



The Global Initiative
for Economic, Social and Cultural Rights

**Joint Parallel Report
to the Committee on Economic, Social and Cultural Rights
on the occasion of the consideration of the
Second Periodic Report of the People's Republic of China
during the Committee's 52nd Session**

Submitted by:

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and

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I. Introduction

1. The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) is an international non-governmental human rights organization which seeks to advance the realization of economic, social and cultural rights throughout the world, tackling the endemic problem of global poverty through a human rights lens. The vision of the GI-ESCR is of a world where economic, social and cultural rights are fully respected, protected and fulfilled and on equal footing with civil and political rights, so that all people are able to live in dignity.
2. The International Human Rights Clinic at Western New England University School of Law is a non-profit educational endeavor committed to advancing human rights across borders.
3. The Global Initiative for Economic, Social, and Cultural Rights and the International Human Rights Clinic at Western New England University School of Law would like to bring to the attention of the Committee emblematic factual situations dealing with the extra-territorial obligations of the State Party to respect and to ensure Covenant rights abroad, including within inter-governmental organizations and by ensuring corporate human rights responsibility. This Parallel Report should be read in conjunction with the Parallel Report submitted by the Global Initiative for Economic, Social and Cultural Rights which lays out the extra-territorial legal obligations of the State Party under to the Covenant on Economic, Social and Cultural Rights.

II. China's Corporate Structure

4. In recent years, China's corporate laws have begun to conform to international standards emphasizing transparency, disclosure and corporate social responsibility regarding activities and investments abroad. The 2006 introduction of the New Company Law of the People's Republic of China has been the source of this change. The new law governs both Limited Liability Companies (LLCs) as well as joint stock companies. The law provides access to more company information including the identity of shareholders, scope of business and registered capital. However, China's State-owned Assets Supervision and Administration Commission (SASAC) generally governs most State Owned Enterprises (SOEs) including wholly State-owned companies in which information regarding companies directors, managers and chairmen is not made available to the public.¹ As such, the SASAC ultimately shields such individuals and entities from corporate social responsibility regarding human rights violations incident to their operations globally.

¹ 2005 *Company Law of the People's Republic of China*, Article 65 (Oct. 27, 2005), http://www.china.org.cn/china/LegislationsForm20012010/2011-02/11/content_21898292.htm.

5. Such SOEs are solely invested in by the State.² Moreover, the Board of Directors is appointed by the State-owned assets regulatory institution and under Article 47,³ their responsibilities are narrowly defined to be accountable to the shareholders, without mentioning any accountability related to corporate social responsibilities. Under Article 5⁴ non-wholly State-owned subsidiaries shall abide by laws and administrative regulations and assume social responsibility. In contrast, Article 65⁵ of the New Companies Law, which governs wholly State-owned companies, lacks any provisions imposing accountability on SOEs. This provides a direct nexus between the Government of China and the operations of SOEs involving human rights violations associated with SOEs, and where those SOEs do violate human rights abroad China itself is in violation of its extra-territorial obligation to respect human rights.

6. Furthermore, as is elaborated upon in the complementary Parallel Report by the Global Initiative for Economic, Social and Cultural Rights, China has an extra-territorial obligation to protect human rights by ensuring that private companies incorporated or domiciled in China abide by human rights obligations.

A. Chinese Financing

7. Resource hungry China has entered into several lucrative financing deals with governments of many countries. A Revolving Credit Line secured against oil and mineral reserves is typical of most agreements. In essence, Chinese loans to foreign governments are secured by forward selling future output, and thus revenue derived from possible future reserves of oil, gas and useful minerals. Because extraction projects in general have extremely high startup and maintenance costs, which governments of many countries cannot back by themselves, many governments are forced to solicit extraction contracts for future resources in return for present capital to fund extraction projects.⁶ Unfortunately, though these countries need the projects for the benefit of their local economies, such projects carry with far-reaching negative externalities including large-scale human rights abuses.

8. China has granted loans through various state owned entities including the China Construction Bank, China Development Bank (CDB) and China EXIM Bank. Additionally, the China Africa Development fund (CAD) is China's largest private equity fund focusing primarily on investments in Africa. Many of these loan-processing entities have charters outlining stringent

² *Id.* For the purposes of this law, a wholly State-owned company is one with limited liability which is solely invested in by the State and for which the State Council or the local people's government authorizes the State-owned assets regulatory institution under the people's government at the corresponding level to perform the duties of an investor.

