

**Submission to UN Special Rapporteur on the situation of human rights in Cambodia  
Hydropower Dam Development in Cambodia:  
Lower Sesan 2 and Stung Cheay Areng Hydropower Projects**

**DATE:** 13 January 2015

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## **1. INTRODUCTION**

### **1.1 Overview of submission**

The development of large-scale hydropower dams has the potential to bring considerable benefit to Cambodia, providing a much-needed boost to domestic electricity supply and contributing to economic development. However, such projects are also fraught with risk, and the environmental and social consequences of hydropower projects, if not adequately managed and mitigated, can have devastating impacts on human rights. Cambodia is currently accelerating its plans to develop hydropower dams across the country. A number of projects have already been constructed, and the planning and implementation of these projects has raised significant concern, including over the lack of a clear regulatory framework for hydropower development and the social and environmental safeguards essential to ensuring protection of human rights.

Chinese companies are lead project developers in all of the existing and many of the currently proposed projects, including the two projects that are the subject of this communication.<sup>1</sup>

The Lower Sesan 2 dam (LS2) in Stung Treng Province is currently under construction. When complete, it will be the largest hydropower project in Cambodia. The LS2 dam is projected to cause the most severe environmental impacts of any dam planned for a tributary of the Mekong River. Specifically, it is predicted to reduce fish biomass by 9.3% across the entire Mekong River Basin and critically endanger over 50 fish species,<sup>2</sup> resulting in significant fishery losses in Cambodia in the Mekong and its tributaries and the Tonle Sap Lake. It is also expected to cause substantial changes to the sediment and hydrological flows of the Mekong River and its tributaries, extending as far downstream as the Mekong Delta in Vietnam.<sup>3</sup> These impacts will have extremely serious implications for the food security of hundreds and thousands of people in riverine communities in the Sesan, Srepok and Sekong (3S) Rivers Basin and the Mekong River Basin. In Cambodia and neighboring countries, migratory fish form a primary source of essential dietary protein; the impacts of fishery losses on health and nutrition are likely to be widespread and severe, and to have disproportionate impacts on indigenous people, women and children.

Decision-making on the LS2 project has been characterized by a lack of transparency and failures to ensure adequate access to information or consultations with communities to be affected. Communities to be relocated, many of whom are indigenous peoples, have expressed serious concerns about the dam's impacts on their lives and livelihoods and opposition to proposals for resettlement and compensation. They have called for consultation and dialogue. These concerns have not been addressed by the Cambodian authorities or the project developers.

In recent weeks, the Resettlement Committee for the LS2 dam<sup>4</sup> conducted asset surveys in the communities to be relocated for the dam reservoir. There are numerous reports from communities that the asset surveys were conducted without prior notice and without providing information on the purpose of the survey or explanation of the resettlement and compensation plans that it aims to implement. Personnel conducting the surveys did not identify themselves and were accompanied by military police. Villagers were required to thumbprint the completed documents, indicating their agreement to the relocation and to the terms of the compensation policy. Many have stated that they felt they had no choice but to do so. Villagers were not provided copies of the completed surveys. In several communities, householders who refused to thumbprint the document were pressured and intimidated. Some villagers received threats from committee personnel and police, including the threat of arrest if they did not comply and place their thumbprint on the survey form.<sup>5</sup> These events indicate that human rights abuses have occurred during the asset survey and evince a serious risk of imminent forced evictions.

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<sup>1</sup> Open Development Cambodia, 'Hydropower: Dams', available at: <http://www.opendevdevelopmentcambodia.net/hydropower/hydropower-dams>; Grimsditch, 'China's Investments in Hydropower in the Mekong Region' at 11; Royal University of Phnom Penh, at 32.

<sup>2</sup> Ziv, G; Baran, E; Nam, S; Rodríguez-Iturbe, I; & Levin SA; 'Trading-off fish biodiversity, food security, and hydropower in the Mekong River Basin' Proceedings of the National Academy of Sciences of the United States, 28 January 2012.

<sup>3</sup> Ketelson, T., International Center for Environmental Management, cited in Vrieze, P, & Chhorn C., "The Battle for the 3S Rivers." *The Cambodia Daily*, 10 September 2011; Piman, T., Cochrane, T., Arias, M., Green, A., and Dat, N. "Assessment of Flow Changes from Hydropower Development and Operations in Sekong, Sesan and Srepok Rivers of the Mekong Basin" (2013) *Journal of Water Resources Planning and Management*, 139(6), 723–732.

<sup>4</sup> The Resettlement Committee is headed by the Stung Treng Provincial Vice-Governor and includes representatives from a number of departments at provincial and lower levels.

<sup>5</sup>3SPN, Notes from consultations with communities affected by LS2 project.

Approval is pending on the Stung Cheay Areng hydropower dam in Koh Kong Province. The project, located within the protected forest area of the Central Cardamom Mountains, is poised to cause serious environmental damage to surrounding ecosystems and displace the valley's indigenous inhabitants who have resided in the area for over 600 years.<sup>6</sup> The Cheay Areng project will have a very low electricity output of 108 MW, with extremely high environmental and social impacts. The chief economic benefits from the project are speculated to be highly lucrative illegal logging of luxury timber and land grabbing within a protected forest area.<sup>7</sup>

Project agreements are reportedly very close to being signed for the Cheay Areng dam. The companies contracted to conduct the feasibility and environmental impact assessment have stated that these will be complete by the end of 2014.<sup>8</sup> The communities to be relocated assert that the company conducting the asset survey in the communities in December 2013 misrepresented the purpose of the survey and used deceptive means to obtain villagers' thumbprints on the completed survey forms, which were improperly used to indicate consent to the project and relocation.<sup>9</sup> For over six months, between March and September 2014, members of the Areng community maintained a roadblock to express their opposition to the project and to prevent company personnel from entering the Areng valley. Currently, subcontracting companies accompanied by military police have gained access to the valley to undertake feasibility and environmental impact assessment studies, and there are reports that they have pressured community members into accepting resettlement and compensation proposals.<sup>10</sup>

This submission relies on information received during consultations and field visits with communities affected by each of the two projects conducted by signatories to this complaint, as well as reports and documentation by researchers, experts and others. On the basis of this information, we contend that in both the LS2 and Cheay Areng projects:

- The human rights of affected communities have already been violated, including rights to information, consultation and participation in decision-making on decisions that will affect the exercise of numerous other fundamental human rights.
- The right of indigenous peoples to free, prior and informed consent has not been recognized.
- Rights to freedom of expression and assembly, and to peacefully oppose the development of these projects free from fear or intimidation, have also been infringed.
- When built, the LS2 and Cheay Areng projects threaten to violate other substantial human rights, including: the right to adequate housing and freedom from forced evictions; the right to an adequate standard of living including rights to food, health, water and adequate livelihoods; indigenous people's rights to self-determination and cultural and community integrity; rights to culture; and the right to a healthy and sustainable environment.

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<sup>6</sup> Conservation International, 'A Summary of the Social and Environmental Impacts of the Proposed Areng Valley Hydroelectric Dam, Southwest Cambodia,' October 2007.

<sup>7</sup> Pichamon, Y., 'Cambodia's Environment: Good News in Areng Valley?' *The Diplomat*, 3 November 2014, available at: <http://thediplomat.com/2014/11/cambodias-environment-good-news-in-areng-valley>.

<sup>8</sup> Pye, D. and Cuddy, A. 'Impact assessment for Areng dam nears final steps as project looms', *The Phnom Penh Post*, 31 October 2014, available at: <http://www.phnompenhpost.com/national/impact-assessment-areng-dam-nears-final-steps-project-looms>.

<sup>9</sup> Samreth Law Group, Notes from consultations with Areng Valley communities.

<sup>10</sup> Samreth Law Group, Notes from consultations with Areng Valley communities.

We respectfully request that the Special Rapporteur on the Situation of Human Rights in Cambodia take urgent and immediate action to investigate the breaches of human rights that have already occurred and the imminent threats posed by these projects to the exercise of other fundamental human rights. We ask that the Special Rapporteur engages with the Royal Cambodian Government to seek remedial action for these abuses. We further request that the Special Rapporteur engages with the project developers and the Chinese Government and urges them to address the concerns outlined in this submission.

## 1.2 Hydropower dam development in Cambodia

The Royal Government of Cambodia (RGC) plans to scale up investment in hydropower projects across the country order to help meet pressing domestic electricity needs and to generate power for export to neighboring countries.<sup>11</sup> In 2003, the government's 'National Sectoral Review for Hydropower' identified 60 potential sites for hydropower projects, with the national generation potential estimated at 10,000 megawatts. Of this capacity, approximately 50% is located along the Mekong mainstream, 40% on Mekong tributaries, and 10% is located outside the Mekong basin in southwest Cambodia.<sup>12</sup>

In 2011, Cambodia's first major hydropower dam, the Kamchay project, went online.<sup>13</sup> Since then the Kirirom III and Stung Atay dams have become operational.<sup>14</sup> The Stung Tatay dam is now complete, but does not yet have a grid in place to transport the power generated.<sup>15</sup> At least two other dams are currently being constructed, the Lower Stung Russei Chrum dam and the Lower Sesan 2 (LS2) dam.<sup>16</sup> Memoranda of understanding to conduct feasibility studies have been signed for at least 12 other projects, including the Stung Cheay Areng project.<sup>17</sup> Existing projects have raised significant concerns around non-adherence to legal frameworks and best practice, including environmental and social safeguards and resulting impacts on human rights.<sup>18</sup>

Cambodia lacks the financial and technical capacity to build large and complex infrastructure projects such as hydropower dams. China has become a key partner in Cambodia's development, in part by backing Chinese state-owned companies' investments in the country.<sup>19</sup> While the Chinese government provides streamlined assistance to developing countries, Chinese firms have been criticized for pushing forward overseas investment projects without due consideration to social and environmental protections.<sup>20</sup>

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<sup>11</sup> Grimsditch, M., 'China's Investments in Hydropower in the Mekong Region: the Kamchay Hydropower Kam, Kampot, Cambodia,' World Resources Institute, January 2012, at 10-11.

<sup>12</sup> Grimsditch (2012) at 11.

<sup>13</sup> Grimsditch (2012) at 11.

<sup>14</sup> Open Development Cambodia, 'Hydropower: Dams.'

<sup>15</sup> China Daily USA, '6th China-built hydropower dam in Cambodia starts operation' 14 August 2014, at: [http://usa.chinadaily.com.cn/business/2014-08/14/content\\_18311670.htm](http://usa.chinadaily.com.cn/business/2014-08/14/content_18311670.htm).

<sup>16</sup> Open Development Cambodia, 'Hydropower: Dams'; Royal University of Phnom Penh, 'Final Report: Improving Hydropower Project Decision Making Processes in Mekong Basin: Case Studies of Lower Sesan 2 and Kamchay Hydropower Projects, Cambodia', December 2013, at 9.

<sup>17</sup> Open Development Cambodia, 'Hydropower: Dams'; Royal University of Phnom Penh (2013) at 9.

<sup>18</sup> See for example, Grimsditch (2012).

<sup>19</sup> Grimsditch (2012) at 12.

<sup>20</sup> See for example Daniel O'Neill, 'Playing Risk: Chinese Foreign Direct Investment in Cambodia,' 37 Contemporary Southeast Asia 173, 181-182 (2014) (noting that the US Embassy staff in Phnom Penh has lamented about the Chinese foreign investment aid with "few strings attached").

Cambodia currently lacks a specific law or clear legal framework for developing hydropower dams.<sup>21</sup> Existing laws pertaining to important aspects of dam development contain significant gaps and weaknesses. For example, there is currently no law on Environmental Impact Assessment (EIA) in Cambodia, although the Sub-decree on EIAs provides general procedural guidelines and requirements for the submission and approval of EIAs.<sup>22</sup> A new draft ‘Law on Environmental Impact Assessment’ is currently under development.<sup>23</sup> The draft law contains detailed requirements for conducting EIA reports and accompanying guidelines for implementation, including on public participation in the EIA process.<sup>24</sup> Guidance in these areas is missing in the existing EIA Subdecree. Very few projects currently undergo the EIA process and of those that do, the process is often used as a rubberstamp for project approval, rather than as an objective tool to ensure a thorough analysis of impacts and deny approval to projects with unacceptable social and environmental consequences.<sup>25</sup>

Decision-making on hydropower development in Cambodia has been critiqued as corrupt and irregular. Intermediaries in investment projects are often relatives or associates of powerful political actors, and operate opaquely.<sup>26</sup> Senior political figures have significant influence on decision-making processes within ministries, particularly in high profile projects.<sup>27</sup> Project approvals are easily pushed through the National Assembly, controlled by Prime Minister Hun Sen’s Cambodian People’s Party (CPP).<sup>28</sup> For example, despite strenuous requests by opposition party members of parliament to postpone the approval of the financial guarantee law for the LS2 dam, raising concerns over the lack of transparency and public participation in the development of the law and project’s Implementation Agreement (IA), the law was swiftly passed by the legislature on the same day it was introduced.<sup>29</sup>

A number of Cambodia’s proposed dams raise serious social and environmental concerns. For example, the 11 dam projects planned for the Lower Mekong mainstream include two in Cambodia: the Stung Treng and Sambor projects.<sup>30</sup> The cascade of mainstream dams are predicted to cause serious damage to fisheries, as well as sediment and water flows, throughout the Mekong River Basin. In 2010, the Mekong River Commission (MRC) published a Strategic

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<sup>21</sup> Royal University of Phnom Penh (2013) at 29; Subedi, Surya P., ‘Report of the Special Rapporteur on the situation of human rights in Cambodia: Addendum - A human rights analysis of economic and other land concessions in Cambodia’ Special Rapporteur report on land concessions in Cambodia’, Human Rights Council 21<sup>st</sup> Session, 24 September 2012, A/HRC/21/63/Add.1, at para 47.

<sup>22</sup> Sub-Decree #72 on Environmental Impact Assessment Process (1999), annex #IX.4, 11 August 1999, available at: [http://www.cambodiainvestment.gov.kh/sub-decree-72-anrk-bk-on-environment-impact-assessment-process-pdf\\_990811.html](http://www.cambodiainvestment.gov.kh/sub-decree-72-anrk-bk-on-environment-impact-assessment-process-pdf_990811.html). (hereafter ‘Sub-decree on EIAs’).

<sup>23</sup> Royal University of Phnom Penh (2013), at 29.

<sup>24</sup> Ministry of Environment, *Draft Law on Environmental Impact Assessment*, 5<sup>th</sup> Revision (2014), Article 11, available at: [www.opendevelopmentcambodia.net/briefing/cia/](http://www.opendevelopmentcambodia.net/briefing/cia/).

<sup>25</sup> Royal University of Phnom Penh (2013), at 37.

<sup>26</sup> Royal University of Phnom Penh (2013), at 34.

<sup>27</sup> Royal University of Phnom Penh (2013), at 34.

<sup>28</sup> See O’Neill, ‘Playing Risk: Chinese Foreign Direct Investment in Cambodia’, at 182-183 (stating, “What is key to the approval of major foreign investments in Cambodia, especially large hydropower and development projects, as well as Cambodian government risk guarantees for these projects, is the support of Hun Sen. My interviewees in Cambodia were unanimous in concluding that Hun Sen has the final say on all such projects regardless of whether they have been approved or rejected by government ministries. At a meeting with an environmental NGO, a government official in charge of water resources stated, ‘There is a water resource law, but we also need to follow the demands of the government for development, especially the prime minister.’ This same group was told frankly by another official that ‘an Environmental Impact Assessment has to be approved if the prime minister says it should be approved.’”).

<sup>29</sup> Royal University of Phnom Penh (2013), at 36-37.

<sup>30</sup> Proposed mainstream dam projects include the Stung Treng and Sambor dams in Cambodia. The Sambor dam, if constructed, will force the relocation of more than 19,000 people.

