of valuation yielding compensation sufficient to replace assets, plus necessary transaction costs associated with asset replacement.

must receive assistance for temporary loss of wages and, if necessary, assistance in identifying alternative employment opportunities;

Economically displaced persons who are without legally recognizable claims to land must be compensated for lost assets other than land (such as crops, irrigation infrastructure and other improvements made to the land), at replacement cost. Additionally, the Borrower will provide assistance in lieu of land compensation sufficient to provide such persons with an opportunity to reestablish livelihoods elsewhere.

i. Environmental and Social Standard 10 (ESS10): Information Disclosure and Stakeholder Engagement

ESS10 is an essential piece in the World Bank's Environmental and Social Framework as it sets the ground for securing the rights and interests of local people in the development process by mandating project implementers to engage in inclusive and meaningful consultation with local communities and other stakeholders as part of the development process. In the preamble to ESS10, the Bank notes that "effective stakeholder engagement (SE) can improve the environmental and social sustainability of projects, enhance project acceptance, and make a significant contribution to successful project design and implementation." ESS10 notes that Stakeholder Engagement is an inclusive process conducted throughout the project life cycle, and it needs to be properly designed and implemented, in order to support the development of strong, constructive and responsive relationships that are important for successful management of a project's environmental and social risks. ESS10 further notes that Stakeholder Engagement is an integral part of early project decisions and the assessment, management and monitoring of the project's environmental and social risks and impacts, and is most effective when initiated at an early stage of the project development process. ESS10 defines "stakeholder" as individuals or groups who: (a) are affected or likely to be affected by the project (project-affected parties); and (b) may have an interest in the project (other interested parties). ESS10 requires that stakeholders be engaged throughout the project cycle including at project preparation and during the project continuously. The ESS further notes that meaningful consultation is a two-way process, that: (a)

begins early in the project planning process to gather initial views on the project proposal and inform project design; and (b) encourages stakeholder feedback, particularly as a way of informing project design and engagement by stakeholders in the identification and mitigation of environmental and social risks and impacts.

Engagement During Project Preparations: At project preparation stage, stakeholder engagement would, among other things, involve stakeholder identification and analysis, development of a stakeholder engagement plan, and information disclosure.

Stakeholder Identification and Analysis: ESS10 requires Borrowers to identify the different stakeholders, both project-affected parties and other interested parties, including and especially those project-affected parties (individuals or groups) who, because of their particular circumstances, may be disadvantaged or vulnerable. In addition, the ESS requires Borrowers to further identify individuals or groups who may have different concerns and priorities about project impacts, mitigation mechanisms and benefits, and who may require different, or separate, forms of engagement. Depending on the potential significance of environmental and social risks and impacts, the Borrower may be required to retain independent third party specialists to assist in the stakeholder identification and analysis to support a comprehensive analysis and the design of an inclusive engagement process.

Stakeholder Engagement Plan: Following the identification of stakeholders, ESS10 requires the Borrower to develop and implement a Stakeholder Engagement Plan (SEP). Among other things, the SEP should describe the timing and methods of engagement with stakeholders throughout the life cycle of the project taking into account the main characteristics and interests of the stakeholders, and the different levels of engagement and consultation that will be appropriate for different stakeholders. The SEP should also describe the measures that will be used to remove obstacles to participation, and how the views of differently affected groups will be captured.

Information Disclosure: ESS10 requires project implementers to disclose project information to allow stakeholders to understand the risks and impacts of the project,

and potential opportunities. Information disclosed should among other things include, the purpose, nature and scale of the project, and the duration of proposed project activities. Most importantly, project implementers are required to disclose the potential risks and impacts of the project on local communities, and the proposals for mitigating these, highlighting potential risks and impacts that might disproportionately affect vulnerable and disadvantaged groups and the measures that will be taken to avoid or minimize these.

With specific reference to land acquisition and Involuntary resettlement, the project implementers are required to engage with affected communities on decision-making processes related to resettlement and livelihood restoration, including options and alternatives from which affected persons may choose.