³ *Id.* Article 47.

⁴ *Id.* Article 5. In its operational activities, a company shall abide by laws and administrative regulations, observe social morals and commercial ethics, persist in honesty and good faith, accept supervision by the government and the public, and assume social responsibility.

⁵ *Id.*, Article 65. The provisions of this Section shall be applicable to the incorporation and the organizational structure of wholly State-owned shall be applicable.

⁶ Theodor H. Moran, 2010, *China's Strategy to Secure Natural Resources*, Burma: China Nonferrous metal Mining Co: Taguang Tagaung Taung Project: \$600 Million for 40 Million tons of nickel ore

loan processing requirements. The CDB in particular has released CSR reports yearly in connection with loans processed during consecutive calendar years.

9. Chinese entities often fund projects as part of a consortium. One example is the Sasan Ultra Mega Power plant, funded by the Bank of China, the CDB and China EXIM are among 14 banks financing the US\$4 Billion project.⁷ The project itself has serious implications for social and economic human rights due to the removal of all local labor from their daily work, and threats to villagers surrounding the plant through the use of weapons and coercion. China EXIM in particular has to date funded 259 projects in 36 African countries, of which 79 per cent are committed to infrastructure and railroads, dams, thermal power plants and oil and copper mines. China EXIM is the 3rd largest export credit agency (ECA) and has approved upwards of US\$5 Billion in Africa.⁸

III. Human Rights Violations: Case Studies

A. Hydroelectric Dam: Agua Zarca Project, Honduras

10. The Agua Zarca dam is a relatively small hydroelectric project and has a generating capacity of 22 MW, a 300 metre-long reservoir and a 3km long diversion channel between the dam and the turbines.⁹ One of the companies investing in the construction of this hydroelectric dam on the Gualcarque River by the Honduran Desarrollos Energeticos, SA (DESA),¹⁰ is the Chinese state-owned SINOHYDRO.¹¹ This enterprise was founded in the early 1950s as China's first brand in hydropower construction¹² and currently controls 50 per cent of the global market for hydropower projects,¹³ 65 per cent of which stems from its projects within China's borders.¹⁴ The concession to this transnational corporation provides it both the common property of the people and their territories.¹⁵

⁷ Id.

⁸ Id.

⁹ Frijns, Johan, *Dodgy Deal: Agua Zarca Dam Honduras*, Banktrack (Dec. 12, 2013), http://www.banktrack.org/manage/ajax/ems_dodgydeals/createPDF/agua_zarca_dam.

¹⁰ This company was created for the sole purpose of constructing the Agua Zarca dam, despite the apparent objection from both COPINH and the indigenous local population. Other participants in the project include, but are not limited to, the Honduran Bank FICOHSA, the Central American Bank for Economic Integration and the World Bank. *Defending Rio Blanco: Three weeks of the Lenca Community Roadblock in Honduras*, SOA Watch, <http://www.soaw.org/about-us/equipo-sur/263-stories-from-honduras/4096-rioblanco2>.

¹¹ Annie Bird, *Honduras: The Agua Zarca Dam And Lenca Communities in Honduras: Transnational Investment Leads to Violence Against and Criminalization of Indigenous Communities* (Oct. 7 2013), Indigenous Issues Around the World,

http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=18257:honduras-the-agua-zarca-dam-and-lenca-communities-in-honduras-transnational-investment-leads-to-violence-against-and-criminalization-of-indigenous-communities&catid=30&Itemid=63.

¹² Sinohydro snapshot, <http://eng.sinohydro.com/index.php?m=content&c=index&a=show&catid=15&id=26>.

¹³ Peter Bosshard, *Will China Find a New Balance Between the Environment and Economic Growth* (Sept. 1, 2011), China US Focus, <http://www.chinausfocus.com/slider/will-china-find-a-new-balance-between-the-environment-and-economic-growth/>.

¹⁴ *Sinohydro Corporation: The World's Biggest Hydropower Dam Company* (2013), International Rivers, <http://www.internationalrivers.org/campaigns/sinohydro-corporation>.

¹⁵ *Honduras: International observation and solidarity mission with the Honduran resistance visited communities in resistance*, (Aug. 11, 2013), <http://quotha.net/node/2549>.

11. As a result of the immense controversy surrounding the construction of the Agua Zarca Dam, a coalition of indigenous people and human rights activists have protested the continuation of this project and have called for the end of the human rights violations that accompany it. The resistance has triggered violent repression by the local authorities and the project's private security forces. The project development was started without any consultation with the local residents and without their consent. Furthermore, it has been accompanied by oppression and harassment through immense militarization, violence, false prosecution of local opposition leaders, forced evictions without compensation and even assassinations.