Environmental Assessment (SEA) of the proposed Mekong mainstream dams.<sup>31</sup> The study estimated the potential losses for fisheries due of the proposed cascade at \$476 million/year, with 35 percent or 550 – 800,000 million tonnes of migratory fish species vulnerable.<sup>32</sup> The dams will flood 54% of the gardens along the banks of the river, many of them owned by subsistence farmers. The report also estimated that the proposed mainstream dams would lead to an estimated 75% reduction in fine sediment load which will reduce the primary productivity of the Mekong River<sup>33</sup> and the Mekong Delta.<sup>34</sup> Resulting impacts on riverbank agricultural productivity would be felt most heavily by the poorest groups and communities in the region, including indigenous peoples and ethnic minority groups.<sup>35</sup>

Dams planned for the 3S Rivers, including the LS2 project, would also block critical fish migration routes, and will “have catastrophic impacts on fish productivity and biodiversity.”<sup>36</sup> The 3S Rivers constitute roughly 17% of the Mekong’s annual discharge, and hydropower projects on these rivers would significantly alter flows in the region, increasing flows by 63% in the dry season and decreasing flows by 22% in the wet season.<sup>37</sup> Such significant flow changes are “of great concern because [they] could impact habitat downstream by reducing wetland areas in the flood season, submerging sandbars, changing river morphology, and altering river bank vegetation.”<sup>38</sup> These impacts will occur in a region in which, as the Asian Development Bank noted in 2010, there is already “a sense [of] approaching some degree of water crisis. . . .”<sup>39</sup>

### 1.3 Land concessions in Cambodia

Land concessions are required in order to grant land to companies to build hydropower dams and associated infrastructure and reservoirs, often displacing local residents. Since the mid-1990s, land concessions have shifted control of huge portions of Cambodia’s land area to private enterprises.<sup>40</sup> Many concessions have been granted on protected areas and lands belonging to indigenous peoples.<sup>41</sup> An incomplete list of land concessions indicated that between January 1996 and 6 June 2012, land concessions had been granted to 117 companies, encompassing a total area of 1,181,522 hectares.<sup>42</sup> LICADHO, a Cambodia-based NGO, estimates that as of May

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<sup>31</sup> International Centre for Environmental Management (ICEM) (Oct. 2010), ‘Strategic Environmental Assessment of Hydropower on the Mekong Mainstream’, commissioned by the Mekong River Commission (MRC) Secretariat (hereafter ‘SEA full report’). Accessible at: <http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEA-Main-Final-Report.pdf>.

<sup>32</sup> International Centre for Environmental Management (ICEM) (Oct. 2010), ‘Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary Report’, commissioned by the MRC Secretariat, at 11 (hereafter ‘SEA summary report’).

<sup>33</sup> ICEM (2010) SEA full report, at 87

<sup>34</sup> Grumbine, RE, Dore, J, Xu, J (2012) ‘Mekong hydropower: drivers of change and governance challenges Frontiers’ 10(2) *Ecology and the Environment* 91-98; Kirby, M, Mainuddin, M (2009) ‘Water and agricultural productivity in the Lower Mekong Basin: trends and future prospects’ 34(1) *Water International* 134-143.

<sup>35</sup> ICEM (2010) SEA full report, at 61

<sup>36</sup> Ziv et al. (2012) at 1.

<sup>37</sup> Piman, T., Cochrane, T. A., Arias, M. E., Green, A., and Dat, N. D., “Assessment of Flow Changes from Hydropower Development and Operations in Sekong, Sesan and Srepok Rivers of the Mekong Basin.” *Journal of Water Resources Planning and Management*. November/December 2013, at 731.

<sup>38</sup> Piman et al (2013) at 731.

<sup>39</sup> Asian Development Bank, ‘Sesan, Srepok, and Sekong River Basins Development Study in Kingdom of Cambodia, Lao People’s Democratic Republic, and Socialist Republic of Viet Nam’. Project no. 40082, July 2010, at 25.

<sup>40</sup> The power to grant land concessions in Cambodia is regulated under a number of laws. See Subedi (2012), para. 20. Land concessions for build, operate, and transfer agreements for hydropower dams and other power generation projects are regulated by the *Law on Concessions* (2007), the purpose of which is to promote private financing in Cambodia in order to ensure the public interest and the fulfillment of economic and social objectives: *Law on Concessions* (2007), arts. 1, 5 and 6.

<sup>41</sup> Subedi (2012), paras. 93-95.

<sup>42</sup> See Subedi (2012), at para. 82.



2013, 2.2 million hectares of land had been granted to companies through economic land concessions (ELCs).<sup>43</sup> This amounts to 12% of Cambodia's total territory, almost 34% of the total arable land, and 81.5% of the reasonably productive land in the country.<sup>44</sup>

Land concessions have impacted thousands of Cambodians, leading to a growing class of landless villagers with little means of self-sustenance as well as numerous conflicts. With 70% of the Cambodian population depending upon agriculture for their livelihoods,<sup>45</sup> the vast amounts of arable land granted in concessions inhibits the ability of many Cambodians to support themselves. LICADHO estimates that between 1990 and 2009, over 250,000 people were dispossessed due to land grabs and evictions in the provinces where LICADHO has offices,<sup>46</sup> and since 2003 land grabbing has affected approximately 400,000 Cambodians.<sup>47</sup> 2,246 families were affected as a result of violent land grabbing in the early months of 2014.<sup>48</sup> Between January 2000 and April 2014, over half a million people were impacted by land conflicts in Cambodia.<sup>49</sup>

The human rights abuses associated with land concessions in Cambodia are well documented.<sup>50</sup> In 2007, the then Special Representative of the Secretary-General for human rights in Cambodia concluded, "instead of promoting development and poverty reduction, economic land concessions have compromised the economic, social and cultural rights of rural communities in Cambodia."<sup>51</sup> Five years later, the Special Rapporteur on the situation of human rights in Cambodia noted that these trends have continued.<sup>52</sup> The report expressed concern regarding the effects of hydropower dams on displacement of communities and harm to the environment, including associated threats to local community livelihoods caused by impacts on fish migration and loss of access to forest products.<sup>53</sup> In his report, the Special Rapporteur made reference to the LS2 dam, noting that the project is expected to displace 4,785 people (1,059 households) in

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<sup>43</sup> LICADHO, 'Submission to the UN's Universal Periodic Review, Cambodia,' (2014), para. 4, available at: <http://www.licadho-cambodia.org/reports/files/187Document-UPR2013-LICADHO.pdf>.

<sup>44</sup> See Subedi (2012), para. 81 (reporting the total territory of Cambodia to be 18.1 million hectares, the total arable land to be 6.5 million hectares, and the total reasonably productive land to be 2.7 million hectares).

<sup>45</sup> Open Development Cambodia, "Economic Land Concessions," (2014), available at: <http://www.opendevdevelopmentcambodia.net/briefing/economic-land-concessions-elcs>.

<sup>46</sup> Cambodian League for the Promotion and Defense of Human Rights (LICADHO), *Land Grabbing in Cambodia: The Myth of Development* at 1 (May 2009), available at <http://www.licadho-cambodia.org/reports/files/134LICADHOREportMythofDevelopment2009Eng.pdf>.

<sup>47</sup> LICADHO, 'Submission to the UN's Universal Periodic Review, Cambodia,' (2014), para. 4.

<sup>48</sup> LICADHO, '2014 Brings a New Wave of Cambodian Land Conflicts,' 1 April 2014, available at: [www.licadho-cambodia.org/pressrelease.php?perm=342](http://www.licadho-cambodia.org/pressrelease.php?perm=342).

<sup>49</sup> LICADHO, '2014 Brings a New Wave of Cambodian Land Conflicts,' 1 April 2014.

<sup>50</sup> See generally, Subedi (2012), at paras 47-60.

<sup>51</sup> Special Representative of the Secretary-General for human rights in Cambodia, 'Economic Land Concessions in Cambodia: a Human Rights Perspective,' Cambodia Office of the High Commissioner for Human Rights, June 2007, at 20, available at: [http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic\\_CMB12062007E.pdf](http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic_CMB12062007E.pdf).

<sup>52</sup> These included: "the destruction of the environment [...]; the lack of consultation with local communities, contributing to their marginalization and conflicts with companies and local authorities; the undermining of efforts to register indigenous peoples as legal entities so that they can preserve their culture, language and traditional agricultural practices, and apply for collective land title; encroachment on farm land and areas of cultural and spiritual significance; the loss of traditional livelihoods and the perpetuation of a gross income disparity [...]; lack of access to clean water and sanitation; forced evictions, displacement and relocation of people from their homes and farm lands, creating difficulties with finding or sustaining employment/ income-generation and access to basic services; sub-standard labour conditions; militarization of land concessions, contributing to intimidation and violence by armed security guards, sometimes members of Royal Cambodian Armed Forces and other times privately employed; and lack of effective remedy or recourse for affected communities." Subedi (2012), at para 129.

<sup>53</sup> Subedi (2012) at para. 150.

seven villages. Villagers affected by the project who spoke to the Special Rapporteur reported that they had not been consulted about the project impacts or resettlement plans.<sup>54</sup>

Little has been done by the Cambodian government to combat the inequities and human rights abuses associated with land concessions. While Cambodia has a plethora of laws on paper that theoretically protect against such abuses, these are poorly implemented in practice.<sup>55</sup> Despite the government's May 2012 directive halting the granting of new ELCs and ordering a review of existing ELCs, the directive has not been fully implemented and there is no evidence of any effective review of ELCs.<sup>56</sup>

On 7 October 2014, a communication was filed by lawyers representing ten Cambodian land-grabbing victims before the International Criminal Court (ICC) alleging that widespread and systematic land grabbing conducted by the Cambodian government for over a decade amounts to a crime against humanity.<sup>57</sup> The communication presents evidence that since 2000, an estimated 770,000 people (6% of the country's population) have been adversely affected by land grabbing in Cambodia, many of them already forcibly displaced, with 20,000 new victims in the first three months of 2014 alone. Indigenous minorities have suffered disproportionately with half their population already excluded from ancestral lands.<sup>58</sup>

#### **1.4 The Lower Sesan 2 Dam**

The LS2 project commenced full construction on the Sesan River in Stung Treng Province in 2014 (preparatory activities and clearing for the reservoir commenced in 2013). The dam is located just below the confluence of the Sesan and Srepok Rivers and approximately 25km from the Mekong mainstream. The project is currently in the initial phase of development, and according to the developers' project schedule, substantive construction will begin in January 2015 and river closure will commence the same month. Completion is scheduled for 2017.<sup>59</sup>

The Sesan River is rich in aquatic life, with surrounding land and forests inhabited by rare wildlife. The area is home to some of the oldest indigenous groups in the country and a variety of other ethnic groups, including: Bunong, Tampuan, Lao, Khmer, Khmer Khek, Brao, Brao Tanap, Jarai, Kachok, Kreung, Kavet, Chinese, and Cham.<sup>60</sup> Lifestyles are self-sustaining and reliant on the use of natural resources; from the river, land and forests the local people derive food, livelihoods, culture and identity. Many of the communities in this area are already facing poverty and livelihoods challenges due to deforestation and loss of access to forest products and other resources as a result of economic land concessions in the area.

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<sup>54</sup> Subedi (2012), at para. 141.

<sup>55</sup> Subedi (2007), at para. 197.

<sup>56</sup> LICADHO, '2014 Brings a New Wave of Cambodian Land Conflicts', 1 April 2014.

<sup>57</sup> International Federation for Human Rights (FIDH), Press Release: Cambodia: ICC preliminary examination requested into crimes stemming from mass land grabbing, 7 October 2014, available at: <http://www.fidh.org/International-Federation-for-Human-Rights/asia/cambodia/16176-cambodia-icc-preliminary-examination-requested-into-crimes-stemming-from>.

<sup>58</sup> Global Diligence, 'Communication Under Article 15 of the Rome Statute of the International Criminal Court: The Commission of Crimes Against Humanity in Cambodia July 2002 to Present', at para. 7-8.

<sup>59</sup> Yunnan Lancang International Energy Limited, 'Se San 2 hydropower dam and powerhouse concrete riverbed construction tender prequalification notice', 2014-4-8, available at: [www.chinapower.com.cn/bussiness/viewbidinfo.asp?bidid=10146314&bidtype=%D4%A4%C9%F3%CD%A8%B8%E6](http://www.chinapower.com.cn/bussiness/viewbidinfo.asp?bidid=10146314&bidtype=%D4%A4%C9%F3%CD%A8%B8%E6).

<sup>60</sup> Baird, IG. (2009) 'Best Practices in Compensation and Resettlement for Large Dams: The Case of the Planned Lower Sesan 2 Hydropower Project in Northeastern Cambodia. Rivers Coalition in Cambodia, Phnom Penh., at 42, 46-47, 49-53.

When complete, the LS2 dam will block both the Sesan and Srepok Rivers and flood a vast area. According to publicly available design information, the dam will be 75m high and 6 km long, creating a 33,560 hectare reservoir. The project is expected to cost \$816 million USD, with a generating capacity of 400 MW and an average output of 1,998 GWh per year.<sup>61</sup> Recent reports note that there has been a significant redesign of the project,<sup>62</sup> however no information regarding the details of the redesign or the proposed operation of mitigation measures has been made publicly available and no updated impact studies have been released.

The Hydropower Lower Sesan 2 Co. (HLS2 Co.) holds a 90% ownership share in the LS2 project. The remaining 10% of the project is owned by EVN International Joint Stock Company (EVNI), a subsidiary of the Electricity of Vietnam (EVN), a state-owned company.<sup>63</sup> EVNI commissioned the feasibility and environmental impact assessment (EIA) studies and an initial resettlement plan for the project and was the former lead project developer, before reducing its interest in the project in 2012. Hydropower Lower Sesan 2 Co. is a joint venture between Cambodia's Royal Group, which owns 49% of HLS2 Co., and China's Hydrolancang International Energy Co., Ltd., which owns 51% of HLS2 Co. The Royal Group's Chairman, Okhna Kith Meng, is reported to be "a major supporter – and beneficiary – of Prime Minister Hun Sen."<sup>64</sup> Hydrolancang International Energy Co., Ltd. is a subsidiary of Huaneng Lancang River Hydropower Co., Ltd., which is itself a subsidiary of Huaneng Group, a major Chinese state-owned enterprise (SOE).

The project is being undertaken as a build-operate-transfer (BOT) agreement with a 45-year land concession period,<sup>65</sup> including 5 years for construction and 40 years for operation before the ownership of the dam is transferred to the Cambodian government.<sup>66</sup> 30% of the LS2 project is being financed from HLS2 Co.'s capital and the remaining 70% is being financed through an undisclosed bank loan, likely from a Chinese bank. There are reports that the finance is being provided by the China Development Bank (CDB), but this has not been confirmed.<sup>67</sup>

Approximately 5,000 people will be resettled to make way for the LS2 project reservoir, most of whom are indigenous peoples and ethnic minority groups.<sup>68</sup> The dam is predicted to cause severe

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<sup>61</sup> Mekong Watch and 3SPN, 'Factsheet on the Lower Sesan 2 Hydropower Project,' updated 18 September 2014, available at: [www.mekongwatch.org/english/country/cambodia/LS2/index.html](http://www.mekongwatch.org/english/country/cambodia/LS2/index.html).

<sup>62</sup> Baird, I. 'Looking Beyond the Reservoir' Phnom Penh Post, 6 August 2014, available at: <http://www.phnompenhpost.com/analysis-and-op-ed/looking-beyond-reservoir>.

<sup>63</sup> EVN, along with the Royal Group, was initially the lead developer of the Lower Sesan 2 project, having conducted initial feasibility studies and environmental impact statements. In September 2012, it withdrew from the project while maintaining a 10% nominal stake as compensation for conducting the studies. Hydrolancang International Energy Co., Ltd. then signed an agreement to build the dam with Royal Group in November 2012: Chen, D. & Kuch Naren, 'Electricity Vietnam No Longer Involved in Lower Sesan 2 Dam,' *The Cambodia Daily*, 28 November 2012, available at: <http://www.cambodiadaily.com/archives/electricity-vietnam-no-longer-involved-in-lower-sesan-2-dam-6363>.

<sup>64</sup> Gluckman, R., 'Bringing Commerce to Cambodia,' *Forbes*, 1 Feb. 2008, at: [www.forbes.com/global/2008/0211/030.html](http://www.forbes.com/global/2008/0211/030.html).

<sup>65</sup> *Law on the Authorization of Payment Warranty of the Royal Government of Cambodia for the Hydro Power Lower Sesan 2 Company*, Cambodian National Assembly, February 2013.

<sup>66</sup> *Law on the Authorization of Payment Warranty*, February 2013.

<sup>67</sup> Mekong Watch, 'Factsheet on the Lower Sesan 2 Hydropower Project,' updated 18 September 2014. There are reports that 70% of the financing from the project is being provided by the China Development Bank: Pye, D. & Seangly, P., 'Waiting for the Deluge' Phnom Penh Post, 24 February 2014, available at: [www.phnompenhpost.com/national/waiting-deluge](http://www.phnompenhpost.com/national/waiting-deluge).

<sup>68</sup> The NGO Forum on Cambodia, 'The Press Conference: Communities and CSOs Concerns on Lower Sesan 2 Dam,' 10 July 2014, available at: <http://www.ngoforum.org.kh/index.php/en/hot-news/events/194-title-the-press-conference-communities-and-csos-concerns-on-lower-sesan-2-dam>.

social and environmental impacts affecting thousands of people<sup>69</sup> in Cambodia as well as downstream in Vietnam, upstream in Laos and possibly even Thailand. A 2009 report found that over 100,000 people, many of whom represent indigenous and ethnic minority groups, stand to be substantially affected by the dam's impact on fisheries. Thousands more up and downstream will experience fisheries losses.<sup>70</sup> A 2012 study predicted that the LS2 dam will reduce fish biomass in the entire Mekong Basin by 9.3%, causing the most severe impact of any proposed dam on a Mekong tributary.<sup>71</sup> The Sesan and Srepok rivers are major breeding sites and the LS2 dam will permanently prevent all migratory species (40% of all fish in the river) from reaching traditional breeding grounds,<sup>72</sup> while many non-migratory species will be unable to survive habitat changes in the reservoir.<sup>73</sup> These impacts will have extremely serious implications for the food and nutrition security of hundreds and thousands of people in riverine communities along the 3S Rivers and in the Mekong River Basin.