Engagement during Project Implementation and External Reporting: ESS10 mandates that disclosure of relevant information and meaningful participation of affected communities continue throughout the planning, implementation, monitoring, and evaluation of the compensation process, livelihood restoration activities, and relocation process. Project implementers are required to conduct stakeholder engagement in accordance with the SEP, and will build upon the channels of communication and engagement already established with stakeholders. In particular, the project implementers are required to solicit feedback from stakeholders on the environmental and social performance of the project, and the implementation of the mitigation measures in the ESCP

Grievance Redress Mechanisms (GRM)

ESS10 requires that project implementers put in place project-level grievance mechanisms for all large-scale projects financed by the Bank. Project implementers are required to respond to concerns and grievances of project-affected parties related to the environmental and social performance of the project in a timely manner. With reference to displacement and resettlement, grievance mechanisms are needed to address specific concerns about compensation, relocation or livelihood restoration measures raised by displaced persons (or others) in a timely fashion. Where possible, such grievance mechanisms must utilize existing

formal or informal grievance mechanisms suitable for project purposes, supplemented as needed with project-specific arrangements designed to resolve disputes in an impartial manner.

An ideal stakeholder engagement process that accounts for information disclosures at all stages of the project process. Annex 1 attached to this report provides a model for an information disclosure and community engaged for the Malawian context.

Discussion and Critique of the World Bank's Environmental and Social Framework

This section discusses the World Bank's Environmental and Social Framework with a view to enumerate its strengths and weaknesses, and to make recommendations on which of the strengths of the Bank's framework could be adopted to strengthen Malawi's own framework.

At the outset, it is worth noting that as a framework the ESF seeks to encourage the management of risk throughout the project cycle, and puts emphasis on supervision, monitoring and reporting. This is the difference between resettlement as a one-off activity vis-a-vis resettlement as a process. In addition, the ESF separates responsibilities between the Bank and the Borrower, and places obligations on both to ensure that land acquisition and resettlement processes follow the established procedures. The following are some of the strengths of the World Bank's ESF that could be adopted beef up Malawi's legal and policy framework.

Categorization of risk: The first key strength of the Bank's framework is the expansive categorization of risk and its attempt to minimize discrimination. The World Bank's framework lays out a broad range of environmental and social risks that ought to be addressed by project implementers, and it is explicit about eliminating discrimination. Environmental risks and impacts, include: (i) those identified in the World Bank Group Environmental, Health, and Safety Guidelines (EHSGs); (ii) those related to community safety (including dam safety and safe use of pesticides); (iii) those related to climate change and other transboundary or global risks and impacts; (iv) any material threat to the protection, conservation, maintenance and restoration of natural habitats and biodiversity; (v) those

related to ecosystem services and the use of living natural resources, such as fisheries and forests.

Many of those risks are recognized by Malawi's Environmental Management Act (EMA) and they are supposed to be reviewed during environmental impacts assessment. Notably, the Bank's ESF further recognizes social risks and impacts, and these include (i) threats to human security through the escalation of personal, communal or interstate conflict, crime or violence; (ii) risks that project impacts fall disproportionately on individuals or groups who, because of their particular circumstances, may be disadvantaged or vulnerable; (iii) any prejudice or discrimination towards individuals or groups in providing access to development. Malawi's EMA and Environmental Impact Assessment Guidelines make no mention of these social risks and impacts. Projects that conduct social assessments do so in order to comply with donor requirements and not necessarily to comply with Malawi's laws. In this regard, it would be beneficial to beef up Malawi's framework by broadening up the categorization of risks in line with the World Bank's classification.

Eligibility for compensation: The second key strength of the World Bank ESF is the *classification of individuals eligible for compensation* which in addition to displaced land owners, also includes land-dependent people such as agricultural laborers and even squatters. In addition, the Bank's ESF notes that economically displaced persons who are without legally recognizable claims to land must be compensated for lost assets other than land (such as crops, irrigation infrastructure and other improvements made to the land), at replacement cost. In a country like Malawi where many people have no documented title to their lands, the expansion of eligibility criteria would go a long way to ensure legitimate claimants are not left out of compensation entitlements.

Assessment and forms of compensation: The Bank's framework outlines some extensive criteria for assessing compensation. Among other things, displaced people are to be compensated for lost land and structures, improvements to the structures, relocation costs, lost livelihoods, etc. However, the Bank requires that the first consideration should be to swap land for land. *Project implementers need to put in the effort to identify and acquire land where displaced people could be resettled.* The ESF further requires

that assets *be valued and compensated at replacement cost.* This is especially pertinent in the Malawian context. A case in point is the Salima Solar Project where displaced people were offered compensation in cash and yet were unable to purchase land of equivalent quality. The Bank also mandates that as part of information disclosure, compensation standards must be publicized and followed consistently. This is not what happened in all Malawian cases reviewed here. Rather, because of loopholes in the legal framework, project implementers were not compelled to disclose this information and displaced communities were unaware of how their compensation was calculated.