12. The dam has significantly limited the indigenous people's access to land and food, as well as the river Gualcarque, which, for some, is the only available source of drinking water, as well as a resource for swimming, washing and fishing with important cultural and spiritual value.¹⁶ Meanwhile, the environmental damage to the adjacent biosphere and the downstream populations remains yet to be determined. In the midst of the ongoing street blockade¹⁷ as part of the resistance for this project, one woman who was part of the protest exclaimed that the companies should stop the construction because:

We haven't given permission for dams to be built. Today they have us oppressed. On the land where we harvest corn, beans, rice, yucca, coffee, they have buried the harvest with the dirt that they throw from the machines. We will not leave the blockade until they withdraw the machines. Because we are poor campesinos and there are about 300 children. Where will the children go? We have to pass this piece of land onto our children, each one of them, so that they can survive.¹⁸

1. Free, Active and Meaningful Participation and Free, Prior and Informed Consent

13. The Lenca Community of Rio Blanco was not consulted on whether they wanted this project.¹⁹ Their vote against the project during a town hall meeting led to the Municipal Mayor's furious departure from the meeting without signing the *acta* in an attempt to invalidate the meeting.²⁰ In the face of refusal by the local communities, DESA purchased illegal titles to tracts of land within the area of the Rio Blanco communal indigenous territory in 2011.²¹

¹⁶ Johan, *supra* at note 9.

¹⁷ *Id.*

¹⁸ SOA Watch, *supra* at note 10.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Annie Bird, *The Agua Zarca Dam and Lenca Communities in Honduras: Transnational Investment Leads to Violence against and Criminalization of Indigenous Communities* (Oct. 3, 2013), Rights Action, http://rightsaction.org/sites/default/files/Rpt_131001_RioBlanco_Final.pdf.

14. The government's usurpation of indigenous peoples' lands without their consent pushed the local residents of the Lenca community, together with the Council of Indigenous and Popular Organizations of Honduras (COPINH), to hold numerous Assemblies and public demonstrations, while also filing numerous complaints against the project to Honduras' National Congress.²² Despite the resistance, the construction of the project continued. The Rio Blanco community continued with their peaceful blockades of the entrance to the project and demanded the withdrawal of the companies from their territory.²³ After closing the only road that leads to Rio Blanco in San Pedro de Zacappa, the local communities sent a delegation to the Presidential Palace with their demands, though to no avail.²⁴

2. Forced Evictions

15. DESA and Sinohydro have violated the communal land rights of the affected communities since the concessions to use the river do not include the rights to land flooded or otherwise impacted.²⁵ The Lenca communities have a communal land title extended in 1911 to document their already existing rights in this region, so the project manager's unrelenting determination to move forward contravenes these rights.²⁶ In the midst of the protest against the project and the forced evictions that accompanied it, the companies, backed up by Honduran security forces protecting the project, resorted to death threats, surveillance, harassment and even local hit men²⁷ to clear the way for the project to continue.²⁸ Reports indicate that the companies directly pay for the transportation and maintenance costs of the large contingents of [the Honduran army's] troops deployed in the area.²⁹

16. On 12 April 2013, police patrols evicted the local protesters, dumped out their drinking waters and removed their banners, sleeping pads, and supplies.³⁰ These forms of oppression further limit the indigenous populations' means of ensuring their right over their land. The opposition also engendered the criminalization and prosecution of resistance leaders with the goal of punishing by example and dismantling the organized protests. For example, the General Coordinator of COPINH Berta Caceres and the indigenous spokespersons Tomas Membreno and Aureliano Molina are currently undergoing judicial persecution with absurd charges.³¹ Caceres

²² SOA Watch, *supra* at note 10.

²³ *Id.*

²⁴ *Id.*

²⁵ Annie Bird, *The Agua Zarca Dam: How the World Bank and Central American Bank for Economic Integration are Profiting from the Looting of Indigenous Lenca Territory* (May 18, 2013), Rights Action, <http://rightsaction.org/action-content/illegal-arrest-priest-and-22-members-honduran-national-resistance-front>

²⁶ *Id.*

²⁷ Rights Action Team, *Campesino Killed by Honduran Soldiers, for Opposing Imposition of Hydro-electric Dam "Development" Project* (July 18, 2013), Rights Action, <http://rightsaction.org/action-content/campesino-killed-honduran-soldiers-opposing-imposition-hydro-electric-dam-development>

²⁸ SOA Watch, *supra* at note 10.

