

# Rechtsidee

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# **Increasing Referendum Participation in Accordance with the Philosophy of Samsen Resident's in Thailand**

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## **Abstract**

Following the referendum on the draft Constitution of the Kingdom of Thailand B.E. which was held on 7 August 2016, it revealed that most voters approved this draft constitution. Nevertheless, in this study of Samsen Community's people who voted, they have their opinions about the political structure which are; Thailand is ready for the 2-party system, the qualification of the candidate should be graduated with a bachelor's degree, and the head of the government should come from the party with a majority vote. Additionally, they disagree about the prime minister who comes from the senator's nomination, and the senator should not have the authority of controlling the independent entity.

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## Introduction

On September 28, 29, 30, and October 1 and 3, 2016, Ciliwung-Cisadane Flood Control Office (*Balai Besar Wilayah Sungai Ciliwung Cisadane*/BBWSCC) of the Ministry of Public Works and Housing with the Provincial Government of the Special Capital City Region of Jakarta (Provincial Government of Jakarta) gradually evicted the residents who live on the riverbank of Ciliwung River in Bukit Duri, South Jakarta. The forced eviction was carried out to acquire land as a part of the Ciliwung River Normalization Program, which aims to reduce flood in Jakarta, especially in the flood-prone area of Bukit Duri.

The case of forced evictions is nothing new in Jakarta with its long-standing record of forced evictions. Forced evictions were carried out across the city throughout several administrations with reasons such as development or infrastructure projects, illegal occupation, public order, slum upgrades, city beautification and many more. In the 2006 report titled *Condemned Communities - Forced Evictions in Jakarta*, Human Rights Watch listed fourteen instances of forced evictions under Governor Sutiyoso's administration in 2006. Jakarta Legal Aid Institute (LBH Jakarta) also made similar report titled *Atas Nama Pembangunan (In the Name of Development)*, which listed 113 cases of development-based forced evictions conducted under the administration of Governor Basuki Tjahaja Purnama in 2015. Both reports noted rampant violations of human rights protection when the forced evictions were carried out.

Especially during the period of Jakarta gubernatorial election in 2016 and 2017, the question on whether the government should continue with the forced evictions policy was heavily debated. While the evictees with the support of human rights groups cried that their rights have been grossly violated, the Provincial Government of Jakarta argued that the eviction was unavoidable for the good of the whole city, as the annual flood will bring bigger disaster. This leads to the main question: can the forced eviction in Bukit Duri be justified for the reason of public purposes even though it was conducted at the cost of human rights?

International law provides an answer to this question. In international human rights law framework, the concept of limitations is introduced to strike a balance between the interests of individual and community or state. The concept of limitations to rights is envisaged in Article 29 (2) of the Universal Declaration of Human Rights, which stated:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Some rights, including individuals' rights to home, can be limited for several reasons that reflect 'public interests'. To their homes, individuals have the right to adequate housing as protected under Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and freedom from unlawful or arbitrary interference to home as protected under Article 17 of the International Covenant on Civil and Political Rights (ICCPR). Forced evictions constitute gross violations of both rights. However, in the most exceptional circumstances, states are allowed to conduct forced evictions only if they are carried out in accordance with the provisions of both covenants, which provide guidelines and standards for states to conduct forced evictions without violating their human rights obligations.

While the two previous reports made by Human Rights Watch and LBH Jakarta only used the procedural standards given by ICESCR to examine their cases, this article will combine the standards from ICCPR and ICESCR to analyze the case of Bukit Duri as the standards provided by both covenants overlap and complement each other. Reviewing the general comments, communications, and report by special rapporteur under the United Nations' human rights framework, this article argues that in general, ICCPR and ICESCR stipulate that forced evictions will not violate international law if they fulfill the standards of 'lawful' and 'non-arbitrary'. However, the Bukit Duri forced eviction did not fulfill both aforementioned standards. First, it was not lawful as it has an unlawful legal basis, was conducted without an appropriate procedural protection, was not followed by an adequate compensation and violated the evictees' rights to effective remedies. Second, it did not fulfill the standard of non-arbitrary as it may not be suitable to reach the legitimate aim, it may not be the least intrusive means, it has violated the essence of the right and it is prone to not fulfilling the standard of proportionality.

In order to reach the above conclusion, Part II of the article firstly discusses the international law protection provided to the human rights to home under the two international human rights covenants. The subsequent Part III elaborates the standards given by both covenants that every state should fulfill to conduct forced evictions. In Part IV, the standards are then applied in the case of Bukit Duri forced eviction. The article ends with conclusions and recommendations.