The dam will submerge 1,290 hectares of agricultural land, around one quarter of the wet rice paddy land in Sesan District, which is of especially good quality for rice farming.<sup>74</sup> Furthermore, LS2 is expected to contribute to reductions in nutrient-rich sediment flows of around 6 to 8 percent.<sup>75</sup> These flows are crucial for fertilizing the small rice farms of hundreds of thousands of subsistence-level villagers downstream.<sup>76</sup> The loss of sediment "would reduce the stability of river channels and the Mekong Delta coastline, increasing erosion and diminishing productivity of the aquatic system and agriculture in the Mekong floodplains and Tonle Sap Lake."<sup>77</sup>

#### 1.4 The Stung Cheay Areng Dam

The Stung Cheay Areng Hydropower Project is proposed for the Areng River in Koh Kong Province. The Areng Valley forms a distinctive ecosystem of evergreen forest, grasslands, swamps and lakes.<sup>78</sup> The area is rich in biodiversity, home to rare and endangered animal and plant species including Siamese crocodiles, Royal Turtles and Asian tigers. It houses one of Southeast Asia's last remaining elephant corridors.<sup>79</sup> If built, the dam destroy the irreplaceable ecosystems and species found in the valley.

According to available project feasibility studies, the dam will cost USD \$327 million and have a production capacity of 108MW. The lead developer for the project has changed numerous times, involving several Chinese companies. In 2006, a Memorandum of Understanding (MOU) to conduct a feasibility study was concluded between China Southern Power Grid Co (CSG) and

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<sup>69</sup> Baird (2009) at 118; Royal University of Phnom Penh (2013) at 55.

<sup>70</sup> Baird (2009) at 13.

<sup>71</sup> Ziv et al (2012): After the LS2 dam, the dam with the second most severe impact would reduce fish biomass by 2.3%.

<sup>72</sup> Carmichael, R., "Work Begins on Controversial Cambodian Dam." *Voice of America*. 7 May 2013, quoting Eric Baran, World Fish Center. Web. 3 June 2013, available at: <http://www.voanews.com/content/work-begins-on-controversial-hydropower-dam/1656035.html>; Baird (2009) at 39.

<sup>73</sup> Baird (2009) at 53-54.

<sup>74</sup> Baird (2009) at 31-32.

<sup>75</sup> Carmichael, R., "Work Begins on Controversial Cambodian Dam." *Voice of America*. 7 May 2013, quoting Eric Baran, World Fish Center. Web. 3 June 2013; *see also* Baird (2009), 54-55.

<sup>76</sup> Carmichael, R., "Work Begins on Controversial Cambodian Dam." *Voice of America*. 7 May 2013, quoting Eric Baran, World Fish Center. Web. 3 June 2013.

<sup>77</sup> Vrieze, P. & Chansy, C., 'The Battle for the 3S Rivers,' *The Cambodia Daily*, 10-11 Sept. 2001. *See also* Baird (2009) at 55.

<sup>78</sup> Conservation International (2007), at 1.

<sup>79</sup> Conservation International (2007), at 1-2. Areng Valley community representatives have put the figure at 1600.

the Cambodian Ministry of Mines and Energy (MME). After completing the feasibility study and an Initial Environmental and Impact Assessment (IEIA), CSG withdrew from the project in November 2011 citing environmental concerns. Guodian Corporation then took over, completing a feasibility study and an IEIA in May 2012. In late 2013, Guodian withdrew from the project, stating that it was not economically viable.<sup>80</sup>

In January 2014, Sinohydro Resources Ltd acquired the concession to develop the Stung Cheay Areng dam through a local affiliate, Sinohydro (Cambodia) United Ltd., and in March announced plans to undertake a new project EIA.<sup>81</sup> Of concern with regard to the transparency of the project, the Cambodian People's Party (CPP) Senator Lao Meng Khin and his wife, Choeung Sopheap, are third-party governors of Sinohydro (Cambodia) United Ltd.<sup>82</sup>

The Cheay Areng dam will displace approximately 1,500 indigenous people living in the valley.<sup>83</sup> The inhabitants are primarily indigenous Chong (Khmer Daeum or 'old Khmer') who consider the valley their ancestral homeland, having lived in the area for over 600 years.<sup>84</sup> The relocation of these communities to make way for the dam threatens belief systems, traditions, livelihoods and wellbeing of the valley's inhabitants. Disruption of water flows and ecosystems imperils the livelihoods of thousands more people living downstream. The Cheay Areng project will have a very low electricity output, with extremely high environmental and social impacts. The chief economic benefits from the project are speculated to be highly lucrative illegal logging of luxury timber and land grabbing within a protected forest area.<sup>85</sup>

## **2. NATIONAL LEGAL FRAMEWORK**

### **2.1 Responsible bodies**

The Ministry of Mines and Energy (MME) is the lead agency responsible for hydropower development in Cambodia. The National Strategic Development Plan (NSDP) (2009-2013) requires MME to encourage private sector investment and promote the exploration of new sources of energy, including hydropower, to meet the country's pressing domestic demand. The Ministry of Environment (MOE) has the role of reviewing and approving environmental impact assessments (EIAs) for hydropower projects and monitoring project compliance with the EIA report. The Ministry of Water Resources and Meteorology (MOWRAM) is responsible for issuing water use licenses for hydropower projects. All projects involving investments of over US\$50 million and all BOT projects must be approved by the Council for the Development of Cambodia (CDC), which is the highest decision-making body for private and public sector investment in Cambodia.<sup>86</sup>

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<sup>80</sup> International Rivers, 'Cheay Areng Dam', available at: [www.internationalrivers.org/campaigns/cheay-areng-dam](http://www.internationalrivers.org/campaigns/cheay-areng-dam).

<sup>81</sup> Walker, B., 'Protests Halt Chinese Backed Dams in Cambodia', *China Dialogue*, 19 March 2014.

<sup>82</sup> Pye, D., 'Power couple linked to Sinohydro project,' *The Phnom Penh Post*, 13 March 2014.

<sup>83</sup> International Rivers, 'Cheay Areng Dam.'

<sup>84</sup> Conservation International (2007); UNESCO has identified three indigenous languages spoken in the area: Paeric, Samrae and Samre: United Nations Economic, Social and Cultural Organization (UNESCO).

<sup>85</sup> Pichamon, Y., 'Cambodia's Environment: Good News in Areng Valley?' *The Diplomat*, 3 November 2014; Mam, K., 'Will Cambodia Flood a Sacred and Biodiverse Valley for a Dubious Dam?' *Mother Jones*, 19 October 2014, available at: <http://www.motherjones.com/environment/2014/10/areng-valley-cambodia-dam-hun-sen-rainy-hydro>.

<sup>86</sup> Open Development Cambodia, 'Briefing: Hydropower'.

## 2.2 National legal principles

There is no specific legal framework governing hydropower development in Cambodia. A number of laws provide principles applicable to the development of hydropower dams, including those related to investment, electricity, land, forests, water resources and the environment. Existing laws contain principles regarding the rights of affected communities and the public in the decision-making and development of such projects.

The *Constitution of the Kingdom of Cambodia* requires the State to “establish a precise plan of management of land, water, [...] ecological system, [...] energy, [...] forests and forestry products, wildlife, fish and aquatic resources.”<sup>87</sup> Article 35 guarantees that “Khmer citizens of either sex shall have the right to participate actively in the political, economic, social and cultural life of the nation” and any “suggestions from the people shall be given full consideration by the grant of the State.” The *Law on Environmental Protection and Natural Resource Management* (EPNRML) sets out the framework for environmental protection in Cambodia. One stated objective is to enable ‘the public to participate in environmental protection and natural resource management’. A further objective is to suppress ‘any acts that cause harm to the environment’.<sup>88</sup>

Cambodian law requires an Environmental Impact Assessment (EIA) be undertaken before the approval of hydropower dam projects.<sup>89</sup> The EIA report must be reviewed and evaluated by the MOE before being submitted to the Royal Government for final approval.<sup>90</sup> Requirements for the procedure and content of EIAs are set out in a sub-decree and two prakas (regulations) of the MOE.<sup>91</sup> The Sub-decree on EIAs stipulates that the EIA process must, “encourage public participation in the implementation of the process and take into account their input and suggestions in the process of project approval.”<sup>92</sup> Unfortunately, the EIA sub-decree does not include detailed guidance on the requisite level and nature of public consultation. However a new EIA law now under development (currently in draft form) includes detailed requirements for public access to information and consultation. The *Law on Forestry* adds to the current requirements, stating that the law should be “implemented to ensure public participation in any government decision that has the potential for heavy impact on concerned general citizens, livelihoods of local communities and forest resources of the Kingdom of Cambodia.”<sup>93</sup>

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<sup>87</sup> *Constitution of the Kingdom of Cambodia*, adopted by the Constitutional Assembly in Phnom Penh on September 21, 1993 at 2nd Plenary Session; Article 59.

<sup>88</sup> *Law on Environmental Protection and Natural Resource Management* (1996), Kingdom of Cambodia, Article 1 (hereafter ‘EPNRML’).

<sup>89</sup> Sub-Decree on EIAs (1999).

<sup>90</sup> The EPNRML requires that an EIA “be done on every project and activity, private or public, and shall be reviewed and evaluated by the Ministry of Environment before being submitted to the Royal Government for decision.” EPNRML (1996), Art. 6; *see also* Sub-decree on EIAs Art. 1; *Law on Forestry* (2002), Kingdom of Cambodia, Art. 4. (“Consistent with the Cambodian code of forest management and the Environmental Protection and Natural Resources Law, an Environmental and Social Impact Assessment shall be prepared for any major forest ecosystem related activity that may cause adverse impact on society and environment. Document of the Environmental and Social Impact Assessment shall be made available for public comment. Any final decisions by the Royal Government on major forest ecosystems related activities must consider the recommendations of the final Environmental and Social Impact Assessment.”).

<sup>91</sup> Sub-decree on EIAs, 1999; Prakas No. 49 Prakas on Guideline for Conducting Environmental Impact Assessment Report, 2000; Prakas on General Guidelines for Initial and Final Environmental Impact Assessment Reports, 2009.

<sup>92</sup> Sub-decree on EIAs, Art. 1.

<sup>93</sup> *Forestry Law* (2002), Article 4.

The *Water Resources Law*<sup>94</sup> requires MOWRAM to consult with other Ministries and local authorities to take appropriate action in relation to dam projects that may cause disastrous impacts. The law also holds that Cambodia has the “duty to participate in the utilization, development and management of an equitable and reasonable share of the international river basins in its territory, consistent with the obligations arising from the international agreements to which Cambodia is a Party.”<sup>95</sup>

Article 44 of the *Constitution* states that: “The right to confiscate properties from any person shall be exercised only in the public interest as provided for under the law and shall require fair and just compensation in advance.” The Cambodian *Land Law* reiterates this requirement.<sup>96</sup> However, the precise meaning and implication of ‘fair and just’ is not clearly stipulated. Furthermore, many Cambodians, including most of the villagers to be displaced by the LS2 and Cheay Areng projects, lack formally registered land title. Both the Constitution and the Land Law are often interpreted as referring only to persons with legally registered land title, denying the rights of legal possessors who have a right to register their land but have not yet completed the registration process.<sup>97</sup>

The 2010 *Expropriation Law* has adopted a broad definition of ‘public interest’; it includes the category of infrastructure projects “required by the nation in accordance with the determination made by the government.”<sup>98</sup> The *Expropriation Law* stipulates that private property is to be compensated based on market price or replacement value.<sup>99</sup> However, although the *Expropriation Law* was adopted several years ago, it still lacks implementing sub-decrees. There is therefore no clear legal process for land acquisition in the ‘national interest’ in Cambodia.

### **3. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS**

#### **3.1 Human Rights Treaty Obligations**

Cambodia has ratified the International Covenant on Civil and Political Rights 1966 (ICCPR),<sup>100</sup> the International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR),<sup>101</sup> the Convention on the Rights of the Child 1989 (CRC),<sup>102</sup> the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW),<sup>103</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD).<sup>104</sup> China is party to the

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<sup>94</sup> *Water Resources Law* (2007), Kingdom of Cambodia, Article 25.

<sup>95</sup> *Water Resources Law* (2007), Article 34. Studies suggest that the dam will have serious consequences downstream, including in neighboring countries, which arguably violates treaties such as the Mekong Agreement of 1995, as well as human rights instruments like the ICESCR.

<sup>96</sup> *Land Law* (2001), Kingdom of Cambodia, Art. 5.

<sup>97</sup> See *Land Law* (2001), Arts. 30, 31, 39, 42.

<sup>98</sup> *Law on Expropriation* (2010), Kingdom of Cambodia, Article 5.

<sup>99</sup> *Law on Expropriation*, (2010), Article 22.

<sup>100</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>101</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>102</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

<sup>103</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>104</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

ICESCR, CERD, CEDAW, and the CRC and has signed, but not ratified, the ICCPR. By becoming parties to international human rights treaties, states assume obligations to respect, protect and fulfil the human rights contained in those treaties. This entails responsibilities to refrain from interfering with or diminishing the enjoyment of human rights, to protect against human rights abuses, and to take positive steps to facilitate the enjoyment of human rights.<sup>105</sup>

As stated in the UN Guiding Principles on Business and Human Rights (UNGPs),<sup>106</sup> states' international human rights treaty obligations require them to protect against human rights abuses resulting from the activities of business enterprises operating within their territory and/or jurisdiction. The UNGPs are not themselves a treaty and do not create new human rights obligations, but set out a framework for understanding the application of existing treaty and customary international law obligations to human rights abuses resulting from business activities. The UNGPs apply to all UN member governments, including Cambodia and China. The Chinese government recently voted in favor of a UN Human Rights Council resolution<sup>107</sup> on elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. In its explanation before the vote, China noted that it supported efforts by the international community to promote respect by businesses, in particular transnational corporations, for human rights. China also stated that it was in favor of "dialogue and cooperation to improve and develop the Guiding Principles, to ensure actual effects."<sup>108</sup>

The 'state responsibility to protect' under the UNGPs includes an obligation to take steps to prevent as well as investigate, punish, and redress human rights abuses resulting from business activities through legislation, regulations, policies, and adjudication.<sup>109</sup> States must properly enforce existing domestic laws which provide protection against rights abuses; ensure that other laws do not constrain respect for human rights; and provide guidance to businesses to ensure human rights compliance.<sup>110</sup> Furthermore, states have a responsibility to ensure access to effective remedial mechanisms for persons whose rights have been violated by business activities and operations within their territory or jurisdiction.<sup>111</sup>

When States contract with or legislate for businesses providing services that carry human rights risks, the responsibility to protect is greater, and they must exercise adequate oversight.<sup>112</sup> Additional steps are required to ensure adequate human rights due diligence when companies are receiving substantial support and services from the government.<sup>113</sup> With respect to the LS2 dam, the Cambodian government passed a law guaranteeing payments to the Hydropower Lower

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<sup>105</sup> See for example, Office of the High Commissioner for Human Rights (OHCHR), 'International Human Rights Law', at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>.

<sup>106</sup> Ruggie, J., Special Representative of the Secretary-General on the Issue of Human Rights & Transnational Corporations and Other Business Enterprises, *Guiding Principle on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework Principle 1*, U.N. Doc. A/HRC/17/31 (2011), available at: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>107</sup> United Nations Human Rights Council, Resolution on the Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/26/L.22/Rev.1, 26 June 2014.

<sup>108</sup> Office of the High Commissioner for Human Rights, 'Human Rights Council Establishes Working Group to Elaborate an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises', 26 June 2014, see: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14785&LangID=E#sthash.jm6Jcyp5.dpuf](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14785&LangID=E#sthash.jm6Jcyp5.dpuf).

<sup>109</sup> UNGP, Principle 1.

<sup>110</sup> UNGP Principle 3.

<sup>111</sup> UNGP Principle 25.

<sup>112</sup> UNGP Principle 5.

<sup>113</sup> UNGP Principle 4.



Sesan 2 Co. for the electricity from the project, including if the dam is unable to operate due to political force majeure.<sup>114</sup> The *Law on the Authorization of Payment Warranty* is based on inadequate due diligence conducted by Key Consultants Cambodia (KCC) of Cambodia and Power Engineering Consulting Joint Stock Company 1 (PECC1) of Vietnam during the feasibility and environmental impact assessment studies. Furthermore, the law lowers the standards for social and environmental protection set out in the EIA report by placing limits on company responsibility for project impacts. This legislation falls far short of the standard under the UNGPs required of governments contracting with businesses, and potentially conflicts with national legal principles pertaining to rights to public participation and environmental protection.