²⁹ Rights Actions, *supra* at note 27.

³⁰ SOA Watch, *supra* at note 10.

³¹ International Observation and Solidarity Mission, *supra* at note 15.

was illegally detained and jailed in May and put on a trial for alleged illegal possession of firearms which was not proved in court.³² Cacaes is currently in hiding.

17. The notoriously corrupt Honduran legal system has been wholly ineffective in achieving the fair adjudication of complaints of violating the rights of indigenous populations.³³ Honduras has illegitimately privatized the rights of the Lenca community, failed to investigate complaints, and aided and abetted and engaged directly in repression.³⁴ The failure of legal processes is further exacerbated by the high cost of legal representation and the harassment and violence directed against lawyers who represent indigenous and campesino communities.³⁵

18. The repression reached a zenith in the murder of the local protest leader Tomas Garcia and the wounding of his 17-year-old son Alan on 15 July 2013, by a member of the state security forces.³⁶ Both Garcia and his son were part of the protest against the building of the hydroelectric project on the Lenca-owned territory when this desperate and criminal reaction occurred.³⁷ Reports show that the protestors were not engaging in any kind of violence while spokespeople for the hydroelectric companies claim otherwise.³⁸ Bertha Caceres explained that the army, members of the Engineers Battalion of Siguatepeque, a military unit that has confronted the protesters in the past, opened fire against our companions without any warnings while the police took no action to protect the peaceful protesters.³⁹

3. Food and Water Security, Right to Culture and Livelihood

19. The Indigenous Lenca community of Rio Blanco has lived near the river for generations and has depended on it for the growth of corn, beans, bananas, yucca, coffee, and other crops.⁴⁰ They have also designated certain areas of their land for the preservation of water sources that are crucial to their survival.⁴¹ The companies, by constructing the Agua Zarca Dam, will deprive the indigenous people of their means of subsistence, thus forcing them to abandon their traditional way of life.

20. The initial preparation for construction of the Agua Zarca Dam was accompanied with the destruction of community members' crops that they depend on to eat.⁴² During and after the construction, much of the land farmed near the fertile banks of the river will be flooded. To

³² Rights Action, *supra* at note 27.

³³ Bird, *supra* at note 21.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Rick Kearns, *Honduran Military Kill Indigenous Protestor at Agua Zarca Project* (July 20, 2013), Indian Country Today Media Network, <http://indiancountrytodaymedianetwork.com/2013/07/20/honduran-military-kill-indigenous-protestor-agua-zarca-project-150510>.

³⁷ Rights Action, *supra* at note 27.

³⁸ Kearns, *supra* at note 36.

³⁹ *Id.*

⁴⁰ SOA Watch, *supra* at note 10.

⁴¹ *Id.*

⁴² *Id.*

facilitate DESA's goal of acquiring that land, the community has been subjected to has been destruction of plantations as well as the release of cattle into the crops planted by the community just before harvest in order to force the local residents to sell their lands.⁴³

21. Moreover, the employees of the companies fenced off the only spring that meets all of the potable water needs of the community of La Tejera, intending to divert the water to serve the company's compound.⁴⁴ Despite the already controversial actions, the companies prohibited the usage of water from the river, which was the Lenca's main source of irrigation, drinking water, washing, bathing and fishing.⁴⁵ The eviction of local communities and the flooding of their land will inevitably destroy the rich and diverse culture of this community.

4. Impact on the Environment

22. Rigoverto Cuellar, the former Minister of natural resources and the environment, permitted the construction of the dam without fulfilling studies and consultations required by law.⁴⁶ Several reports clearly establish that the flooding of the region will cause widespread environmental destruction.⁴⁷ In addition, the project will degrade the pristine natural areas, produce huge quantities of greenhouse gasses through the decomposition of submerged biomass and contaminate the water and land in the area.⁴⁸ The construction of the 300 metre-long water reservoir, the diversion channel, the machine house and new streets to the construction site require the destruction of trees, vegetable and coffee fields.⁴⁹ Moreover, the interruption of the flow of the river will hinder fish from moving downstream.⁵⁰

B. Hydroelectric Dam: The Patuca River, Honduras

23. The Honduran Government also signed a \$50.5 million contract⁵¹ with China's Sinohydro for the construction of the first phase of one of the three hydroelectric power plants on the Patuca River in the eastern region of Honduras,⁵² with \$350 million more envisioned for the second phase of the project.⁵³ The Patuca III project will be funded by loans from Chinese

⁴³Bird, *supra* at note 21.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Joshua Nichols, *Honduras: Rio Blanco Communities take action to defend rivers, territory, and life* (Apr 9, 2013), Intercontinental Cry, <https://intercontinentalcry.org/indigenous-peoples-begin-anti-hydro-dam-action-in-honduras/>.