### Protection of Rights to Home under International Law

Even though international law emerged as a law that governs relations between kingdoms and states, the recognition of human rights protection in international law, which mainly governs states' treatment of their own citizens, started to develop in the wake of World War II. The discussion was triggered by the cruelty and massive human rights violations committed during the war. In the wake of the war, The United Nations was formed not only

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to maintain peace, but also to promote and to encourage respect for human rights.

One of the most important human rights milestones during the early development of the United Nations is the adoption of Universal Declaration of Human Rights (UDHR) by the General Assembly in 1948. Created by the United Nations Commission of Human Rights, the UDHR contains catalogue of rights that greatly influences the codification of human rights in subsequent international law treaties. In 1966, two human rights treaties were adopted by the General Assembly: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

## 2.1 The Protection of Rights to Home under Article 17 of the ICCPR

The ICCPR is a codification of individual freedoms against the interference of state and rights to participate in a democratic society. 169 states are currently parties to the covenant, including Indonesia. Pursuant to Article 28 of the ICCPR, Human Rights Committee (CCPR) was established to monitor the observance of state parties and implementation of the covenant. The Committee also publishes General Comments, which serve as significant normative interpretations and implementations of the ICCPR provisions. The Committee also can receive reports submitted by individuals regarding alleged human rights violations of states as stipulated by the Optional Protocol to the ICCPR. The reports will be forwarded to the particular state party along with CCPR views on the case. Even though the views are not legally binding, they are influential in the human rights system, even admitted as a source of law by the International Court of Justice in the case of *Diallo*.

There are 21 civil and political rights protected under the ICCPR, including freedom from interference to home. In the Article 17 of the ICCPR, it is stated, “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation” and that “everyone has the right to the protection of the law against such interference or attacks.” The word ‘home’ is defined by the CCPR as the place where a person usually resides or carries out his occupation.

The protection of home is given to guarantee that every person has a home to live and feel safe without being disturbed or interfered. The protection is given to all types of home, regardless of its ownership or function, from any act of interference, such as trespassing, surveillance and also forced evictions. However, the act of interference will not violate the states’ ICCPR obligation if it is not conducted in an ‘unlawful’ or ‘arbitrary’ manner.

## 2.2 The Protection of Rights to Home under Article 11(1) of the ICESCR

The ICESCR, was a codification of fifteen economic, social, and cultural rights which currently binds 165 state parties. Indonesia has also ratified the covenant in 2006. Similar to the ICCPR, ICESCR also has a treaty-based body named *Committee on Economic, Social and Cultural Rights* (CESCR) which is established by the Economic and Social Council. The Committee also has similar functions, which are to publish General Comments and receive reports.

The right to adequate housing is derived from the right to an adequate standard of living, stipulated in Article 11 (1) of the ICESCR, which states that

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

According to the CESCR, the term ‘adequate’ should be defined broadly, not only limited to the physical existence, but also extends to privacy, space, security, lighting, ventilation, basic infrastructure and distance to workplace and other facilities in a reasonable cost. This includes a degree of security of tenure that guarantees legal protection against forced evictions.

In ensuring the right to adequate housing, CESCR requires states to prioritize disadvantaged social groups by giving them special considerations. This principle implicates that any policy and legislation should not give benefit to the more advantaged social groups at the expense of the other groups.

### Standards of Forced Evictions under the ICCPR and the ICESCR

CESCR in its General Comment No. 7 defines forced evictions as “*permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.*” The practice of forced evictions violates the right to adequate housing because they impaired the security of tenure that every person should possess. Forced evictions also violate freedom from interference to home, which complements the right to not be forcefully evicted without adequate protection.

As an obligation to the ICCPR and ICESCR, states must refrain from forced evictions. However, many instances of forced evictions occurred because of reasons such as disasters as well as development and infrastructure projects.



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In these extraordinary circumstances, the practice of forced evictions, as a form of limitations of rights, can be justified only when it is carried out in full compliance with the provisions set out in the ICCPR and the ICESCR.

## 3.1 Standards of Forced Evictions according to Article 17 of the ICCPR

Article 17 of the ICCPR only prohibits unlawful or arbitrary interference to home. Therefore, forced evictions, as a form of interference to home, will not violate Article 17 of the ICCPR if it is conducted in a lawful and non-arbitrary manner.

### 3.1.2 Lawful

Lawful means that no interference should be carried out unless it is envisaged by law. The standard of legality obliges every forced eviction to not only have a legal basis, but the legal basis should also be consistent with the objective, purpose and aim of the ICCPR. Therefore, a national law that is not consistent with the standards of the ICCPR will not become a lawful basis.