International human rights bodies have held that States must prevent private companies in their jurisdiction from violating the human rights of individuals in other countries.<sup>115</sup> The Chinese government has an obligation to prevent businesses domiciled in China from violating human rights in their operations abroad, through adequate legislation, policies, and adjudication. This obligation is stronger when, as with the LS2 and Cheay Areng projects, the companies are state-owned enterprises (SOEs) under effective government control. In the case of SOEs, states should ensure that human rights due diligence is undertaken prior to investing in a project.<sup>116</sup> The obligation to protect also includes ensuring effective remedial mechanisms for persons whose human rights have been violated as a result of activities of Chinese companies operating abroad.

### 3.2 Human Rights Obligations of Business Enterprises

According to the UNGPs, each of the business enterprises investing in and involved in the development of the LS2 and Cheay Areng projects have an obligation to respect human rights, avoid infringing upon human rights, and address adverse human rights impacts with which they are involved through their business activities and relationships.<sup>117</sup> This obligation refers, at a minimum, to the human rights contained in the International Bill of Human Rights.<sup>118</sup> The obligation to each enterprise in the supply or ownership chain for the project, connected to actual or potential human rights impacts through a direct business relationship. In order to fulfill this

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<sup>114</sup> *Law on the Authorization of Payment Warranty* (2013).

<sup>115</sup> The Human Rights Committee has recommended States “take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad”: Human Rights Committee, *Concluding Observations: Germany* para. 16, UN.Doc. CCPR/C/DEU/CO/6 (2012). The Committee on Economic, Social, and Cultural Rights has advised that States should take steps to prevent their own companies from violating the right to health and the right to water in other countries: Committee on Economic, Social, and Cultural Rights, General Comment 14: The right to the highest attainable standard of health para. 39, UN Doc. E/C.12/2000/4 (2000); Committee on Economic, Social, and Cultural Rights, General Comment 15: The right to water para. 33, UN Doc. E/C.12/2002/11 (2003). The Committee on the Rights of the Child has stated that home States have obligations under the Convention and its optional protocol to “respect, protect and fulfill children’s rights in the context of businesses’ extraterritorial activities,” and “must ensure that all business enterprises, including transnational corporations operating within their borders, are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child and/or aid and abet violations in foreign jurisdictions: Committee on the Rights of the Child, General Comment No. 16: State obligations regarding the impact of the business sector on children’s rights, paras. 42-43, UN Doc. CRC/C/GC/16 (2013). The Committee on the Elimination of Racial Discrimination has called upon States to “take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in [the State] which negatively impact on the enjoyment of rights of indigenous peoples in territories outside [of the State]: Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada* para. 17, UN Doc. CERD/C/CAN/CO/18 (2007). See also Maastricht Centre of Human Rights and the International Commission of Jurists, *The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights* principle 25(c) (2012).

<sup>116</sup> See UNGP Principle 4 Commentary.

<sup>117</sup> UNGP Principle 11.

<sup>118</sup> UNGP Principle 12.

responsibility, all business enterprises must establish and operationalize an internal corporate human rights policy, undertake appropriate human rights due diligence and act upon relevant findings,<sup>119</sup> provide meaningful consultations with affected groups,<sup>120</sup> operate in a transparent manner,<sup>121</sup> and establish or participate in remedial mechanisms.<sup>122</sup>

## 4. HUMAN RIGHTS IMPACTS

### 4.1 Rights to Information, Consultation and Participation

The ICCPR and ICESCR contain the right of all peoples to self-determination, which includes the right to freely determine one's economic, social, and cultural development, as well as the right to freely dispose of natural wealth and resources.<sup>123</sup> ICCPR article 25(a) guarantees the right to participate in public affairs, directly or through freely chosen representatives, which includes the execution of administrative powers and the formulation and implementation of policy at regional and local levels.<sup>124</sup> This right entails an obligation to ensure affected persons are provided sufficient information regarding proposed projects, especially those that will impact on exercise of other human rights, and have access to full and meaningful participation in project impact assessment and resettlement processes.<sup>125</sup> The Human Rights Council has emphasized the state obligation "to provide information on assessments concerning environmental impacts on human rights," and that the public is "entitled to have access, to the fullest extent practicable, to information regarding the actions and decision-making processes of their government."<sup>126</sup>

The UN Independent Expert on human rights and the environment has stated that specific procedural rights, including rights to information, consultation and participation, are triggered in order to safeguard the fundamental rights to life, health and livelihood that are at risk in large-scale development projects. He notes that procedural and substantive rights "create a kind of virtuous circle: strong compliance with procedural duties produces a healthier environment, which in turn contributes to a higher degree of compliance with substantive rights such as rights to life, health, property and privacy."<sup>127</sup>

Failures to ensure protection of the rights of affected communities and persons to information, consultation and participation in decision-making processes also infringe requirements under international environmental law. The *Rio Declaration on Environmental and Development*<sup>128</sup>

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<sup>119</sup> UNGP Principle 17, 19

<sup>120</sup> UNGP Principle 18.

<sup>121</sup> UNGP Principle 21.

<sup>122</sup> UNGP Principles 22, 29.

<sup>123</sup> ICCPR art. 1; ICESCR art. 1.

<sup>124</sup> Human Rights Committee, General Comment 25: Article 25, (Participation in Public Affairs and the Right to Vote), para. 5, CCPR/C/21/Rev.1/Add.7 (1996)

<sup>125</sup> Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Basic Principles and Guidelines on Development-Based Evictions and Displacement, paras 56(h) and (i), A/HRC/4/18 (2007) (hereinafter, BPED). *See also* UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, Article 18.

<sup>126</sup> Human Rights Council, Resolution 12/12: the Right to Truth, p. 3, A/HRC/RES/12/12 (2009); Human Rights Council, Draft Resolution: Human Rights and the Environment, para. 4(a), A/HRC/25/L.31 (2014).

<sup>127</sup> "Report of Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment," A/HRC/22/43 at 41 - 42.

<sup>128</sup> UN Environmental Programme, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

holds that states must make information regarding activities affecting the environment widely available and allow participation in decision-making processes by affected stakeholders, particularly indigenous people.<sup>129</sup> The *Convention on Biological Diversity* (1992), to which both Cambodia and China are party, requires states to allow public participation in EIA procedures.<sup>130</sup>

### ***Lower Sesan 2 Dam***

The feasibility study for the LS2 project was conducted in 2008 by a subsidiary of EVN, the Power Engineering Consulting Joint-Stock Company No. 1 (PECC1). The EIA was completed in 2009 by Key Consultants Cambodia (KCC), and approved by the MOE in 2010.<sup>131</sup> The feasibility and EIA studies for LS2 have been subject to significant criticism. The EIA has been critiqued as providing an inadequate assessment of the project impacts and lacking detailed budgets and mitigation and monitoring plans.<sup>132</sup> As noted above, independent studies have indicated that project impacts will be severe and extensive, affecting large numbers of people in Cambodia and neighbouring countries. While the authors of the EIA study acknowledged the likelihood of wider environmental impacts outside of the immediate vicinity of the project, including along the Mekong River and the Tonle Sap Lake, the EIA report did not adequately examine these impacts. It therefore failed to provide information or propose mitigation measures to address potentially severe threats to food security, livelihoods, nutrition and health and to local and indigenous cultures in Cambodia and the region.

The feasibility and EIA studies also involved very limited information and consultation with affected communities, meaning it was not possible to properly assess the project's impacts.<sup>133</sup> According to a 2009 report, the studies "dismally failed to meet even minimum standards for public participation. . . ."<sup>134</sup> Consultations conducted with villages in the reservoir area were not participatory, did not provide substantial information, and did not focus on critical issues.<sup>135</sup> Consultations were not conducted in villages outside of the reservoir area that will experience serious impacts, meaning that tens of thousands of affected people were not consulted at all during the process.<sup>136</sup> Of those consulted, amounting to a few hundred individuals, many felt they were not given adequate information regarding the dam's impacts, or were only informed of the benefits of the project. PECC1's feasibility study lacked transparency, with no written information about the project being publically provided in Khmer.<sup>137</sup> No special measures were taken to ensure the involvement of vulnerable groups, including indigenous persons, women and children.<sup>138</sup> An independent review of the EIA found that 100% of the communities and

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<sup>129</sup> Principles 10, 17, 22.

<sup>130</sup> United Nations *Convention on Biological Diversity*, 1760 UNTS 79; 31 ILM 818 (1992), Art. 14(1), available at: <http://www.cbd.int/doc/legal/cbd-en.pdf>.

<sup>131</sup> Mekong Watch, 'Fact Sheet: Lower Sesan 2 Hydropower Project', updated September 2014.

<sup>132</sup> The NGO Forum on Cambodia, 'Lower Sesan 2 Hydro Project EIA Review' Phnom Penh, Cambodia, August 2009.

<sup>133</sup> Rasmey, L., (2013) Case Study: Expected Impact and Management Plan of Lower Se San II Hydropower Project, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ); The NGO Forum on Cambodia, 'Lower Sesan 2 Hydro Project EIA Review' Phnom Penh, Cambodia, August 2009.

<sup>134</sup> Baird (2009), at 116.

<sup>135</sup> Baird (2009), at 116.

<sup>136</sup> Baird (2009), at 116; Grimsditch, M., '3S Rivers Under Threat: Understanding New Threats and Challenges from Hydropower Development to Biodiversity and Community Rights in the 3S River Basin', 3S Rivers Protection Network and International Rivers, April 2012, at 26.

<sup>137</sup> Baird (2009), at 117.

<sup>138</sup> Baird (2009), at 117.

individuals approached, including groups consulted during the EIA process and groups who had not been consulted, opposed construction of the dam.<sup>139</sup>

The EIA also lacked a detailed cost-benefit analysis or assessment of alternatives to the LS2, both of which are required in order to provide a transparent basis for decision-making.<sup>140</sup> The economic feasibility of the dam has been questioned.<sup>141</sup> Dams upstream have reduced water flows downstream, and already face difficulties meeting projected electricity outputs.<sup>142</sup> The LS2 dam's capacity is expected to drop to 100MW during dry season, when electricity demand peaks.<sup>143</sup> The dam will cause serious financial impacts on the fishing industry and agriculture in the region;<sup>144</sup> these do not appear to have been considered in any cost-benefit analysis. An independent study of the trade-offs between Mekong tributary dam locations, power production, and fishery resources highlighted the LS2 dam as "highly detrimental" and opined that it "should probably be avoided."<sup>145</sup> Feasibility reports have concluded that the dam has a very low energy production to land use efficiency.<sup>146</sup>

Cambodia has failed to comply with requirements under international law by failing to conduct a transboundary impact assessment for the LS2 dam, denying the communities to be affected in neighboring countries access to their rights to information, consultation and participation in decision-making. The lack of such an assessment is an issue of contention in other hydropower projects in the region, such as the Xayaburi and Don Sahong dams on the Mekong mainstream in Lao PDR, which are expected to have downstream impacts in Cambodia. The 1972 *Stockholm Declaration* obliges States to ensure activities within their jurisdiction do not damage the environment of other States.<sup>147</sup> The *Rio Declaration* requires states to "provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and consult with those States at an early stage and in good faith."<sup>148</sup> The International Court of Justice (ICJ) has ruled that there is an obligation under customary international law to conduct a transboundary EIA before commencement of any activity that may cause damage to other States' environments, and to continue monitoring the effects on the environment throughout the lifespan of the project.<sup>149</sup>

### ***Stung Cheay Areng Dam***

The initial environmental impact assessment (IEIA) study conducted for the Cheay Areng project by previous project developers was made public in Khmer but was not disseminated to affected communities. None of the existing assessments have involved adequate opportunities for consultation and participation by affected communities and other stakeholders. During the previous IEIA process, limited consultation was conducted but without adequate information or

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<sup>139</sup> Baird (2009) at 13, 72.

<sup>140</sup> The NGO Forum on Cambodia, 'Lower Sesan 2 Hydro Project EIA Review' Phnom Penh, Cambodia, August 2009

<sup>141</sup> See generally, Grimsditch (2012) at 27-28.

<sup>142</sup> Grimsditch (2012) at 27.

<sup>143</sup> Grimsditch (2012) at 27.

<sup>144</sup> Grimsditch (2012) at 27.

<sup>145</sup> Ziv et al. (2012), at 5611.

<sup>146</sup> Grimsditch (2012) at 27-28.

<sup>147</sup> UN General Assembly, Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972), Principle 21. See also Rio Declaration (1992) Principle 2.

<sup>148</sup> Principle 19.

<sup>149</sup> International Court of Justice, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* paras. 204-205, Judgment, I.C.J. Reports 2010, p. 14 (2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

opportunities for community members to voice their concerns regarding the project. During the most recent EIA process in 2014, some consultation has taken place with international NGOs, but no consultation opportunities have yet been extended to communities and local groups. Key details of the project, such as the proposed layout and size of the dam, remain unknown. To date, no information has been provided to affected communities regarding the impacts of the project on the environment and natural resources and resulting harm to their lives, livelihoods and well-being. The project developers have not yet made any meaningful attempt to enter into dialogue with affected indigenous communities or to enable their participation in decision-making.<sup>150</sup>

In December 2013, staff of Cambodian consulting firm SBK Research and Development (SBK) arrived in the valley to conduct an asset survey in the communities to be relocated for the project. Villagers state that SBK personnel provided no information and misrepresented the objective of the survey in order to acquire villager's thumbprints as evidencing consent to the project and relocation, when in fact villagers did not understand the purpose of the survey document.<sup>151</sup> More recently, there are reports that subcontracting companies accompanied by military police have gained access to the valley to undertake feasibility and EIA studies, and that they have pressured community members into accepting resettlement proposals.<sup>152</sup>

## 4.2 The Right to Adequate Housing:

### 4.2.1 Freedom from Forced Evictions

Forced evictions violate a number of human rights, foremost the right to adequate housing guaranteed by ICESCR article 11(1).<sup>153</sup> Evictions should only be carried out in accordance with the law, as a last resort in exceptional circumstances “solely for the purpose of promoting general welfare,”<sup>154</sup> and in full compliance with human rights.<sup>155</sup> This requires undertaking a

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<sup>150</sup> Ham, O., ‘Fieldwork Report: The Potential Impacts of Araeng Hydro-power Project on the Central Cardamom Protected Forest of Koh Kong Province, Cambodia’, EarthRights School Mekong, December 2013.

<sup>151</sup> Samreth Law Group, ‘Report from community consultations’ March 2014.

<sup>152</sup> Samreth Law Group, Notes from consultations with Areng Valley communities.

<sup>153</sup> Both the Commission on Human Rights and the Committee on Economic, Social, and Cultural Rights have found that forced evictions violate fundamental human rights. Commission on Human Rights, *Resolution 1993/77: Forced Evictions*, para. 1, E/CN.4/RES/1993/77 (1993), available at <http://www.refworld.org/docid/3b00f0c514.html>; Committee on Economic, Social, and Cultural Rights, *General Comment 7: the Right to Adequate Housing (article 11, paragraph 1 of the Covenant): Forced Evictions*, para. 5, E/1998/22 paras. Annex IV (1997), available at:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1998%2f22&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1998%2f22&Lang=en). Specifically, rights affected include ICESCR article 11(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.”); ICCPR art. 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, [or] home...”); ICCPR art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); ICCPR art. 9 (“Everyone has the right to liberty and security of person. . . .”); ICCPR art. 12(1) (“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”); CRC art. 27(3) (“States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”); CEDAW art. 14(2)(h) (“States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”). Forceful eviction from traditional spiritual grounds can violate the right of minorities to enjoy their own culture and to profess and practice their own religion (ICCPR art. 27), as well as the right of individuals to manifest their religious beliefs in observance and practice (ICCPR art. 18).

<sup>154</sup> ICESCR art. 4.