Rehabilitation and Resettlement: As alluded to in an earlier section, none of the pieces of legislation in the Malawi framework make mention of the need to resettle and rehabilitate the livelihoods of displaced people. There is a need to lobby parliament to enact a Resettlement and Rehabilitation Bill.

Project plans must include plan for relocation and resettlement: Some commentators have argued that at the very least, the Government of Malawi treats resettlement as an afterthought, and at worst, just another means to remove people from their lands to bring in a project. The World Bank's ESF stipulates that resettlement and compensation processes must be part of the project plans and that assets including land must only be transferred to the project after these processes are completed.

Distribution of development benefits: The World Bank's ESF stipulates that displaced people must be offered land and they must be given the opportunity to derive direct benefits from the project. This could include access to jobs and access to services from the project. This is in line with the constitution of Malawi which guarantees the right to development for everyone

Weaknesses of the ESF

Despite noted strengths, the World Bank's framework has some weaknesses, and these include:

Over-reliance on Borrower Provided Information: The ESF relies heavily on Borrowers to provide information for environmental and social due diligence. This in a way dilutes the Bank's due diligence responsibilities making it difficult

to hold the Bank responsible in the event of mismanaged projects.

Working with Borrower or Third-Party Frameworks: The ESF shows that there are instances where the Bank allows other actors including Borrower governments and other co-financiers to use their own frameworks (WB 2016, p 6) but it is not clear under what conditions. In large projects with multiple lenders, it can be difficult to determine which requirements apply, and negotiating the differences between national law and the requirements of the financial institutions can also be complex. This could lead to lapses in terms of responsibilities for ensuring compliance with safeguards, and communities may find it hard to pinpoint which entity to present specific complaints to.

Policy versus Practice: The key weakness is the ability of the Bank to enforce compliance of these safeguards. In practice some Borrowers have not complied with the ESCP but it is not always clear what the stance of the Bank is if the borrower doesn't meet the ESCP obligations. The Bank framework needs to be explicit on consequences for non-compliance.

In conclusion, while acknowledging its notable shortcomings, one can say that the World Bank's ESF is a fairly strong framework that, if adhered to would help safeguard the rights of displaced people. Its wide classification of eligibility would ensure people are heard, and its broad categorization of risks would go a long way in helping to protect the environment and people alike. Furthermore, the provisions for information disclosure and local consultation, in theory, open up avenues for local participation in development projects. However, the ESF also has some weaknesses in that it is heavily reliant on Borrower information which in a way masks the Bank's due diligence responsibilities. In addition, there is need for clarity on which standards apply when there are multiple players all with their own safeguard frameworks. As with all global standards and frameworks, it all boils down to enforcement. The Bank relies on national frameworks and institutions to enforce compliance. If these are weak, the rights of displaced people and the environment will suffer.

9.0 Recommendations and Conclusion

This study has noted that DIDR is a current and urgent challenge in Malawi, and that this problem and the perpetrators have evaded scrutiny because many cases remain undocumented, and because the victims have kept silent. The review contends that the problem is set to become even bigger as the key drivers including large-scale agriculture, construction of power plants, mining and urbanization are set to intensify in Malawi. Key to the unsatisfactory practice of resettlement work is the fragmentation of the legal framework, and the loopholes in the key legislation governing land acquisition in Malawi, the Land Acquisition Act (2016). Among other things, this brief noted that the Land Acquisition Act (2016) vests power to acquire land for ‘public utility’ entirely in the Minister responsible for Lands, and it makes no room for consultations with individuals and communities that will be affected by this decision. Further to this, by the mere fact that the Act simply gives the Minister powers to acquire land for ‘public utility’ without defining what constitutes ‘public utility’ leaves the Act open to abuse by the Minister or other vested interests. Although the Act provides that land displaced people are entitled to compensation, it excludes land-dependent people such as agricultural laborers, squatters and ‘vendors’ who do not have verifiable claims to the land they depend on. International practice stipulates that such people are eligible for compensation.