In accordance with Article 17 (2) of the ICCPR, the Office of the High Commissioner for Human Rights (OHCHR) sets out several standards of legality that should be fulfilled: (i) the law should be publicly accessible; (ii) the law should contain provisions that restrict the limitation for specific purposes; (iii) the law should be clear and precise, which specifies the conditions where the limitation is allowed, the authorization procedure and the procedure to carry out the limitation; and (iv) the law should have effective safeguards.

In regard to effective safeguards, OHCHR states that oversight or supervision is needed to prevent an unlawful or arbitrary interference. These safeguards can take form of independent oversight body or judicial oversight. Moreover, OHCHR also states that in implementing Article 17(2) of the ICCPR, states should refer to Article 2(3)(b) of the ICCPR that stipulates individuals' right to effective remedy. The right to effective remedy, which in the bigger picture serves as ensurance of access to justice, includes a quick, comprehensive and impartial investigation to the alleged violation by an independent oversight body or judicial body. An essential element for the ensurance of effective remedy is cessation of the ongoing violation.

### 3.1.2 Non-arbitrary

In addition to lawful, forced evictions should also be non-arbitrary. CCPR defines a non-arbitrary interference as an interference that is reasonable in its circumstances, that is, an interference that is in compliance to the principle of proportionality and necessity on the pursuit of legitimate aim. These principles are acknowledged by both CCPR and the OHCHR. Thus, in order for a forced eviction to be non-arbitrary, it must have a legitimate aim, it must be necessary and it must be proportional.

#### 3.1.2.1 Legitimate Aim

Article 17 of the ICCPR does not list any specific aim that can justify the limitations to its right. Nowak suggests referring to other limitation clauses in ICCPR that list several reasons, such as national security, public order, public health, public morality, or the rights and freedoms of others. Oppositely, Bertil Wennergren, a member of CCPR, in his Individual Opinion in the case of *Toonen v. Australia* opines that it should be upon the state's discretion to determine the aim in imposing such limitation. However, such discretion is limited, as the reasonableness of the aim has to be determined by the CCPR. This is demonstrated in the case of *Coeriel v. The Netherlands*, whereby Netherlands refused to change the authors' names because Hindu names are considered not essential to learn the authors' religion and do not sound like Dutch names. CCPR deemed this reason as unreasonable.

#### 3.1.2.2 Necessary

The standard of necessary comprises of two tests, the test of necessity and the test of suitability. The test of necessity means that there should be no other alternative that is less intrusive or less restrictive in effectively achieving the aim sought. This test was applied by CCPR in the case of *Bakhtiyari v. Australia* and *Lee v. Korea*, whereby CCPR deemed that both states have violated the covenant for imposing limitations that are not least restrictive.

Concerning the test of suitability, the limitation imposed by states must be proven essential to reach the aim sought. CCPR's application of the test of suitability in evaluating the necessity of a limitation can be seen in cases such as *Faurisson v. France*, *Lee v. Korea* and *Toonen v. Australia*. For example, in the case of *Toonen v. Australia*, CCPR viewed that Australia has violated its obligation in the covenant because Australia's prohibition on homosexuality was considered not essential to protect public morality. In addition to the two tests, the OHCHR also adds that a limitation that is necessary should not impair the essence of the rights.

#### 3.1.2.3 Proportionality

Forced evictions should also fulfill the standard of proportionality, which in the strict sense means that the benefit of the limitation should be greater than the harm caused. As illustrated in the cases of *Bakhtiyari v. Australia* and

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*Raihman v. Latvia*, CCPR applied the test of proportionality by comparing the loss suffered by the victims and the purpose of the limitation in determining the arbitrariness of a limitation.

Particularly, in the case of forced evictions, the test of proportionality was applied by the CCPR in the case of *Naidenova v. Bulgaria*. In that case, CCPR viewed that the forced eviction planned by Bulgaria was not proportional, as it is only conducted for the reason that the community occupy the land illegally. The Committee regarded the impact suffered by the victims of the forced evictions as disproportional, considering the fact the government has let the author's community lived in the disputed land for decades. As the forced eviction will render the community homeless and no alternative housing or land is provided by the government, the Committee deemed that the forced eviction was arbitrary and has violated Article 17 of the ICCPR.

## 3.2 Standards of Forced Evictions according to Article 11(1) of the ICESCR

In its General Comment No. 7, CESCR provides guidelines and standards for states to conduct forced evictions, which are mostly procedural. Different from ICCPR, ICESCR has a general limitation clause that applies to the whole covenant. Article 4 of the ICESCR states that,

The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Therefore, in accordance to Article 4 of the ICESCR, any legitimate aim provided by states in conducting forced evictions will be justified only if it also promotes the general welfare in a democratic society. In addition to the general limitation clause in Article 4, CESCR in the General Comment No. 7 clearly refers to the standards of forced evictions in the CCPR's General Comment No. 16 of Article 17 of the ICCPR, which maintains the applicability of the principle of legality and non-arbitrary.