<sup>155</sup> See CESCR, *Comment 7* para. 4, 6; UN Basic Principles and Guidelines on Development Based Evictions and Displacement.

comprehensive impact assessment which addresses alternatives prior to the initiation of the project in order to ensure human rights are respected.<sup>156</sup> When undertaken, evictions must be conducted in accordance with the general principles of reasonableness and proportionality.<sup>157</sup>

The UN ‘Principles and Guidelines on Development-Based Evictions and Displacement’ set out guidance to states on ensuring compliance with human rights principles. Governments must ensure that a clear and comprehensive resettlement policy consistent with human rights is in place before relocation occurs; sufficient information regarding relocation is provided to affected persons; prior and informed consent regarding relocation and participation in relocation decisions is guaranteed; the rights of indigenous peoples and women are equally protected; and 90 days’ notice is provided before evictions take place.<sup>158</sup> The eviction process must guarantee that affected people will be in the same position or better off as a result of the evictions.<sup>159</sup> The Committee on Economic, Social, and Cultural Rights has held that evictions require, at a minimum: “an opportunity for genuine consultation for those affected; adequate and reasonable notice prior to the scheduled date of eviction; and information on the proposed evictions.”<sup>160</sup>

### ***Lower Sesan 2 Dam***

The LS2 project will flood community land in three communes and 6 villages.<sup>161</sup> The compensation and resettlement process for the LS2 dam has lacked transparency and has not been carried out in a consistent manner. The communities to be relocated for the project have not been adequately informed or consulted regarding the compensation and relocation plans, which were developed without their input.<sup>162</sup> As noted, the project lacked an adequate impact assessment and failed to examine less damaging alternative,<sup>163</sup> although subsequent studies have shown that such alternatives do exist, such as a reconfiguration of dam locations.<sup>164</sup> Compensation and long-term costs were not given serious or comprehensive treatment in the assessment reports.<sup>165</sup> Forcing thousands from their homes to pursue such a risky project, with resulting deleterious impacts on the exercise of fundamental human rights is neither reasonable nor proportional. The proposition that the LS2 dam is a last resort and for the “general welfare” is questionable, considering the availability of alternatives and the poor tradeoff between economic benefits and social, cultural, and environmental costs.

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<sup>156</sup> BPED para. 32; CESCR, *Comment 7*, para. 14.

<sup>157</sup> CESCR, *Comment 7*, para. 15.

<sup>158</sup> BPED para. 56.

<sup>159</sup> BPED paras. 56(d), 58; ICESCR 11.

<sup>160</sup> CESCR *Comment 7*.

<sup>161</sup> Kbal Romeas commune (three villages – Kbal Romeas, Sre Sronok and Chrob); Sre Kor commune (two villages - Srekor 1 and Srekor 2); and Pluk commune (one village – Pluk).

<sup>162</sup> Pye, D. & Seangly, P., ‘Waiting for the Deluge’ Phnom Penh Post, 24 February 2014; 3SPN, Consultations with LS2 Communities, 2014; Press Release and Community Statements: Phnong Ethnic Villagers in Kbal Romeas and Lao villager in Srekor 1 & 2 Village Publically Announce: “We Refuse to be Resettled by the Lower Sesan 2 Dam”, 29 September 2014, available at: <http://www.3spn.org/phnong-ethnic-villagers-in-kbal-romeas-and-lao-villager-in-srekor-1-2-village-publically-announce-we-refuse-to-be-resettled-by-the-lower-sesan-2-dam>.

<sup>163</sup> Baird (2009), at 119.

<sup>164</sup> See, e.g., Ziv et al (2012): “75 percent of the tributaries’ total energy could be generated by a [different] combination of dams...” which would reduce fish biomass by roughly 6 percent instead of 20); Ryder, G., ‘Powering 21<sup>st</sup> Century Cambodia with Decentralized Generation: A Primer for Rethinking Cambodia’s Electricity Future’, The NGO Forum on Cambodia and Probe International: October 2009 (indicating that recent technological advances make decentralized electricity systems a viable option for rural Cambodia, including off-grid solar, micro-hydropower, and biomass technologies).

<sup>165</sup> Baird (2009) at 117.

Involuntary evictions have already occurred in some affected villages. In November 2013, a small number of villagers located within the construction area were ordered to relocate without any prior notice and paid limited amounts of compensation (reports state that they received up to \$500 US dollars), which they were given no choice but to accept.<sup>166</sup> In Phluk village, only a minority of households will have land and homes flooded by the project. Most of these villagers do not have registered land title. Villagers in Phluk have not been included in the overall compensation and resettlement policies. Some villagers report having their farmland and homes taken from them and bulldozed without payment of any compensation.<sup>167</sup> There are also reports of compensation payments being skimmed by authorities from the resettlement committee in the form of facilitation fees.<sup>168</sup> Grievance mechanisms within the framework of the government resettlement committee have not adequately addressed this issue.

During 2013, meetings regarding relocation were held with community members from some of the affected villages and provincial officials. Community members in attendance at a meeting in Srekor village with the Provincial Vice-Governor were asked to raise their hands in support of one of two options for a resettlement site. No opportunity was provided at the meeting for villagers to express opinions on the relocation or the proposed sites, or on the project and its impacts. Community members present at the meeting expressed dissatisfaction with the proposed sites and frustration at the lack of opportunity to voice concerns or provide input.<sup>169</sup>

In January 2014, policy documents on the resettlement and compensation plans were issued by the relevant authorities and the project developers. At the time they were issued, these documents were not disseminated to affected communities. In one village, a commune leader was provided with a copy of the documents, but without any further explanation or opportunity to ask questions.<sup>170</sup> Copies of the resettlement policy documents were provided to communities during meetings involving members of the provincial resettlement committee, project developers and communities in June and July 2014. Community members who attended these meetings reported that they were not given any detailed information or explanation regarding the policy documents, and were not consulted or afforded an opportunity to express their concerns.<sup>171</sup> People report being hesitant to plant crops or even travel away from their homes since they do not know the details or timing of the relocation.<sup>172</sup>

In September 2014 community members from Kbal Romeas and Srekor villages publicly issued statements expressing their refusal to relocate for the project.<sup>173</sup> In the statements, the communities noted that they had not been consulted with regarding the project or resettlement plans. Community representatives travelled to Stung Treng to deliver the statements in person to

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<sup>166</sup> Pye, D., and Seangly, P., 'Waiting for the Deluge,' *The Phnom Penh Post*, 24 February 2014.

<sup>167</sup> 3SPN, Notes from Consultations with LS2 Communities, 2014.

<sup>168</sup> Seangly, P., & Pye, D., 'Officials 'take cut' of dam compensation', *Phnom Penh Post*, 3 July 2014, available at: <http://www.phnompenhpost.com/national/officials-%E2%80%98take-cut%E2%80%99-dam-compensation>.

<sup>169</sup> 3SPN, Notes from Consultations with LS2 Communities, 2013.

<sup>170</sup> 3SPN, Notes from Consultations with LS2 Communities, 2014.

<sup>171</sup> The NGO Forum on Cambodia, 'The Press Conference: Communities and CSOs Concerns on Lower Sesan 2 Dam,' 10 July 2014; Mekong Watch and 3S Rivers Protection Network, 'Fact Sheet: Lower Sesan 2'; 3SPN, Consultations with LS2 Communities, 2014.

<sup>172</sup> Royal University of Phnom Penh (2013) at 53.

<sup>173</sup> 3SPN, Press Release and Community Statements: Phnong Ethnic Villagers in Kbal Romeas and Lao villager in Srekor 1 & 2 Village Publicly Announce: "We Refuse to be Resettled by the Lower Sesan 2 Dam", 29 September 2014, available at: <http://www.3spn.org/phnong-ethnic-villagers-in-kbal-romeas-and-lao-villager-in-srekor-12-village-publicly-announce-we-refuse-to-be-resettled-by-the-lower-sesan-2-dam>. See also: Cuddy, A., & Seangly, P., 'Villagers Refuse Relocation,' *Phnom Penh Post*, 29 Sept. 2014.

the Stung Treng Provincial Governor. They were turned away on several occasions by provincial government employees, and were unable to deliver their statement. In November 2014, community members from affected villages in and outside of the dam site issued a public statement to the National Assembly again voicing their non-consent to the resettlement process and demanding that the LS2 project be cancelled.<sup>174</sup> They are still waiting for a response.<sup>175</sup>

During November and December 2014, the Resettlement Committee commenced an asset survey in the communities to be relocated for the purpose of calculating compensation. The surveys were undertaken without any prior notice. On completion of each survey form, representatives of each family were required to place their thumbprint on the document, indicating their agreement to the resettlement and items contained in the survey. The asset survey team were accompanied by military police. Villagers reported that the survey team did not identify themselves and that the survey form and purpose was not explained to them. They were not provided copies of the completed form. Many villagers did not want to thumbprint the document, but did so despite not understanding the document as they felt they had no choice. In one report, a child was asked to thumbprint the survey document on behalf of the family in the absence of their parents.<sup>176</sup>

In Sre Sranok village on 25 November 2014, 9 families refused to put thumbprint on document. The asset survey team told them that they did not have a right to refuse and that if they did not thumbprint the document, they would not receive any compensation. The 9 families eventually thumbprinted the document but reported that they had not willingly done so. On 13 and 14 December in Kbal Romeas, 62 families stated their refusal to accept the resettlement and compensation and voiced their opposition to the project. After pressure from other villagers, 51 of the 62 families placed their thumbprint on the document, but did not allow the measurement team to measure their assets.<sup>177</sup>

On 23 December in Srekor II village, a meeting was held, attended by representatives of the provincial government and project developer and about 90 community members. Government and company representatives delivered information about the resettlement and compensation policies without allowing villagers an opportunity to speak. Three women from the community attempted to express their views and were stopped by the meetings organizers. The asset survey commenced in Srekor I and II immediately following the meeting. Community members who refused to participate and were threatened by police. On the evening of 23 December the commune police chief went around to each household and threatened them, stating that if they did not participate in the survey they would be arrested. The police chief also threatened a community activist, telling her that if she resisted the process, she would be arrested.<sup>178</sup>

The current situation in the LS2 communities occurs in the context of long term resistance to the project by a large proportion of the affected villagers. Villagers have repeatedly voiced their

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<sup>174</sup> 3SPN, Press Release and Community Statements: 'Affected Communities Appeal to the National Assembly: "Lower Sesan 2 Dam Damages Cambodia's Rich Natural Resources. Cancel the Project Immediately"' available at: <http://www.3spn.org/for-immediate-release>. Community statement available at: [http://www.3spn.org/wp-content/uploads/2014/11/Community-Statement-23-November-2014\\_Eng.pdf](http://www.3spn.org/wp-content/uploads/2014/11/Community-Statement-23-November-2014_Eng.pdf).

<sup>175</sup> 3SPN, 'National Assembly of Cambodia has not yet responded to the request of the community', 5 December 2014, available at: <http://www.3spn.org/national-assembly-of-cambodia-has-not-yet-responded-to-the-request-of-the-community>.

<sup>176</sup> 3SPN, Notes from Consultations with LS2 Communities, 2014.

<sup>177</sup> 3SPN, Notes from Consultations with LS2 Communities, 2014.

<sup>178</sup> 3SPN, Notes from Consultations with LS2 Communities, 2014.



opposition to the project, have requested consultations and the opportunity to have concerns addressed and have stated they were ready to “die on their land” instead of being relocated.<sup>179</sup> The latest developments indicate that there is a serious risk of imminent forced evictions.

#### **4.2.2 Adequate Alternative Housing and Compensation**

ICESCR art. 11(1) guarantees the right to adequate housing and ICCPR art. 2(1) requires an effective remedy for human rights violations. The Cambodian government is obliged to provide adequate compensation for personal and real property affected by evictions, as well as to ensure that affected individuals have access to legal remedies or procedures.<sup>180</sup> At a minimum, evicted persons must have access to potable water, food, and sanitation; housing; clothing; medical services; livelihood sources; feed for livestock and access to common property resources; as well as childcare facilities and education for children.<sup>181</sup> Affected persons should not suffer any detriment to their human rights as a result of the project and relocation.<sup>182</sup>

Replacement housing must be adequate. The Committee on Economic, Social, and Cultural Rights has identified the minimum factors for adequate housing as: security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location, including access to employment; and cultural adequacy.<sup>183</sup>

Compensation must be ‘fair’ and include losses for property; goods, including rights and interests in property; any economically assessable damages; and transportation.<sup>184</sup> Cash compensation should not replace real compensation in the form of land and common property resources, and the resettlement land should be the same or better in quality, size and value.<sup>185</sup> Compensation should include lost income or replacement livelihoods when the land provides livelihood for the evicted.<sup>186</sup> Indigenous persons must be provided land of equal value or just compensation for land they have traditionally occupied, and have the right to restitution for cultural, religious, and spiritual property taken without their free, prior, and informed consent.<sup>187</sup> Persons subject to eviction must have access to timely remedy, including “a fair hearing, access to legal counsel, legal aid, return, restitution, resettlement, rehabilitation and compensation.”<sup>188</sup>

#### ***Lower Sesan 2 Dam***

As noted above, the communities affected by the LS2 dam have received very limited information about the compensation and resettlement policies, and little or no opportunity to provide input into the development of these plans. Some community members have still not received any official information about the resettlement and compensation plans, despite the fact

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<sup>179</sup> Pye, D. & Seangly, P., ‘Waiting for the Deluge’ Phnom Penh Post, 24 February 2014; Towards Ecological Recovery and Regional Alliance (TERRA), ‘Cambodian Women, Views on Lower Sesan 2 Dam And the Future of Downstream Communities: Notes on July 2014 Community Field Trip.

<sup>180</sup> CESCR, *General Comment 7*, para. 14.

<sup>181</sup> BPED para. 52.

<sup>182</sup> BPED paras. 56(d), 58; ICESCR 11.

<sup>183</sup> Committee on Economic, Social, and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (art. 11(1) of the Covenant), para 8 (1992). *See also* BPED, para. 55.

<sup>184</sup> BPED para. 60, 61.

<sup>185</sup> BPED para. 60; UNDRIP Article 28(2).

<sup>186</sup> BPED para. 63.

<sup>187</sup> UNDRIP Articles 11(2), 28.

<sup>188</sup> BPED para. 59.

that asset surveys have been undertaken in their villages. The implementation of the compensation and resettlement policies for LS2 has lacked transparency and has been applied inconsistently. For example, in Phluk village, only a minority of households will have land and homes flooded by the project. Phluk villages have not been included in the overall compensation and resettlement plans; instead there are reports that villagers who will lose land have been approached on an individual basis and pressured to accept amounts of cash compensation.<sup>189</sup>

The explanatory note of the *Law on the Authorization of Payment Warranty* relies upon KCC and PECC1's proposed compensation plans, which have been criticized as incomplete and inadequate.<sup>190</sup> New resettlement policy documents were issued in January 2014; these differ from the original plans and were developed without input from affected communities. Many villagers do not have legally registered land title,<sup>191</sup> and it remains unclear whether those without registered title will be fully compensated. There have been recent reports of a redesign of the project, including a reduced reservoir size. This potentially means that fewer villagers will be required to relocate, however no information has been made publicly available about the details of redesign and resulting changes to the resettlement plans.<sup>192</sup>

The compensation and resettlement plans and policies do not appear to comply with human rights and best practice standards. Replacement land proposed for resettlement is felt to be of lesser quality than villagers' present land, with some proposed sites of poor quality for rice or vegetable farming and located upon hazardous groundwater.<sup>193</sup> Compensation amounts for housing and fruit trees are deemed insufficient.<sup>194</sup> Amounts of cash compensation proposed for land are low, and some villagers have rejected compensation offers as falling short of market prices.<sup>195</sup> The compensation does not include transportation and labor costs of resettlement or income lost during the resettlement process. Proposed compensation measures do not include sufficient compensation for lost livelihoods or provide for adequate livelihood replacement schemes. Some of the villagers to be relocated for LS2 have expressed their desire to live in traditional wooden houses and are concerned that compensation for new houses is inadequate to support the cost of the high quality wood used.<sup>196</sup>

No compensation is included for long-term restrictions on movement caused by the project.<sup>197</sup> No compensation has been offered for the loss of culturally important sites, such as spirit houses and forests.<sup>198</sup> At a recent meeting on 31 December 2014 regarding the resettlement, attended by district and provincial authorities, project developers and some community representatives,

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<sup>189</sup> 3SPN, Notes from Consultations with LS2 Communities, 2014.

<sup>190</sup> See generally, Baird (2009) at 29-38; Rasmey, L., (2013) Case Study: Expected Impact and Management Plan of Lower Se San II Hydropower Project, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), at 31-33.

<sup>191</sup> Baird (2009) at 33.

<sup>192</sup> Baird (2014).

<sup>193</sup> Baird (2009) at 32; Mekong Watch and 3S Rivers Protection Network, 'Fact Sheet: Lower Sesan 2 Hydropower Project,' Pye, D., & Seangly, S., 'Waiting for the Deluge,' *The Phnom Penh Post*, 24 Feb. 2014.

<sup>194</sup> Royal University of Phnom Penh (2013) at 53;

<sup>195</sup> Yeang Socheameta and Samean Yun, 'Cambodia's Parliament OKs Compensation Plan,' *Radio Free Asia*, 19 June 2014, available at: <http://www.rfa.org/english/news/cambodia/dam-06192014195419.html>; 3SPN, Notes from Consultations with LS2 Communities, 2014.

<sup>196</sup> See Baird (2009) at 86, 93-94, 106.

<sup>197</sup> See Baird (2009) at 36-37.