Still on compensation, the Land Acquisition Act does not allow for flexibility in terms of forms of compensation. The Act mandates that compensation be paid in form of cash whereas international practice recommends that displaced people be given options, and the first preferred option is to swap land for land. But perhaps the biggest flaw in Malawi’s legal framework with regards to displacement and resettlement work is that the current legislation has not provisions for rehabilitation of displaced communities and their livelihoods. This means that displaced communities are largely left to their own devices to do whatever they can to rebuild their communities and their livelihoods on their own. These shortfalls require strengthening the legal framework so that it is robust enough to protect the rights of people.

This will require making amendments to the clauses in the Land Acquisition Act so that they are in line with the international best practices. It will also require additional legislation to mandate the rehabilitation of displaced communities. With the foregoing in mind, we make the following specific recommendations.

Recommendations for the Government of Malawi

For the Government of Malawi, we make the following recommendations:

- 1.) We recommend that the Government of Malawi amends the Land Acquisition Act (2016). The amendment process should pay attention to or include the following key provisions:
 - a) Access to information for affected communities – communities earmarked for displacement and resettlement must be given complete and accurate information at the earliest possible time to ensure their informed consent and participation in the project. The requirement for providing information to affected communities must be included as a provision in the Land Acquisition Act. Annex 1 provides a detailed outline of the steps in community engagement and information disclosure processes.
 - b) Consultation with affected communities – there is need for a provision that compels the Minister to consult communities and people who will be affected by any proposed land acquisition. The provision should clearly lay out the steps that would constitute meaningful consultation as suggested in Annex 1.
 - c) A clause declaring mandatory human rights due diligence and reporting as core values or principles of the Act and its entire provisions and application.
 - d) Clarification on the definition of ‘public utility’– there is need to include a clause to define the types of development that qualify as ‘public utility’ to warrant acquisition of land by the Minister.

e) Provision for alternative forms of compensation – the Act needs to provide for the possibility for land swapping rather than mandating that all compensation be in monetary form.

f) Provisions for expanding eligibility classification– the Act needs to recognize that there are people who may have no verifiable claim to a piece of land, and yet they derive their livelihoods from the same.

g) Returning land back to Government – this needs to be revised to stipulate that land will only revert to government after all compensation processes have been completed.

(a) We recommend that the Government of Malawi harmonize laws and policies related to land acquisition and resettlement with the Land Acquisition Act as the central pillar. This will entail that any policy or law that contracts any provisions of the Land Acquisition Act and as provided by the Constitution shall be invalid to the extent of the contradiction

2.) We recommend that the Government of Malawi enact a separate Resettlement and Rehabilitation Bill. Such a Bill would ensure that government and project implementers are compelled to rehabilitate the livelihoods of displaced people. In addition, this kind of a Bill would consolidate into one all the elements from the various pieces of legislation and policies.

e) Go Beyond Mitigation of Effects of DIDR: Ensure Communities Benefit from Large Scale Investments

Time has come for communities to begin to lobby to be included as active participants in these large scale projects through community development agreements. Community development agreements (CDAs)¹⁷ are arrangements to ensure that communities share in the value added created by local large-scale investments. CSOs must lobby for a legal framework that imposes requirements for investors in large scale extractive industries, such as mining, forestry, large scale agriculture to enter into CDAs with affected communities. Arrangements could include revenue-sharing agreements and requirements for investors to make contributions to community development projects to make sure communities benefit in a meaningful way.

¹⁷ World Bank, <https://olc.worldbank.org/system/files/Community%20Development%20Agreements%20%2818%29.pdf>

Annex 1: Community Engagement and Information Disclosure Processes

This outline is presented as model for community engagement and information disclosure in the Malawian context. It assumes that Government departments and project implementing entities actually want to go into meaningful dialogue with communities that will be affected by the project in question, and that feedback from the community will be taken into account in the design and implementation of the project. It begins with the understanding that information disclosure is not a one-and-done event, rather it is a continuous process that begins before and continues during the entire project cycle. In this regard, a robust community engagement is key to facilitating on-going information disclosure processes.