Throughout the whole general comment, it is apparent to see that procedural protection and due process of law are essential in protecting the right to not be forcefully evicted without adequate protection. The procedural protections that must be provided by states to the victims of forced evictions are:

1. An opportunity for the people affected by the forced evictions to have a genuine public consultation with the state. In this consultation, the affected people should also be able to submit any objection or suggestion to the proposed forced evictions plan. Any possible alternatives to the proposed forced eviction plan should also be discussed by the states and the victims. This opportunity is important to prevent the use of violence when the forced eviction is carried out. If during the consultation, an agreement cannot be reached, an independent body such as a court or an ombudsman should settle the matter through mediation, arbitration, or litigation.
2. An adequate and reasonable notice to the victims prior to the day of the evictions. This notice should include detailed information of the program that will be carried out, the steps that have been or will be taken to minimize the impact of the evictions and explanation on why there is no other alternative that can be taken.
3. Information regarding the eviction, and if possible, the information regarding the subsequent use of the land or building after the forced eviction is carried out. This information should be available to the victims in a reasonable period of time.
4. Especially when a group of people is affected, government officials or their representative should be present during the forced evictions. International and regional observer should also be given permission to monitor when the eviction is carried out.
5. Every person who carries out the forced evictions should be identified properly. Any use of force by state should be in accordance with the principle of necessity and proportionality.
6. Forced evictions should not be carried out during bad weather, at night, on holidays or religious celebrations, before election, or prior or after school exams, unless the victims have determined so.
7. Provision of legal remedies and legal aid to individuals who seek redress from the courts.

Providing an adequate compensation is also an essential element in conducting forced evictions. CESCR requires that every victim of forced evictions has the right to adequate compensation to the property that is evicted, both personal and real, and that remedy should be given immediately by the competent authorities. In estimating the compensation, states should also account moral damage, lost of employment and education opportunities, cost of legal counsels, and other countable loss. The agreed figure should be determined together with the victims of the forced evictions and be given immediately after the evictions were carried out.

In regard of compensation in a form of alternative housing, the alternative houses that are provided should fulfill the criteria of adequate housing as described in General Comment No. 4. Further, information regarding the new place should be sufficiently clear to the affected victims. CESCR also requires that the distance between the alternative housing to workplace or access to basic needs should not be too burdensome for the low-income groups.

Lastly, CESCR will also assess the impact of the forced evictions. After the forced evictions were carried out, the

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victims should not be rendered homeless or vulnerable to other forms of human rights violations. When victims of forced evictions are unable to provide for themselves, states must take all appropriate measures to ensure that adequate alternative housing or productive land is available.

CESCR applied the above procedural protection standards in the case of *I.D.G. v. Spain*. In that case, CESCR viewed that Spain did not fulfill the standard of adequate notice because the state has not used all available means to give notice to the author regarding the mortgage of her property before publishing it in public notice. Therefore, the Committee held that Spain has violated Article 11(1) of the ICESCR.

The standards given by ICCPR and ICESCR as elaborated above overlap and complement each other. In summary, the standards that states should fulfill to conduct forced evictions are as listed below:

ICCPR	ICESCR
Lawful• Envisaged by law. • Consistent with the provisions of international law:- Publicly accessible- Contains provisions that tailored the limitation to specific aim- Clear and precise: <sup>9</sup> Specifying the conditions where limitation is allowed. <sup>9</sup> Procedure for authorization. <sup>9</sup> Procedure for carrying out the limitation. <sup>9</sup> Effective safeguards.	Lawful• Envisaged by law. • Consistent with the provisions of international law. • Procedural protection:- Genuine consultation for the victims.- Adequate and reasonable notice.- Information regarding the proposed forced evictions and the subsequent use of the land or building.- Attendance of government officials or their representations during the forced evictions.- Each person who carries out the evictions are properly identified and any use of force should be necessary and proportional.- Not conducted during bad weather, at night, on holidays or religious celebrations, before election, or prior or after school exams.- Legal remedies and legal counsel are available to the victims.- Adequate compensation- Effective remedies.
Non-arbitrary	Non-arbitrary
Legitimate aim: undefined.	Legitimate aim: Promotes general welfare in the democratic society.
Necessary• Least intrusive measure• Suitable to the aim sought• Compatible with the essence of the right	Necessary
Proportional	Proportional

**Table 1.**

## Analysis of the Bukit Duri Forced Eviction

Bukit Duri Forced Eviction occurred on September 28, 29, 30, and October 1 and 3, 2016, in four neighbourhoods located on the bank of Ciliwung River in Bukit Duri, Tebet Sub-District, South Jakarta. The forced eviction was administered and carried out by BBWSCC and the Provincial Government of Jakarta.