<sup>198</sup> Royal University of Phnom Penh (2013) at 54; Baird (2009) at 36.

possibly payments for lost spirit homes were discussed as a benefit, rather than as a right.<sup>199</sup> No compensation is provided for lost grazing land or access to forests and forest products, which are an important source of livelihoods for many community members. Compensation plans for fishery losses are inadequate.<sup>200</sup> There is virtually no compensation for the tens of thousands of villagers upstream and downstream of the site whose livelihoods and food security will be affected by water quality changes, fishery impacts, and destruction of farming land.<sup>201</sup>

The remedial mechanisms are inadequate and compensation and mitigation plans lack clear roles and responsibilities for monitoring and implementation.<sup>202</sup> The measures that are in place lack the budget or equipment necessary to perform their duties, or a mechanism to fairly and effectively receive and resolve complaints and grievances in the implementation of the resettlement policy. Authorities have acknowledged this issue, but have failed to act.<sup>203</sup>

### ***Stung Cheay Areng Dam***

Only limited information regarding the proposed resettlement has been provided to the communities of the Areng valley who will be relocated for the project. The current resettlement plans and proposed relocation sites remain unknown. Communities have asserted that land proposed by the government and the previous project developers for resettlement is in a protected forest area, is too small and is unsuitable as it forms part of an elephant corridor.<sup>204</sup>

In December 2013, SBK Research and Development (SBK) entered the communities of Chom Nob, Prolay and Thmor Daun Pov to conduct an asset survey on behalf of Sinohydro Resources Ltd. According to the communities, SBK staff failed to provide any information and or to consult with community members, and instead, made misrepresentations regarding the purpose of the survey in order to obtain the thumbprints of the local community members which they used to evince agreement to the proposed resettlement and compensation. When conducting the survey, SBK used surveyors from the Directive 001 Youth Group to conduct the survey together with SBK staff. Use of the Youth Group surveyors as subcontractors without clearly declaring the purpose meant that the villagers understood that the survey was being undertaken in order to implement official government policy, rather than in connection with a private project to which they were entitled to information, consultation and consent under Cambodian law. The surveyors further misled the communities by failing to explain the survey form or its purpose. The villagers assert that if they had understood the purpose of the form, they would not have agreed to complete it or to place their thumbprints on the form.<sup>205</sup>

In addition to omissions and misrepresentations regarding the purpose and importance of the form, the content of the form was complex and not clearly explained to the communities in a manner that they could understand. After completing the forms a number of villagers told SBK

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<sup>199</sup> 3SPN, Notes from Consultations with LS2 Communities, 2014.

<sup>200</sup> See Baird (2009) 33-35, 37, 62.

<sup>201</sup> See Baird (2009) 37-38. See also, Royal University of Phnom Penh (2013) at 53 (“Downstream villagers complained that the dam would cause a loss of biodiversity resources, poor water quality and flooding. . . the interviewed government stated that the downstream villages would only suffer minor effects and should not be eligible for compensation at all and that’s why they were not included in the study.”).

<sup>202</sup> Grimsditch (2012), at 30.

<sup>203</sup> Royal University of Phnom Penh (2013) at 53.

<sup>204</sup> Mam, K., ‘Will Cambodia Flood a Sacred and Biodiverse Valley for a Dubious Dam?’ Mother Jones, 19 October 2014.

<sup>205</sup> Samreth Law Group, ‘Report from community consultations’ March 2014.

representatives that they did not want to relocate and did not consent to the dam. This information was not recorded on the forms. Despite misrepresenting the purpose of the form to the communities, SBK used the completed survey forms to submit a report on resettlement and compensation to the project developers and MME.<sup>206</sup>

### 4.3 The Right to an Adequate Standard of Living

#### 4.3.1 Rights to Food, Health, Water and Livelihoods

ICESCR article 11 recognizes the right to an adequate standard of living, including adequate food, and places a duty on the State to protect against business activities which deprive people of access to food and nutrition.<sup>207</sup> This includes guaranteeing that changes in access to food supplies do not negatively affect dietary intake and composition.<sup>208</sup>

ICESCR article 12 sets out a right to the enjoyment of the highest attainable standard of physical and mental health, which includes protecting access to safe and potable water, adequate sanitation, safe food, nutrition, and healthy environmental conditions.<sup>209</sup> States violate this right when they take retroactive measures that are incompatible with ensuring access to the minimum essential food that is nutritionally adequate and safe.<sup>210</sup> The Committee on Economic, Social, and Cultural Rights has held that development-related activities that involuntarily displace indigenous persons from their traditional territories, and which deny them their sources of nutrition and break their symbiotic relationship with their lands, are damaging to their health.<sup>211</sup>

The right to water is protected under articles 11 and 12 of the ICESCR.<sup>212</sup> The right obliges governments to take steps to ensure the protection of water sources, including by reducing the depletion of water resources through unsustainable damming and ensuring that proposed developments do not interfere with access to adequate water.<sup>213</sup> States violate ICESCR article 12 by taking retroactive measures that are incompatible with ensuring access to an adequate supply of safe and potable water.<sup>214</sup> Water must be treated as a social and cultural good, not primarily an economic good, and indigenous peoples' access to water on their ancestral lands must be protected from encroachment.<sup>215</sup>

States must protect persons' right to gain their living by the work they freely choose.<sup>216</sup> They must respect the right of individuals to enjoy just and favorable working conditions that allow a decent living.<sup>217</sup> In conjunction with the right to food, this requires measures to protect self-

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<sup>206</sup> Samreth Law Group, 'Report from community consultations' March 2014.

<sup>207</sup> CESCR, *General Comment 12: The Right to Adequate Food (Art. 11)*, paras. 15, 27, E/C.12/1999/5 (1999).

<sup>208</sup> CESCR, *General Comment 12*, para. 9.

<sup>209</sup> ICESCR art. 12; CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social, and Cultural Rights)*, para. 11, E/C.12/2000/4 (2000).

<sup>210</sup> CESCR, *General Comment 14*, para. 43(b) and (c), 48.

<sup>211</sup> CESCR, *General Comment 14*, para. 27.

<sup>212</sup> CESCR, *Comment 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights)*, E/C.12/2002/11 (2003).

<sup>213</sup> CESCR, *Comment 15*, paras 25, 28.

<sup>214</sup> CESCR, *General Comment 14*, para. 43(b) and (c), 48.

<sup>215</sup> CESCR, *Comment 15*, para. 11, 16(d).

<sup>216</sup> ICESCR art. 6.

<sup>217</sup> ICESCR art. 7.

employment that provides remuneration ensuring a decent living.<sup>218</sup> Indigenous persons have a right to security in their means of subsistence and enjoyment of traditional economic activities.<sup>219</sup>

### ***Lower Sesan 2 Dam***

According to studies, at least 38,675 individuals, including many indigenous persons, stand to lose access to the vast majority of their fishery resources as a result of the LS2 dam, and at least 78,000 people upstream of the dam will lose access to migratory fish.<sup>220</sup> Furthermore, the dam “would certainly result in significant negative fisheries impacts on... Vietnam, Laos and Thailand.”<sup>221</sup> A recent scientific study predicts that the LS2 dam will reduce fish biomass across the entire Mekong Basin by 9.3% and critically endanger more than 50 fish species, which equates to 200,000 tons of fish per year; the most severe impact of any proposed Mekong tributary dam.<sup>222</sup> The dam will also contribute to significant changes in hydrological flows in the Mekong River and decrease sediment by approximately 6-8 percent,<sup>223</sup> affecting agricultural production in the Mekong floodplains and Delta.

The estimated 200,000-ton reduction in fish catch per year across the Mekong Basin<sup>224</sup> and other basin wide impacts to sediment and hydrological flows is likely to have devastating effects on the food security and livelihoods of hundreds of thousands of people in Cambodia, Laos, Vietnam, and even Thailand.<sup>225</sup> As one report has noted, “in a river basin where 70% of communities are rural and inland fisheries are the most intensive in the world, food security and livelihoods are still largely based on river-dependent natural resources. Risks and losses incurred by the Mekong terrestrial and aquatic ecosystems translate into threats to the livelihoods of millions of people—primarily through increasing food insecurity in the basin.”<sup>226</sup>

Cambodians consume around 570,000 tons of inland fish per year, and fish and other aquatic animals constitute 18% of total food consumption for all Cambodians.<sup>227</sup> For the average Cambodian, fish and other aquatic animals contribute 37% of total protein consumed, 28% of total fat intake and 37% of total iron intake.<sup>228</sup> In a country in which 81% of people currently do not receive the recommended iron intake, 75% of individuals lack the necessary level of energy intake,<sup>229</sup> and 33% of the population is undernourished,<sup>230</sup> “[a] reduction in the availability of fish and specifically of long-distance migrants, which is important for the provision of iron, would have an extremely detrimental impact on the rural population, driving iron security even lower and posing a risk to public health.”<sup>231</sup> The health of children and pregnant women stand

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<sup>218</sup> CESCR, *General Comment 12*, para. 26.

<sup>219</sup> UN Declaration on the Rights of Indigenous Peoples (2007), Article 20.

<sup>220</sup> Baird (2009) at 13.

<sup>221</sup> Baird (2009) at 58.

<sup>222</sup> Ziv et al (2012).

<sup>223</sup> Vrieze, P, & Chhorn C., "The Battle for the 3S Rivers." *The Cambodia Daily*, 10 September 2011; Piman et al (2013).

<sup>224</sup> Carmichael, R., "Work Begins on Controversial Cambodian Dam." *Voice of America*. 7 May 2013, quoting Eric Baran, World Fish Center. Web. 3 June 2013.

<sup>225</sup> Baird (2009) at 14.

<sup>226</sup> ICEM (2010) SEA full report p 16, at note 15.

<sup>227</sup> Inland Fisheries Research and Development Institute (IFREDI), Fisheries Administration, Ministry of Agriculture, Forestry and Fisheries, *Food and nutrition security vulnerability to mainstream hydropower dam development in Cambodia*, December 2012, at 4, 5.

<sup>228</sup> IFREDI, December 2012, at 5.

<sup>229</sup> IFREDI, December 2012, at 5.

<sup>230</sup> MRC. 'State of the Basin Report 2010: Summary.' Publication. Vientiane: Mekong River Commission, 2010, at 44.

<sup>231</sup> IFREDI, December 2012, at 7.

most at risk from a protein reduction.<sup>232</sup> In Stung Treng, the site of the project, the Provincial Department of Planning reported in 2003 that 44.8% of children under five were underweight.<sup>233</sup>

The loss of fisheries will have negative economic effects on the region, especially in Cambodia. KCC calculated the dam to cause a US \$2.84 million loss in fishing revenue per year.<sup>234</sup> This estimate has been criticized as being far too low.<sup>235</sup> In 2008, the total value of Cambodian fishery exports was US \$35.8 million,<sup>236</sup> and fishery sales account for nearly 12% of Cambodian GDP,<sup>237</sup> with the industry creating over 420,000 primary sector jobs and over 2 million secondary sector jobs.<sup>238</sup> The dam will damage the economic livelihoods of thousands of Cambodian fishers and the contribution of the industry to the national economy.

Villagers on the Sesan River claim that upstream dams have already caused flooding and changes to water flow, reduced water quality and decreased fish catch for family consumption.<sup>239</sup> Villages in the Srepok and Sesan River Basins in Cambodia to be impacted by the fishery losses from the LS2 dam encompass range of ethnicities, including Lao, Bunong, Tampuan, Khmer, Khmer Khek, Brao, Brao Tanap, Jarai, Kachok, Kreung, Kavet, Chinese, and Cham.<sup>240</sup> The loss of a crucial protein and iron source could strain these communities' food and health security, their livelihoods as well as destroying their cultural traditions and way of life.

The dam will also harm the health and livelihoods of hundreds of thousands of farmers. The dam is expected to destroy 1,290 hectares of agricultural land, around one quarter of the wet rice paddy land in Sesan District, which is of especially good quality for rice farming.<sup>241</sup> Nutrient rich sediment flows are crucial for fertilizing the small rice farms of hundreds of thousands of subsistence-level riverine villagers,<sup>242</sup> and the loss of sediment "would reduce the stability of river channels and the Mekong Delta coastline, increasing erosion and diminishing productivity of the aquatic system and agriculture in the Mekong floodplains and Tonle Sap Lake."<sup>243</sup>

Tens of thousands of people located downstream of the LS2 dam will experience dramatic changes in hydrology and water quality due to the dam's construction.<sup>244</sup> The quality of the

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<sup>232</sup> IFREDI, December 2012, at 5.

<sup>233</sup> Krahn, J., (2007) 'Lao PDR: Comprehensive food security and vulnerability analysis', Vientiane, World Food Program (cited in Baird, 2009, at 227).

<sup>234</sup> Baird (2009) at 34. In the draft EMP the company, however, inexplicably only provided \$2.3 million in compensation in one lump sum, instead of the \$2.84 million in per annum payments which is due, as fishing losses would be permanent.

<sup>235</sup> Baird (2009) at 34-35.

<sup>236</sup> FAO. 'National Fishery Sector Overview: Cambodia'. Food and Agriculture Organization of the United Nations, Mar. 2011 at 1.

<sup>237</sup> Hortle, K.G. 'Consumption and the yield of fish and other aquatic animals from the Lower Mekong Basin'. MRC Technical Paper No. 16, Vientiane: Mekong River Commission, 2007 at 12; Fisheries. Mekong River Commission. Web. 5 June 2013. Available at: <http://www.mrcmekong.org/topics/fisheries>.

<sup>238</sup> FAO. (2011) at 1.

<sup>239</sup> Community representatives of the 3S Rivers, 'The joint statement of the communities along Sesan, Srepok and Sekong Rivers: Request to Withdraw China's Involvement in the Lower Sesan 2 Dam' delivered to Ambassador of the People's Republic of China in Cambodia, 12 December 2013, available at: <http://www.3spn.org/the-communities-along-the-sesan-srepok-and-sekong-river-submit-their-joint-statement-to-chinese-embassy>.

<sup>240</sup> Baird (2009), at 42, 46-47, 49-53

<sup>241</sup> Baird (2009) at 31-32.

<sup>242</sup> Carmichael, R., "Work Begins on Controversial Cambodian Dam." *Voice of America*. 7 May 2013, quoting Eric Baran, World Fish Center. Web. 3 June 2013.

<sup>243</sup> Vrieze, P., & Chhorn C., "The Battle for the 3S Rivers." *The Cambodia Daily*, 10 September 2011 at 55.

<sup>244</sup> Baird (2009) at 13

downstream water supply will be negatively affected for many years.<sup>245</sup> Toxic algae created in the reservoir could be carried downstream, causing serious illnesses.<sup>246</sup> The creation of a stagnant reservoir could also increase mosquito-breeding habitats, increasing dengue fever and malaria.<sup>247</sup> Current infrastructure around the dam site does not provide safe drinking water,<sup>248</sup> and the amount of usable or drinkable water will further decline as a result of the dam.<sup>249</sup>

### ***Stung Cheay Areng Dam***

The full EIA study for the Cheay Areng dam has not been completed. An Initial Environmental Impact Assessment (IEIA) report conducted in 2008 was made public in Khmer. However, a second IEIA, which forms the basis of the current EIA study now underway, has not yet been made public. Similarly, an updated resettlement and compensation plan has been developed by SBK, but this report has not been publicly released. There is therefore limited information regarding the potential impacts of the project on rights to food, health and water.

As noted, the Areng Valley is home to approximately 1,500 people, the vast majority of whom are indigenous Chong (Khmer Daeum), who currently manage the river, forest and its resources sustainably and whose livelihoods and well-being are intricately connected with the surrounding land and forests.<sup>250</sup> The project will flood a large area of land and forest, including 1,500 – 2,000 hectares of indigenous lands and sacred forests and will displace 1,500 people in 3 communes.<sup>251</sup> The people relocated will be forced to adapt to new livelihoods and ways of life. The project is likely to create further conflicts over access to food and other resources between affected communities and workers and migrants to the area.

The Cheay Areng Dam also threatens the health and livelihoods of 2,500 persons living in the Trapeang Rung commune downstream of the dam. The irrigation of community farms' rice paddies depends upon the flooding cycles of the river, which will be disrupted by the dam. Fishery production downstream will also be affected, further impacting the health of local communities who are reliant on fish for protein.<sup>252</sup>

## **4.4 Indigenous Peoples and Minority Rights**

### **4.4.1 Free, Prior and Informed Consent**

Under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP): “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other

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<sup>245</sup> Baird (2009) at 66-67.

<sup>246</sup> Baird (2009) at 67.

<sup>247</sup> BankTrack, ‘Dodgy Deal: Lower Sesan 2 Dam, Cambodia’, 24 Feb. 2014, available at: [http://www.banktrack.org/manage/ajax/ems\\_dodgydeals/createPDF/lower\\_sesan\\_2\\_dam](http://www.banktrack.org/manage/ajax/ems_dodgydeals/createPDF/lower_sesan_2_dam).

<sup>248</sup> Baird (2009) at 66.