Stage 1: Initial Contact with Communities to Raise Awareness

- i. Starts with as early as possible with the announcement from Government or from a financier such as the World Bank about the award of the contract for construction, mining license, wildlife concession, etc depending on the nature of the project.
- ii. Prior to commencement of project, concerned communities must be approached in the spirit of constructive collaboration and made aware of the options with regard to their participation in the project. To initiate community engagement process, the project implementing entity should develop an information package which clearly describes
 - the nature of the project,
 - the area(s) where the project will be implemented (TA, and village),
 - clearly specifies the potential risks,
 - which categories of people may be at increased risk,
 - the potential opportunities
 - Names and contacts of individuals where the community can address any queries and concerns.

- iii. Information package must be translated into the relevant local languages
- iv. Communication throughout the project cycle will use appropriate information, education, and communication (IEC) materials to respond to issues of language and ethnicity, literacy / illiteracy, gender, and social vulnerability. For example, project implementers may use different formats of a communications product with the same information eg flyers to be handed to villagers, posters to be placed in visible at relevant offices (DC, TA and village headman).

Stage II: Pre-Project Consultations

- v. Project implementing entity develops a Stakeholder Engagement Plan (SEP) which will include a schedule for consultations (identify and classify key stakeholders including those who are at most risk of adverse effects for separate consultations)
- vi. Project implementer must utilize local channels including Area and Village Development Committees (ADC and VDC), schools and churches to publicize the consultations schedule (dates, time, place). Community radios are another powerful tool for getting this information across.
- vii. Project implementer must conduct the consultations according to the SEP and the schedule where they will provide more details about the project and take in feedback from communities. Other key stakeholders including traditional leaders, relevant government agencies, representatives of contracted companies CSOs acting as advocates for the community must be encouraged to attend and ensure integrity of the consultation process. Relevant village-level committees (Health, Education, Forestry, Environment, etc) must be represented depending on the nature of the project. At a minimum this consultation meeting must be used to disclose and inform people of the project, its purpose,

and its potential risks and benefits and issues around displacement, relocation and compensation.

- viii. Record attendance and take notes at consultation meetings. Involve prominent people in the village to take register of all who attended and record key issues raised at consultations. The register and copy of minutes must be placed as public record with the village headman or other relevant authorities. The more people have copies the better. Where feasible, communities are encouraged to elect a liaison committee that will facilitate engagements between the community and the project implementer. But caution is advised as these committees are at risk of being co-opted.

Stage III: Establishing Consensus and a Framework for Joint Planning and Implementation

- ix. Following the meeting, the project implementer must follow-up on the next steps as agreed with the communities including proposed actions to mitigate the risks.
- x. Together with the community, project implementer needs to come up with a roadmap and a timeframe for addressing community issues including compensation and relocation. For World Bank funded projects, these issues must align with the issues raised in the ESCP. The roadmap must also include provisions for participatory monitoring and reporting on progress on specific issues raised by the communities, and progress on the project more broadly. The project implementer and the community must jointly come up with key indicators.
- xi. At this stage project implementer must set up or disclose the existence of a Grievance Redress Mechanisms (GRMs). GRMs are there to ensure that rights and interests of affected communities and individuals are protected, and that concerns of project participants arising from the project implementation process are adequately addressed and in a prompt and timely manner.
- xii. There needs to be several levels of GRMs each with a proper institutional set up and procedures including forms for recording complaints and timeframes for addressing them. For example, village level, district level

and national level GRMs. Communities must also be informed that they are at liberty to take their grievances to court if all levels of GRMs fail to address them.

- xiii. Alongside broader consultations with the community following the SEP, project implementer must also come up with a Resettlement Stakeholder Engagement Plan (RSEP) to address land access, compensation and resettlement activities. The RSEP should be specifically focused on displaced households and/or individuals, rather than on all local stakeholders. The RSEP may also necessitate the formation of a working group specifically focused on land and resettlement issues.

Stage IV: Community Engagement and Information Disclosure During Project Implementation

- xiv. Participatory Monitoring and Reporting: As part of the stakeholder engagement plan, project implementer and communities must agree on a reporting period, ideally every six months. This will be an opportunity for project implementer to report to the community on progress of the project and receive feedback from the community. Ideally, the project liaison committee could also come up with their own monitoring report that will include progress made in addressing concerns and grievances raised by the communities. Among the issues to report on could include:
- Budget and time frame of implementation
 - Delivery of project activities (project inputs)
 - Project achievements in relocation and rehabilitation of livelihoods
 - Consultation, Grievance and Special Issues
 - Monitoring of benefits from project activities

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