### 4.1 Factual Background of the Bukit Duri Forced Eviction

The Bukit Duri neighborhoods have existed on the riverbanks of Ciliwung River for decades, as the residents claimed they have lived there from generation to generation since the era of Dutch Colonial. Since then, the residents also paid the land and building tax regularly to the authorities. In spite of the claim, the residents do not own any legal proof of ownership that is acknowledged by Indonesian agrarian law, e.g. certificate or building permit, as they only possess documents such as *asverponding*, land and building tax payment receipt, statement of physical occupation and sale and purchase deed.

During their habitation, the residents stated that they never received any disturbance nor their homes have ever been labeled as illegal. However, suddenly the residents were informed that their land and buildings were included in the Ciliwung River Normalization Program and the Construction of Inspection Road pursuant to Jakarta Regional Regulation No. 1 of 2012 regarding 2030 Spatial Plan. According to a witness named Isma Istikhomah who testified in the court, the residents of Bukit Duri were informed about the Ciliwung River Normalization Program the first time through socialization in 2014. In the socialization, the attending government representation promised adequate compensation for all residents. However, in the second socialization in April 2016, BBWSCC and the Provincial Government of Jakarta refused to give any compensation because the residents have occupied the land illegally. Instead, the government will provide the residents with alternative housing which requires the residents to move to government's Low-Cost Apartment (Rusunawa).

The residents of Bukit Duri admitted that the offer to relocate to the low-cost apartment was done with intimidation and coercion. Isma Istikhomah testified that during the third socialization, almost all residents refused to relocate because of distance problem. Afterwards, the employee from the government persuaded the residents persistently so they would agree to relocate to the low-cost apartment. In May 2016, more than a hundred residents agreed to

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relocate to Rawabebek Low-Cost Apartment.

A group of Bukit Duri residents then submitted a civil law suit against the government in the District Court of Central Jakarta on the basis of tort. During the adjudication process, the President of the presiding judges asked BBWSCC and the Provincial Government of Jakarta to refrain from any abuse of power. Despite the advice, on August 30, 2016, September 7 and 20, 2016, the residents of Bukit Duri received three consecutive warnings from the Municipal Police Unit (*Satuan Polisi Pamong Praja/Satpol PP*) that ordered the residents to demolish their buildings in the given period of time. The issuance of these warnings was not preceded by any discussion or socialization.

After the issuance of the first warning, CiliwungMerdeka Foundation along with the residents of Bukit Duri filed another lawsuit to the Jakarta State Administrative Court. During the court session, the residents submitted an appeal to the judges to give order to postpone the demolition of buildings prior to any legally binding decision. The presiding judges decided to deliver their decisions regarding the order in the following court session on October 10, 2016. The judges also asked the Chief of Satpol PP to refrain from any action in Bukit Duri.

Regardless of the rejection from the residents and the appeal from the judges, BBWSCC and the Provincial Government of Jakarta carried out the forced evictions on September 28, 29, and 30, 2016. The demolition of buildings was carried out with bulldozers by combined personnels from BBWSCC, Provincial Government of Jakarta, SatpolPP, *Camat* Tebet, Headman (*Lurah*) of Bukit Duri, South Jakarta Sector Police and South Jakarta Military District Commander (*Dandim*).

Another eviction followed on October 1, 2016, at 7.30 in the evening, when the *Lurah* of Bukit Duri suddenly shouted at the remaining residents, whose houses were left in the neighborhoods, that their houses would be demolished at that moment. This demolition of the twelve houses was done by the *Lurah* of Bukit Duri without any prior planning, notice and available field map. The demolition of buildings continued on October 3, 2016, where the combined personnels demolished eighteen houses. The legal counsel of the Bukit Duri residents stated that the demolition was also without any prior planning and notice. At that time, in total of 776 families have relocated to Pulo Gebang Low-Cost Apartment, Cipinang Besar Selatan Low-Cost Apartment and RawaBebek Low-Cost Apartment. However, 45 families, which were then added to 51, are still declining to relocate.

After going through the whole adjudication process, in January 5, 2017, Jakarta State Administrative Court decided in the favor of the Bukit Duri residents. The Court declared that the issuance of the Satpol PP's warnings violated the law, thus rendered invalid. However, as the forced eviction has been carried out at that time, the judges stated that the decision could only serve as a lesson to the government to be wise and not arbitrary in implementing the development policy. Until today, the tort lawsuit in Central Jakarta District Court is still on going.