<sup>249</sup> BankTrack, ‘Dodgy Deal: Lower Sesan 2 Dam, Cambodia’, 24 Feb. 2014.

<sup>250</sup> Seangly, P., & Pye, D., ‘Standoff in the Areng Valley Continues’, *Phnom Penh Post*, 18 March 2014. Community representatives have put the figure at 1600.

<sup>251</sup> Conservation International (2007), at 16.

<sup>252</sup> Conservation International (2007), at 2.

resources.”<sup>253</sup> UNDRIP provides that “no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”<sup>254</sup>

‘Free, prior and informed consent’ is a means of effectuating the substantive rights of indigenous peoples, including self-determination and the preservation of indigenous culture and way of life.<sup>255</sup> Where the risk posed by a project or activity to indigenous peoples and their way of life is substantial, the need for actual and prior consent has been recognized.<sup>256</sup> The UN Special Rapporteur in the Rights of Indigenous Peoples has stated that the obligation to obtain prior consent is “presumptive” for extractive or similar operations that might affect “natural resources that are traditionally used by indigenous peoples in ways that are important to their survival.”<sup>257</sup>

Free, prior, and informed consent requires those affected by a project be provided full information about the project and its impacts, its costs and benefits, and how it would affect the community and their livelihoods, land and culture. The lack of information, transparency and engagement or dialogue with communities concerned in both the LS2 and Cheay Areng projects means those affected cannot be considered ‘informed’ in order to fully understand the project impacts and provide their consent. Furthermore, indigenous communities affected by both of the projects have clearly stated their opposition and their fears that the projects will impact on their enjoyment of rights and the integrity and survival of their communities.

### ***Lower Sesan 2 Dam***

Communities living in the area of the dam site who will be relocated include several indigenous and ethnic minority groups, including Phnong, Kavet, Pov and Lao.<sup>258</sup> There has been no free, prior, and informed consent of indigenous communities to the LS2 project or to the relocation. Indigenous villagers have continued to express opposition to the project and to the relocation plans, prior to approval of the project until the current date.

Little effort has been made to engage affected communities in decision-making or meaningfully address their concerns. In 2009, an independent review of the EIA found that 100% of the communities and individuals approached, including groups consulted during the EIA process and groups who had not been consulted during the EIA process, opposed construction of the dam.<sup>259</sup> During the initial resettlement and compensation study conducted by EVN, alleged ‘consent’ was obtained by taking pictures of uninformed Cambodian villagers holding placards in Vietnamese, while villagers refusing to be photographed were reported to local authorities. Intimidation, harassment, and threats of arrest have been reported against those who oppose the

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<sup>253</sup> UNDRIP Article 32.

<sup>254</sup> UNDRIP Article 10.

<sup>255</sup> Anaya, J., Report of the Special Rapporteur on the rights of indigenous peoples, UN Doc. A/HRC/21/47, at 48-51 (6 July 2012).

<sup>256</sup> Anaya (2012) at 65 (“[W]here the rights implicated are essential to the survival of the indigenous groups as distinct peoples and the foreseen impacts on the exercise of the rights are significant, indigenous consent to the impacts is required, beyond simply being an objective of consultations.”).

<sup>257</sup> Anaya (2012). See also Anaya, J., Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples, UN Doc. A/HRC/24/41 (1 July 2013) at 81-84.

<sup>258</sup> Baird (2009) at 118; Royal University of Phnom Penh (2013) at 55; The NGO Forum on Cambodia, ‘The Press Conference: Communities and CSOs Concerns on Lower Sesan 2 Dam,’ 10 July 2014, available at:

<http://www.ngoforum.org.kh/index.php/en/hot-news/events/194-title-the-press-conference-communities-and-csos-concerns-on-lower-sesan-2-dam>.

<sup>259</sup> Baird (2009), at 13.



project, as well as attempts to bribe community leaders to obtain their consent and support in encouraging community members to accept the project.<sup>260</sup>

Community members have arranged numerous peaceful public demonstrations and other activities to express concerns over the LS2 dam and frustration at lack of consultation and any proper assessment of impacts on communities.<sup>261</sup> Communities have developed and delivered petitions to various bodies, including several Cambodian Ministries: MME, MOE and the Ministry of Economy and Finance (MEF). In September 2014, indigenous and ethnic minority communities issued public statements stating opposition to the project and their refusal to relocate. In the statements, community members noted that they have not been afforded an opportunity to express concerns over the loss of land and resources and have these considered in decision-making around the project.<sup>262</sup> Petitions have also been delivered to the Chinese Ambassador to Cambodia and to National Assembly. No response has been received to date.

### ***Stung Cheay Areng Dam***

The relocation of the indigenous communities of the Areng valley to make way for the dam threatens belief systems, traditions, livelihoods and wellbeing of the valley's inhabitants.<sup>263</sup> There has been no attempt to obtain the free, prior and informed consent or to provide opportunities for consultation and dialogue with the indigenous Areng communities with respect to the Stung Cheay Areng project. The villagers have demonstrated clear opposition to the project and voiced their concerns over the lack of dialogue, consultation and consent.

In March 2014, indigenous villagers from the Cheay Areng Valley commenced a roadblock to prevent Sinohydro staff from entering and transporting machinery into the valley to conduct feasibility and environmental impact studies. The roadblock remained in place for months, with ongoing standoffs between villagers and company representatives.<sup>264</sup> In September 2014 several community members and activists were arrested and authorities ordered that the roadblock be discontinued.<sup>265</sup> However, the roadblock was again restarted in October 2014 in response to attempts to press forward with preparatory studies.<sup>266</sup> The district and provincial authorities reportedly required Areng communities and activists to discontinue the roadblock and allow access to the valley to Sinohydro and contracting personnel.<sup>267</sup> Currently, subcontracting companies accompanied by military police have gained access to the valley to undertake

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<sup>260</sup> 3SPN, 'Consultation with LS2 Communities', 2014.

<sup>261</sup> Yeang Socheameta and Samean Yun, 'Cambodia's Parliament OKs Compensation Plan,' *Radio Free Asia*, 19 June 2014; The NGO Forum on Cambodia, 'The Press Conference: Communities and CSOs Concerns on Lower Sesan 2 Dam.'

<sup>262</sup> 3SPN, 'Press Release and Community Statements: Phnong Ethnic Villagers in Kbal Romeas and Lao villager in Srekor 1 & 2 Village Publically Announce: "We Refuse to be Resettled by the Lower Sesan 2 Dam"', 29 September 2014. *See also*: Cuddy, A. & Seangly, P. 'Villagers Refuse Relocation,' *Phnom Penh Post*, 29 September 2014.

<sup>263</sup> Conservation International (2007) at 1-2.

<sup>264</sup> Narim, K., 'Chorng Villagers Block Chinese Engineers from Reaching Dam', *The Cambodia Daily*, 17 May 2014.

<sup>265</sup> Narim, K., 'Police Arrest Activists in Koh Kong', *Cambodia Daily*, 16 September 2014, available at: <http://www.cambodiadaily.com/news/police-arrest-environmental-activists-in-koh-kong-68053/>.

<sup>266</sup> Pye, D., 'Eco groups slam Areng Dam,' *Phnom Penh Post*, 3 April 2014, available at: <http://www.phnompenhpost.com/national/eco-groups-slam-areng-dam>.

<sup>267</sup> *See* Narim K., 'Activists Released, Plan to Block Road Again', *The Cambodia Daily*, 17 September 2014, available at: <http://www.cambodiadaily.com/news/environmental-activists-released-plan-to-block-road-again-68114>; Seangly P. & Pye, D., 'Soldiers sent to Areng post', *Phnom Penh Post*, 17 September 2014, available at: <http://www.phnompenhpost.com/national/soldiers-sent-areng-post>.

feasibility and EIA studies, and there are reports that they have pressured community members into accepting resettlement and compensation proposals.<sup>268</sup>

#### 4.4.2 Indigenous Peoples Rights and Cultural Rights

The UNDRIP contains the right of indigenous people to self-determination, encompassing a right to freely ‘pursue their economic, social and cultural development’.<sup>269</sup> Indigenous peoples have a right to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in traditional and other economic activities.<sup>270</sup> Indigenous peoples are free to determine and develop priorities and strategies for exercising the right to development, including those regarding the use of their lands and resources,<sup>271</sup> and health, housing and economic and social programs affecting them.<sup>272</sup> UNDRIP also recognizes a right to maintain and strengthen distinctive spiritual relationships with traditionally owned or otherwise used and occupied lands, territories, waters and other resources and to uphold responsibilities to future generations.<sup>273</sup>

Indigenous people have a right to protection against forced destruction of their cultures and identity and the right to maintain, protect, and access their religious and cultural sites.<sup>274</sup> The state has a duty to provide effective mechanisms to prevent and redress ‘actions with the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; or dispossessing them of their lands, territories or resources.’<sup>275</sup> Under UNDRIP, indigenous peoples deprived of any of their rights are entitled to just and fair redress through an effective grievance mechanism. Just and fair redress includes appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impacts from projects undertaken on indigenous people’s land or damaging their land, water and other natural resources.<sup>276</sup>

The right to take part in cultural life<sup>277</sup> includes non-interference with the right of indigenous peoples or ethnic minorities to the lands and resources they have traditionally occupied or used, and protecting against unjust exploitation of their resources by state or corporate entities.<sup>278</sup> The right of minorities to enjoy their own culture, protected by ICCPR article 27, requires that States refrain from interfering with indigenous peoples’ and ethnic minorities’ ways of life closely associated with their territories and the use of natural resources, including traditional activities such as fishing and hunting.<sup>279</sup> States must respect the right of indigenous peoples and ethnic minorities to maintain their spiritual relationship with traditionally occupied lands, waters, and resources,<sup>280</sup> and their right to protect past, present, and future manifestations of their culture.<sup>281</sup>

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<sup>268</sup> Samreth Law Group, Notes from consultations with Areng Valley communities.

<sup>269</sup> UNDRIP, Article 3.

<sup>270</sup> UNDRIP Article 20.

<sup>271</sup> UNDRIP Article 32.

<sup>272</sup> Article 23.

<sup>273</sup> Article 25.

<sup>274</sup> Article 12.

<sup>275</sup> Article 8.

<sup>276</sup> Article 32.

<sup>277</sup> ICESCR Art. 15.

<sup>278</sup> CESCR, *General Comment 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1(a), of the International Covenant on Economic, Social, and Cultural Rights)*, paras. 36, 50(b) and (c), E/C.12/GC/21 (2009).

<sup>279</sup> See Human Rights Committee, *General Comment No. 23: Article 27 (Rights of Minorities)*, paras. 3.2 and 7, CCPR/C/21/Rev.1/Add.4 (1994).

<sup>280</sup> UNDRIP Article 25.

<sup>281</sup> UNDRIP Article 11.

### ***Lower Sesan 2 Dam***

Indigenous and ethnic minority communities stand to be among those most affected by the LS2 project. The language and cultures of resettled groups are at risk, and many of the villagers believe the project may force the dissolution of communities due to loss of livelihoods.<sup>282</sup> Flooding will destroy traditional lands, ancient burial grounds, and spiritual and cultural sites.<sup>283</sup> In a 2013 study, 88% of upstream villagers surveyed stated that the LS2 dam would destroy their spiritual and cultural beliefs.<sup>284</sup> Communities fear a breakdown of community integrity and the disappearance of traditional practices and knowledge.<sup>285</sup> Many villagers, including those who are Buddhists, hold animist beliefs, and are deeply concerned that together with their houses, their spiritual places and burial sites will be flooded by the dam.<sup>286</sup> The villagers believe these spirits may become enraged, and require substantial sacrifices, such as buffaloes and pigs.<sup>287</sup>

Far-reaching impacts on fisheries and farms will affect the traditional livelihoods of other indigenous communities upstream and downstream of the projects. Forcing communities to modify traditional lifestyles and adopt alternative livelihoods is likely to cause irreparable damage to indigenous cultures. Thousands of indigenous persons' right to water as a cultural good will be affected due to relocations away from water on their ancestral lands and the loss of access to traditional fisheries. In short, the dam risks causing the erasure of unique indigenous cultures, belief systems, traditions, and the cultural heritage they represent, and affecting the livelihoods of thousands of indigenous people and ethnic minority groups in the Mekong Basin.

Concern for protection and preservation of indigenous cultures and traditional practices are given paramount importance in the UNDRIP. The policies regarding resettlement and compensation for the LS2 project have thus far failed to take any account of the loss of such non-tangibles which cannot be easily compensated or replaced. The stated concerns of indigenous and ethnic minority groups have not been considered in the development of resettlement and compensation proposals. On the contrary, during meetings in the villages announcing the compensation and relocation policies, communities were informed that it is not possible to modify existing plans.<sup>288</sup>

### ***Stung Cheay Areng Dam***

In the Areng Valley, the indigenous communities' social, cultural, and religious identities are intricately tied to the spirit deities and spirit forests of the area.<sup>289</sup> The displaced persons will be forced to adapt new livelihoods and ways of life, losing their traditional customs and spiritual ties to the land and leading to a permanent erasure of their cultural and belief systems. Priceless archaeological sites may also be destroyed by the dam. Surveys conducted between 2002 and 2012 located eleven ancient and culturally unique Khmer Chong burial sites that have not been

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<sup>282</sup> Baird (2009), at 95.

<sup>283</sup> Yeang Socheameta and Samean Yun, 'Cambodia's Parliament OKs Compensation Plan,' *Radio Free Asia*, 19 June 2014; Baird, at 36; Pye, D., & Seangly, P., 'Waiting for the Deluge,' *The Phnom Penh Post*, 24 Feb. 2014; Royal University of Phnom Penh (2013) at 54-56.

<sup>284</sup> Royal University of Phnom Penh (2013) at 24.

<sup>285</sup> 'The NGO Forum on Cambodia, 'The Press Conference: Communities and CSOs Concerns on Lower Sesan 2 Dam,' 10 July 2014.

<sup>286</sup> Baird (2009), at 36, 96, and 110.

<sup>287</sup> Baird (2009), at 36.

<sup>288</sup> Community reports from the meetings with representatives of government resettlement committee, June-July 2014.

<sup>289</sup> Samreth Law Group, Notes from community consultations.

subjected to detailed studies.<sup>290</sup> These are some of the only identified historical remains in Cambodia from the Khmer Chornng ethnic minority group.

#### 4.5 Human Rights Impacts on Women and Children

The Cambodian government has obligations to ensure women's equal enjoyment of all human rights and to avoid activities with a disproportionate impacts on women.<sup>291</sup> This must take into account particular issues faced by rural women, including their work in non-monetized sectors of the economy.<sup>292</sup> The government also has an obligation to pursue the full implementation of children's right to the highest attainable standard of health, including combatting disease and malnutrition, in part by ensuring adequate nutritious foods and clean drinking-water, while taking into consideration the risks of environmental pollution.<sup>293</sup> The right of children to participate in their culture must also be protected.<sup>294</sup>

The Committee on the Rights of the Child (CRC) has emphasized that violations of children's rights can lead to lifelong and irreversible developmental impacts that can span generations.<sup>295</sup> The CRC has noted that the environmental degradation caused by business activities can violate children's rights to health, access to safe water and sanitation, and food security.<sup>296</sup> To meet obligations in the context of business related human rights abuses, States must take legislative, regulatory and enforcement measures, such as requiring businesses to undertake due diligence on child-rights; remedial measures; monitoring; and collaboration and awareness-raising actions.<sup>297</sup>

Women's groups representing members of the affected communities have expressed strong opposition to the LS2 and Cheay Areng projects. Women will be disproportionately affected by both projects, as they are traditionally responsible for activities such as gathering water and growing food.<sup>298</sup> If water quality decreases, women will experience health issues first – they will be most vulnerable to mosquito-carried illnesses and hazardous water conditions. Additionally, if water levels decrease or relocation sites are farther from the river, women will be forced to travel longer distances to gather water, with potential risks to their personal security. The poor quality of alternative farmland may force women to find replacement means of gathering food.

Children also will be negatively affected. As mentioned above, the developmental health of children and pregnant women are most at risk from reductions in fish protein intake. Additionally, children will face high risks of health issues and drowning due to the reduction in water quality, and possible water surges related to the dams' operations, as they spend time playing and bathing in the water.<sup>299</sup> Children's education risks being interrupted due to the relocation of families and a need to contribute to the family livelihood following relocation.<sup>300</sup>

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<sup>290</sup> McPherson, P., 'New chapter in ancient jar mystery', *The Phnom Penh Post*, 31 January 2014, available at: <http://www.phnompenhpost.com/7days/new-chapter-ancient-jar-mystery>.

<sup>291</sup> ICCPR Art. 3; ICESCR art. 3.

<sup>292</sup> CEDAW Art. 14(1).

<sup>293</sup> CRC Article 24.

<sup>294</sup> CRC Article 30.

<sup>295</sup> Committee on the Rights of the Child, General Comment No. 16, para 4(a)

<sup>296</sup> Committee on the Rights of the Child, General Comment No. 16, paras. 19-20.