## 4.2 Ciliwung River Normalization Program

The Ciliwung River Normalization Program is a program under the ambit of BBWSCC that aims to widen the river trace as an effort to control the flood in the Ciliwung-Cisadane watershed area. The normalization is conducted from Manggarai Flood Gate to Pondok Cina.

As the previous river trace of Ciliwung River is only 15-20 meters wide, the widening of the river trace is needed because with the previous figure, Ciliwung River can only flow 200 m<sup>3</sup> of water per second. According to the formula of probability, the water discharge of 200 m<sup>3</sup> will be exceeded every a year, which means statistically the watershed area will be flooded at least once a year. The normalization is then conducted to widen the trace into 35-50 m, so the river can flow 570 m<sup>3</sup> of water per second. The water discharge of 570 m<sup>3</sup> will statistically be exceeded only every 25 years, which dramatically reduce the frequency of the flood. In order to achieve such result, 446.73 hectares of land along the riverbanks of Ciliwung River has to be acquired.

The planning of the Ciliwung River Normalization Program was done in three separated years, which encompassed steps such as Survey Investigation Design (SID) dan Detail Engineering Design (DED). After that, a private company was appointed as a consultant to conduct the design review of the project, which included activities such as identification of flood area and river critical area, inventory of buildings on the riverbanks, measurement and topographic depiction, as well as consultation meetings with the local residents to inform them about the benefit and harm of the program. The acquisition of land was then conducted by the Provincial Government of Jakarta.

## 4.3 Analysis

Indonesia is a party to both the ICCPR and the ICESCR, having ratified both covenants and acknowledges the protection to human rights to home in its constitution and human rights law. Accordingly, the Bukit Duri forced eviction will be analyzed with the standards given by the ICCPR and the ICESCR. Pursuant to both covenants, the forced eviction will be examined to know whether it fulfills the standard of legality and non-arbitrary.

### 4.3.1 Analysis on the Standard of Legality

The first standard, which is the standard of legality, was not fulfilled because of two reasons. First, it was

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conducted without the legitimate legal basis. Second, it was conducted inconsistently with the provisions of international law.

Pursuant to both ICCPR and ICESCR, any limitation to rights, including forced evictions, should be envisaged by law and the law has to be in force when the limitations are carried out. In this case, the law referred to by BBWSCC and the Provincial Government of Jakarta has two problems.

First, the forced eviction had a wrong legal basis. The Provincial Government of Jakarta referred to an incorrect regulation in acquiring the land needed for Ciliwung River Normalization Program, e.g. Regional Regulation No. 8 of 2007 on Public Order, which prohibits the occupation of riverbanks. Consequently, this law served as the basis for the government to refuse providing any compensation for the victims of Bukit Duri forced eviction because they are clearing slums that illegally located on the riverbanks. Moreover, the residents also did not own any land right or certificate over their land or buildings. According to Article 239 of the Regional Regulation No. 1 of 2012 on 2030 Spatial Plan, any construction of buildings outside the spatial plan, including those on the riverbanks, can be demolished.

However, the residents of Bukit Duri argued that they fulfill the criteria of land ownership in Law No. 2 of 2012 on Acquisition of Land for Development for Public Interest, which requires the government to provide adequate compensation for the victims affected by the land acquisition. The residents' stance is affirmed by the Jakarta State Administrative Court's decision, which stated that the residents of Bukit Duri had occupied the state land with good will for generation to generation pursuant to Article 17, Article 23 and Article 25 of the Presidential Regulation No. 71 of 2012 as the implementation of the Law No. 2 of 2012. Thus, the forced eviction was carried out with the wrong legal basis.

Secondly, the law that stipulated the location established to be cleared for Ciliwung River Normalization Program in Bukit Duri was not in force when the forced eviction was carried out. Pursuant to Article 3 of the Governor Regulation No. 163 of 2012, the regulation will only be in force for two years and can be prolonged for a period of a year. The one-year extension of the validity period of the location stipulation was then regulated under the Governor Decision No. 2181 of 2014. Based on the decision, the location stipulation has expired in 2016. The expiration of the legal basis was also noted by the Jakarta Administrative State Court, which then concluded that the issuance of the forced eviction warnings has violated the national law. Therefore, the forced eviction in Bukit Duri was carried out without a legal basis that is in force.

Turning to the second point of the standard of legality, the Bukit Duri forced eviction was conducted inconsistently with the international law. First, the forced eviction was carried out without the provision of sufficient procedural protection. Prior to the forced eviction, the residents of Bukit Duri did not have the opportunity to have a genuine consultation with the government regarding the forced eviction plan. Even though the chance of public consultation is regulated under Law No. 2 of 2012 and Presidential Regulation No. 70 of 2012 and was conducted several times by BBWSCC and the Provincial Government of Jakarta, these public consultations did not fulfill the standards of the covenant, as the implementation of the plan and the amount of the compensation was determined solely by the government. The lack of public participation in the consultation is also noted by the Jakarta State Administrative Court in their decision.

The second procedural violation is inadequate notice for demolition of buildings on October 1 and 3, 2016. Even though the demolitions conducted in September have fulfilled the standard of adequate notice, the demolitions of houses in October 1 and 3 were carried out out of sudden without prior planning and notification to the victims affected. This consists as a violation to the standard of inadequate notice. Moreover, the demolition of buildings on October 1, 2016 was conducted at night, which was prohibited by the covenant unless the affected victims agreed otherwise.

Another procedural matter in this case is the lack of technical procedure and standard of procedures for the persons who carried out the eviction. In his testimony, the *Lurah* of Bukit Duri even acknowledged that the eviction was conducted based on the "game of art at the field." Consequently, the implementation of the forced evictions and the use of force involved can be out of control.

The Bukit Duri forced eviction was also inconsistent with the international law because BBWSCC and the Provincial Government of Jakarta did not provide adequate compensation to the evictees. First, the evictees are rightful to receive proper monetary compensation for the acquisition of their lands, but did not receive so. Second, even though the government has provided low-cost apartments as alternative housing for the evictees, the far distance between the apartments with workplace and access to basic needs increases the transportation cost of the evictees, imposing difficulties especially on the low-income groups.

BBWSCC and the Provincial Government of Jakarta also did not respect the right to effective remedy of the evictees. As stated by the OHCHR, an essential element of the right to effective remedy is cessation of the alleged violation. In this case, the residents of Bukit Duri have submitted an appeal to both Jakarta State Administrative Court and the Central Jakarta District Court for the delay of the eviction order, whereby both panels of judges have accepted by giving instruction to the government to not carry out the eviction prior to the final decision of the courts. However, the pleadings were disregarded by BBWSCC and the Provincial Government of Jakarta as the

forced eviction was still carried out. Thus, the right to effective remedy of the evictees, as well as the whole due process of law, have been disregarded.

Lastly, the Bukit Duriforced eviction pushed the evictees to the brink of homelessness and poverty. Even though the low-cost apartments that are provided by the government are proper in terms of physical facilities, the evictees experienced increase of their living budget because of the monthly rent, loss of employment and increase of transportation cost. In particular, the monthly rent that has to be paid by the low-cost apartment residents is proven burdensome for low-income groups. 43,3% percent of the low-cost apartment residents were in arrears, which could lead them to be evicted again, now from their apartment units. In conclusion, this fact shows that the evictees are vulnerable to other human rights violations and consequently, the government has the obligation to provide help with any appropriate means.

#### 4.3.2 Analysis on the Standard of Non-Arbitrary

Cumulatively, Bukit Duri forced eviction also did not comply with the second standard of forced eviction, which is the standard of non-arbitrary. Based on the collected facts, the forced eviction has a legitimate aim, which is to control flood in Jakarta. As the annual disaster can cause loss up to 7.5 zillion Rupiah a year, the reduction of flood will help maintaining the public order, public health and promoting the general welfare of the whole society. However, the Bukit Duri forced eviction did not fulfill the standard of necessary and proportionality.

The Bukit Duri forced eviction did not fulfill the standard of necessary for three reasons. First, the forced eviction may not be essential to the aim sought. In the beginning of 2017, two neighborhoods that have been affected by the normalization program, which are Kampung Melayu and Bukit Duri, were still flooded. In response to the event, the government argued that the flood happened because the normalization program has not been completed yet, but did not provide any official data to support the argument or the success of the normalization program.

Moreover, in historical perspective, the construction of canals and normalization of waterways have been conducted since the Dutch Colonialism era to minimize flooding in Jakarta, but these efforts have not been successful. In his dissertation, Restu Gunawan argues that normalization and canals will not solve the problem of flood in Jakarta without the additional effort to infiltrate the water vertically into the ground. Therefore, without the combined effort to expand the water catchment area from the upstream to the downstream, the normalization can be rendered fruitless. In absence of any contrasting study and data from the government, the Bukit Duri forced eviction should be deemed not essential to the aim sought, thus not fulfilling the standard of suitability.