<sup>297</sup> See Committee on the Rights of the Child, General Comment No. 16.

<sup>298</sup> Pye, D., & Seangly, P., 'Waiting for the Deluge,' *The Phnom Penh Post*, 24 Feb. 2014.

<sup>299</sup> BankTrack, *Dodgy Deal: Lower Sesan 2 dam, Cambodia*, 24 Feb. 2014.

<sup>300</sup> BankTrack, *Dodgy Deal: Lower Sesan 2 dam, Cambodia*, 24 Feb 2014.

## 4.6 The Right to a Healthy and Sustainable Environment

The ICESCR article 12(2)(b) requires States to take measures necessary to achieve the improvement of all aspects of environmental and industrial hygiene. The natural environment has been interpreted by the CESCR to be one aspect of humans' right to a cultural life that requires protection,<sup>301</sup> and indigenous peoples have a right to the conservation of their environment.<sup>302</sup> Furthermore, article 28(f) of the ASEAN Human Rights Declaration states the right to a safe, clean, and sustainable environment. The destruction of ecosystems and biodiversity as a result of ill-planned hydropower dams infringes upon these rights and the enjoyment of humanity's shared cultural heritage of a healthy, natural environment.

Along with the 9.3% reduction in fish biomass across the Mekong Basin, the LS2 Dam will create approximately 56 new endangered species of fish.<sup>303</sup> The dam is also expected to destroy over 25,000 hectares of forests, including woodland located close to National Protected Areas and habitats identified by the World Wide Fund for Nature (WWF) as particularly important to the environment and surrounding ecosystems. Illegal logging in community forests and other areas outside of the project reservoir was reported in 2013, and despite logging firms having their contracts suspended, no investigation was ever launched, and reports of illegal logging continue.<sup>304</sup> Bird and mammal species will be negatively affected, including Eld's deer (one of the rarest mammals in Southeast Asia), dhole, banteng, and several endangered vultures.<sup>305</sup> The inadequacy of the LS2 impact assessments in accounting for the cumulative environmental impacts of the dam in combination with other Mekong dams and current changes to the local landscape and livelihoods<sup>306</sup> means the true damage to ecosystem services remains unknown.<sup>307</sup>

The Cheay Areng project is anticipated to cause catastrophic and irremediable harm to the area's fragile ecosystems. Approximately 20,000 hectares of forests are expected to be cleared, including logging in dam's reservoir and the surrounding area.<sup>308</sup> The largest known breeding population of critically endangered Siamese Crocodiles will likely be destroyed due to damage to habitat and breeding grounds. The dam will inundate elephant herd range areas and disrupt important annual migratory pathways, including one of the last remaining elephant corridors in Southeast Asia. The dam is likely to put critical strain on 31 other vulnerable and endangered species found in the Areng Valley.<sup>309</sup> Furthermore, threatened species downstream will also be affected by changes to the river's flow regime, leading to the possible extinction of species like the Smooth-coated Otter and Yellow-headed Temple Turtle.<sup>310</sup>

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<sup>301</sup> CESCR Cmt 21 (Right to cultural life) para 13.

<sup>302</sup> UNDRIP Article 29.

<sup>303</sup> Ziv et al (2012).

<sup>304</sup> Pye, D., and Seangly, P., 'Waiting for the Deluge,' *The Phnom Penh Post*, 24 Feb. 2014.

<sup>305</sup> Baird (2009) at 62-65.

<sup>306</sup> Baird (2009), at 68-69.

<sup>307</sup> Ecosystem services have been defined by the UN Environment Programme as "the benefits people obtain from ecosystems. These include provisioning services such as food and water; regulating services such as flood and disease control; cultural services such as spiritual, recreational, and cultural benefits; and supporting services, such as nutrient cycling, that maintain the conditions for life on Earth." United National Environment Programme (2003), *Millennium Ecosystem Assessment, Ecosystems and Human Well-being A Framework for Assessment*, p. 49, accessible at <<http://www.unep.org/maweb/en/Framework.aspx>>.

<sup>308</sup> Walker, B., 'Protests Halt Chinese Backed Dams in Cambodia', *China Dialogue*, 19 March 2014; Forsyth, L., 'Cambodia's Marching Monks', Al Jazeera, 15 November 2013, available at: <http://www.aljazeera.com/indepth/features/2013/11/cambodia-marching-monks-2013111494032111150.html>.

<sup>309</sup> Conservation International (2007).

<sup>310</sup> Conservation International (2007).

## 5. ATTEMPTS TO SEEK REMEDIES

The Special Rapporteur on the situation of human rights in Cambodia has described the current development context in Cambodia as “characterized by low transparency and uneven access to information, inadequate consultation and participation which is not inclusive, [...] unsustainable and likely to hamper future national economic growth.”<sup>311</sup> He has also noted the ineffectiveness of both non-judicial and judicial remedial mechanisms, as marked by a lack of independence and susceptibility to bribery, and an increased use of the judiciary to criminalize land activists.<sup>312</sup> Given the current political and judicial context and the sensitivity of opposing hydropower dam projects, it is extremely difficult for the affected communities to seek remedies through judicial or non-judicial means in Cambodia. Nonetheless, communities affected by the LS2 and Cheay Areng dams have taken various actions to seek dialogue and redress in relation to these projects. These actions have been supported and supplemented by actions of national and regional non-governmental organizations (NGOs), experts, donors and others.

Communities affected by the LS2 project have engaged in public demonstration, media advocacy and other activities to voice their concerns about the project and their frustration at the lack of information or opportunities for consultation. They have issued petitions and statements to various bodies and authorities, and to date, have not received any meaningful response.

In December 2013, community representatives presented a statement to the Chinese Ambassador to Cambodia in Phnom Penh urging the Ambassador to visit affected communities and intervene with the Chinese companies involved in the LS2 project.<sup>313</sup> In February 2014 communities presented petitions to several Cambodian ministries, including MME, MOE and the Ministry of Economy and Finance (MEF), calling for a halt to the project and adequate consultation with communities. In September 2014, community members in Srekor and Kbal Romeas villages issued public statements to the Chairperson of the Resettlement Committee for the LS2 project, stating their opposition to the project and refusal to relocate.<sup>314</sup> Attempt to deliver this statement in person were thwarted by provincial government employees. On 25 November 2014, communities from the reservoir area and downstream of the dam site delivered a public statement to the National Assembly calling for the parliament to cancel the project, citing concerns over impacts and frustration over exclusion from decision-making processes.<sup>315</sup> On 10

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<sup>311</sup> Special Rapporteur on the situation of human rights in Cambodia (2012), ‘A Human Rights Analysis of Economic and other Land Concessions in Cambodia,’ at para. 199.

<sup>312</sup> Special Rapporteur on the situation of human rights in Cambodia (2012), ‘A Human Rights Analysis of Economic and other Land Concessions in Cambodia,’ at paras. 177, 181, 182.

<sup>313</sup> Community representatives of the 3S Rivers, ‘The joint statement of the communities along Sesan, Srepok and Sekong Rivers: Request to Withdraw China’s Involvement in the Lower Sesan 2 Dam’ delivered to Ambassador of the People’s Republic of China in Cambodia, 12 December 2013, available at:

<http://www.3spn.org/the-communities-along-the-sesan-srepok-and-sekong-river-submit-their-joint-statement-to-chinese-embassy>.

<sup>314</sup> 3SPN, Press Release and Community Statements: Phnong Ethnic Villagers in Kbal Romeas and Lao villager in Srekor 1 & 2 Village Publicly Announce: “We Refuse to be Resettled by the Lower Sesan 2 Dam”, 29 September 2014, available at: <http://www.3spn.org/phnong-ethnic-villagers-in-kbal-romeas-and-lao-villager-in-srekor-12-village-publicly-announce-we-refuse-to-be-resettled-by-the-lower-sesan-2-dam>. See also: Cuddy, A., & Seangly, P., ‘Villagers Refuse Relocation,’ *Phnom Penh Post*, 29 Sept. 2014.

<sup>315</sup> 3SPN, Press Release and Community Statements: ‘Affected Communities Appeal to the National Assembly: “Lower Sesan 2 Dam Damages Cambodia’s Rich Natural Resources. Cancel the Project Immediately”’ available at: <http://www.3spn.org/for-immediate-release>. Community statement available at: [http://www.3spn.org/wp-content/uploads/2014/11/Community-Statement-23-November-2014\\_Eng.pdf](http://www.3spn.org/wp-content/uploads/2014/11/Community-Statement-23-November-2014_Eng.pdf); 3SPN, ‘National Assembly of Cambodia has not yet responded to the request of the community’, 5

December 2014, community representatives joined public marches for Human Rights Day carrying banners expressing concern and opposition to the project.

Community actions have been supplemented by those of other actors nationally and regionally. In February 2014, members of the regional Save the Mekong Coalition sent a letter to the members of the Mekong River Commission (Cambodia, Laos, Vietnam and Thailand), citing concerns over likely severe and transboundary impacts of the project.<sup>316</sup> In May 2014, a group of Cambodian and regional NGOs issued letters to the Chinese Ambassador to Cambodia, Chinese Ministries and the companies invested in the project raising concerns regarding the environmental and social impacts of the project and non-compliance with legal standards.<sup>317</sup>

In October 2014 a further statement was issued by regional groups calling for the Cambodian government and project developers to release on information on the project redesign and conduct a new EIA for the project.<sup>318</sup> In a response to the statement, MME failed to respond to key requests for information and demands. In June 2013<sup>319</sup> and June 2014,<sup>320</sup> the Development Partners to the Mekong River Commission (MRC) expressed concern over the project's regional impacts and called for voluntary submission of the project to Prior Consultation under the Procedures for Notification, Prior Consultation and Agreement (PNPCA) of the 1995 Mekong Agreement. No response has been made to this call.

In the Cheay Areng project, the communities have organized numerous public demonstrations and a roadblock to prevent contractors of the investing companies from entering the area. These actions have aimed to publicly express concern and opposition to the project. The communities have called publicly for consultation with relevant government authorities so that their views are considered in any decision to approve or proceed with the project. To date, no attempt has been made by the relevant authorities or by companies proposing to develop the project to engage with or enter into dialogue with the communities.

## 6. REQUESTS FOR ASSISTANCE

As outlined in this submission, in both the LS2 and Cheay Areng dams, rights of communities to information, consultation and participation in decision-making on decisions that will affect the exercise of numerous other human rights have been infringed. The right of indigenous peoples to

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December 2014, available at: <http://www.3spn.org/national-assembly-of-cambodia-has-not-yet-responded-to-the-request-of-the-community>.

<sup>316</sup> Save the Mekong Coalition, Letter to the Mekong River Commission Governments: Urgent Request to Reconsider the Lower Sesan 2 Dam in Cambodia, 11 February 2014, available at: [http://www.savethemekong.org/admin\\_controls/js/tiny\\_mce/plugins/imagemanager/files/xayaburi/20140211\\_StMLetter\\_on\\_Lower\\_Sesan\\_2.pdf](http://www.savethemekong.org/admin_controls/js/tiny_mce/plugins/imagemanager/files/xayaburi/20140211_StMLetter_on_Lower_Sesan_2.pdf).

<sup>317</sup> International Rivers, Press Release and letters sent by coalition of 15 national and regional NGOs to project developer companies, Chinese Ambassador, Chinese Ministries of Commerce (MOFCOM), Environment (MOE) Foreign Affairs (MFA), 26 May 2014, available at: <http://www.internationalrivers.org/node/8324>.

<sup>318</sup> International Rivers, Press Release and Statement: Thousands of Lives to Be Devastated by Lower Sesan 2 Dam: International Groups Demand New EIA, 16 October 2014, available at: <http://www.internationalrivers.org/node/8422>.

<sup>319</sup> Joint Development Partner Statement: MRC Informal Donor Meeting, 28 June 2013, available at: [www.mrcmekong.org/news-and-events/speeches/joint-development-partner-statement-mrc-informal-donor-meeting-28-june-2013/](http://www.mrcmekong.org/news-and-events/speeches/joint-development-partner-statement-mrc-informal-donor-meeting-28-june-2013/).

<sup>320</sup> Joint Development Partner Statement, Twentieth Meeting of the MRC Council Joint Meeting with the Eighteenth Development Partner Consultative Group, 26 June 2014, available at: [www.mrcmekong.org/news-and-events/speeches/joint-development-partner-statement-twentieth-meeting-of-the-mrc-council-joint-meeting-with-the-eighteenth-development-partner-consultative-group-26-june-2014](http://www.mrcmekong.org/news-and-events/speeches/joint-development-partner-statement-twentieth-meeting-of-the-mrc-council-joint-meeting-with-the-eighteenth-development-partner-consultative-group-26-june-2014).

free, prior and informed consent has not been recognized. Rights to freedom of expression and assembly, and to peacefully oppose projects free from fear or intimidation, have also been violated. When complete, the LS2 and Cheay Areng dam projects threaten to negatively impact other substantial human rights, including: the right to adequate housing and freedom from forced evictions; the right to an adequate standard of living including rights to food, health, water and adequate livelihoods; indigenous people's rights to self-determination and cultural and community integrity; right to culture; and the right to a healthy and sustainable environment.

The Cambodian government's failure to fully enforce existing laws; ensure an effective regulatory framework is in place for the development of hydropower projects, including adequate social and environmental protections; the passage of legislation facilitating the construction of destructive dams in the absence of adequate safeguards; and the failure to provide guidance or require communication from companies regarding human rights impacts, fail to fulfil the duty to protect human rights, including against the actions of developer companies.

We respectfully request the Special Rapporteur to take urgent and immediate action to investigate these breaches of human rights and engage with the relevant governments and project developers to address the concerns outlined in this submission. Such actions could include:

1. During the Special Rapporteur's upcoming mission to Cambodia, engage with the Cambodian Government, and request:
  - a. A halt to construction of the LS2 project until full compliance is assured with obligations under international human rights law, international environmental law, and the UN Principles and Guidelines on Development-Based Evictions and Displacement:
    - i. conducting a transparent and participatory EIA and transboundary EIA;
    - ii. obtaining the free, prior, and informed consent of indigenous communities to compensation and relocation measures;
    - iii. ensuring a comprehensive resettlement policy consistent with human rights principles is in place and made public before relocation occurs; and
    - iv. providing 90 day notice to affected individuals prior to eviction;
  - b. Withhold government approval to the Cheay Areng project until participatory environmental and social impact assessments are completed and made public, and affected communities have given free, prior, and informed consent to the project;
  - c. Provide information on the recent asset surveys conducted in LS2 communities and those conducted previously with communities in the Areng valley, including details of the process and measures in place to ensure community rights were protected throughout;
  - d. Release detailed and comprehensive information on the resettlement plans for communities affected by the LS2 dam and the ways in which access to livelihoods, housing, food, and water will be protected;
  - e. Release information on plans for livelihoods transference and replacement of water resources and essential elements of human nutrition, including protein and other nutrients, with other equivalent sources;
  - f. Provide information as to how the social, cultural, and environmental impacts of the LS2 project will be monitored and the mechanisms for the resolution and compensation



- of complaints arising from these impacts at the national and transboundary levels, including responsibility for remediating such impacts;
- g. Provide complete information about the current proposed design and mitigation measures of the LS2 and Cheay Areng dams, together with full details of social and environmental impacts, including transboundary impacts with respect to the LS2 project. Ensure that this information is made available to affected communities in their own language;
  - h. Provide information as to measures taken to ensure the equal enjoyment of rights by indigenous peoples, women, and children will be ensured;
  - i. Provide information on measures to ensure the safety of human rights defenders and civil society activists and protection from intimidation and violations of free speech, in particular for those representing or speaking on behalf of local communities affected by large-scale hydropower projects;
  - j. Release information on state compliance with the UN Guiding Principles on Business and Human Rights, including the responsibility to ensure companies that are contracted by the state respect human rights in their business operations.
2. During the Special Rapporteur's upcoming mission to Cambodia, conduct visits to the LS2 and Cheay Areng sites and areas to be impacted by the projects in Cambodia, including stakeholder consultations with affected people.
  3. Engage with the project developers and businesses invested in the LS2 and Cheay Areng projects to raise the concerns in this communication and request information regarding their social and environmental due diligence and ensuring compliance with national legislative frameworks and the requirements of international law, including the UN Guiding Principles on Business and Human Rights.
  4. Engage with the Chinese Government to raise the concerns in this communication and request information regarding how it ensures state-owned enterprises conduct adequate social and environmental due diligence, and fully comply with national legislative frameworks and the requirements of international law, including the UN Guiding Principles on Business and Human Rights, in hydropower projects in Cambodia.
  5. Issue an authoritative, public statement before the expiration of the Special Rapporteur's current term in March 2015, on the extent to which the Cambodian and other responsible governments have violated obligations under international human rights law in relation to the LS2 and Cheay Areng dam projects.