Second, Bukit Duri forced eviction, as the part of Ciliwung River Normalization Program, may not be the least intrusive measure to reduce flood in the Jakarta area. In an interview in 2008, Governor Fauzi Bowo admitted that the constructions of hotels and shopping malls in several parts of Jakarta were done on water catchment areas and green spaces. However, he claimed that an effort to demolish those buildings is not practical, but not elaborating further the reasons of the impracticality. Absence of any rationale, the government has the onus to prove that the revocation of building permit and demolition of buildings that violated the spatial planning for water catchment areas and green spaces are more intrusive than clearing *kampungs* on the riverbanks. In delivering such reasons, the government should also bear in mind the principle of rights to adequate housing, where CESCR requires states to give priority to the social groups who live in disadvantaged over to the more advantaged groups. The failure to deliver any reasonable reasons should render the Bukit Duri forced eviction as not necessary.

Third, the administration and implementation of the Bukit Duri forced eviction have impaired the essence of the right to not being forcefully evicted without adequate protection because both BBWSCC and the Provincial Government of Jakarta did not respect due process of law and did not give adequate procedural protection to the affected victims. Based on all aforementioned reasons, the Bukit Duri forced eviction has not fulfilled the standard of necessary.

Finally, the Bukit Duri forced eviction is also prone to not fulfilling the standard of proportionality. The Bukit Duri community has been lived in the riverbank area for decades. Up until 2012, the government let the residents settled without disturbance, even regularly took taxes from the residents. Similar to the case of *Naidenova v. Bulgaria*, this creates a strong sense of belonging between the community to the area. Further, as the consequence of the forced eviction, the evictees who now live in government's low-cost apartments have high probability of becoming homeless because of the failure to pay rent. As the success of the Ciliwung River Normalization Program to control flood is still dubious, the harm that has been caused by the Bukit Duriforced eviction can be greater than the benefit it has gained. This will render the forced eviction as unproportional.

According to the above discussion, the failure of the government to fulfill the standards of forced evictions in accordance with the ICCPR and ICESCR will materialize into the violation of the Bukit Duri residents' rights to home. Even though the residents of Bukit Duri have to lose their homes and have their rights restricted to protect public interest, the government, however, failed to protect the minimum of their rights. In light of that, the Bukit Duri forced eviction has betrayed the concept of limitations to human rights, which aims to strike the balance between individuals rights and community's interest, as the forced eviction only satisfied community's interest but neglecting the rights of the individuals.

## Conclusion

Forced evictions are gross violations of human rights, particularly rights to adequate housing and freedom from interference to home. However, for the purpose of development and welfare, states are permitted to conduct forced evictions. In such cases where the practice of forced evictions is justified, states must follow the standards and guidelines given by the provisions of the covenant in order to balance the interest between individuals and the community.

Forced evictions violate right to adequate housing as protected under Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and freedom from unlawful or arbitrary interference to home as protected under Article 17 of the International Covenant on Civil and Political Rights (ICCPR). The standards of forced evictions provided by both covenants overlap and complement each other. To summarize, forced evictions will not violate states' human rights obligation if they fulfill the standards of lawful and non-arbitrary. Lawful means that forced evictions must be envisaged by law and the law must be consistent with the international. Non-arbitrary means that forced evictions must be reasonable in any circumstances, which means that it must fulfill the standard of necessary and proportionality.

In the case of Bukit Duri forced eviction, the forced eviction did not fulfill both standards. The forced eviction has an unlawful legal basis, was conducted without an appropriate procedural protection, was not followed by an adequate compensation and has violated the evictees' rights to effective remedies. Second, it did not fulfill the standard of non-arbitrary as it may not be suitable to reach the legitimate aim, it may not be the least intrusive means, it has violated the essence of the right and it is prone to not fulfilling the standard of proportionality. Even though the forced eviction is conducted to protect the interest of many, which is to control flood, however, the implementation of the policy did not protect the minimum interest of the few victims. In conclusion, the Bukit Duri forced eviction has failed to strike the balance between individuals and community's interest, thus violated both the ICCPR and the ICESCR.

My recommendation to the Indonesian government is to adopt the human rights mainstreaming paradigm, which encourages the integration of human rights with social justice issues, specifically in this case, with development issues. By integrating human rights perspective in its development regulation and policy under the paradigm of human rights mainstreaming, the issues of human rights will not only be discussed only when there is a violation, but human rights will form the government's decision and policymaking.

In the case of forced evictions, first, the government and the legislative body should reform the land acquisition law in order to give adequate procedural protection to the evictees. The law shall include protection such as standard of procedures and technicalities when forced evictions are carried out, including the use of force and prohibition to conduct forced evictions on certain time. Second, in developing cities, the government must involve public participation in making a decision, especially that affects a group of people. This includes inviting indigenous people, minority groups, and marginalized people in order to accommodate their needs and interests. Third, the government should also enhance transparency in its policy-making. Public participation and policy-making are important aspects to ensure that the government is not carrying out its function arbitrarily and that the policies serve the interest of the people.

## References