⁴⁸ *Id.*

⁴⁹ Johan, *supra* at note 9.

⁵⁰ *Id.*

⁵¹ The contract also includes the building of a tunnel that will divert river water, construction of a camp, the building of access roads and construction of a quarry. *Honduras Signs Deal with Chinese firm on Hydro Plant* (Apr 19, 2011), Latin American Herald Tribune, <http://www.laht.com/article.asp?CategoryId=23558&ArticleId=391935>.

⁵² *Id.*

⁵³ Laurence Allan, *Chinese Hydropower plan sparks tension in Honduras* (Jan 24, 2013), Dams and Alternatives, <http://damsandalternatives.blogspot.com/2013/01/chinese-hydropower-plan-sparks-tension.html>.

financial institutions⁵⁴ and is expected to generate its first 104 megawatts of power by January 2014.⁵⁵ Similar to the Agua Zarca Dam, this project has faced resistance from the indigenous locals, including the Indigenous Tawahka, Miskitu, Pech, and Garifuna, who were not consulted and whose consent was not obtained prior to the start of the projects.⁵⁶ In this case, the indigenous people attempted unsuccessfully to use the Supreme Court of Justice to prevent the abuse by the state.⁵⁷

24. In some instances, despite longstanding ancestral claims to land, the indigenous people's lack of formal legal ownership of the land they have occupied for generations has made it easier for the Honduran Government to grant concessions to transnational corporations. Norvin Goff, president of the MASTA (Moskitia Asia Takanka), a local governance body of the Miskitu, explained: "The defense of our territory is our first concern. Because we don't have the full legal titles to our land, the government is able to give concessions to foreign companies, without any kind of consultation with us."⁵⁸

1. Active, Free and Meaningful Participation and Free, Prior and Informed Consent and failure to recognize indigenous land rights

25. In addition to proceeding with construction without obtaining the consent and consultation with the Tawahka, Miskitu, Pech, and Garifuna people who live downstream along the river, the government only compensated property owners.⁵⁹ In January 2013, even the landowners who were promised compensation by the Chinese corporations through an agreement with the Honduran Government revolted against the construction because more than 60 percent of them had not received the compensation.⁶⁰ Violating the indigenous people's right to free, prior and informed consent for any construction in their territory appears to be the standard practice for Sinohydro.⁶¹

⁵⁴ *Chinese Firm to Build 3 Hydroelectric Dams in Honduras*, Latin American Herald Tribune, <http://www.laht.com/article.asp?CategoryId=23558&ArticleId=365841>.

⁵⁵ *Patuca Hydroelectric Power Projects Speed Up* (Jan 21, 2011), Born in Honduras, <http://borninhonduras.com/2011/01/patuca-hydroelectric-power-projects.html>.

⁵⁶ *Campaign Update: Honduras – Military Evicts Residents at Dam Site* (Oct 27, 2011), Cultural Survival, <http://www.culturalsurvival.org/news/honduras/campaign-update-honduras-military-evicts-residents-dam-site>.

⁵⁷ *Global Response Travels to Honduras* (July 18, 2011), Cultural Survival, <http://www.culturalsurvival.org/news/honduras/global-response-travels-honduras>.

⁵⁸ *Id.*

⁵⁹ *Campaign Update: Honduras: Dam Construction Speeds Ahead in Violation of Indigenous Rights* (Dec 1, 2011), Cultural Survival, <http://www.culturalsurvival.org/news/honduras/campaign-update-honduras-dam-construction-speeds-ahead-violation-indigenous-rights>.

⁶⁰ Allan, *supra* at note 53.

⁶¹ The Gibe III Dam's impact on the Omo River will significantly threaten the ecosystem of Lake Turkana in Kenya, and the lake "could end up a shrunken, ecologically unsustainable relic, no longer able to support its current diversity of life (including human communities)," which is numbered to around 500,000 indigenous people (*supra* at note 64). The construction of this dam, too, has proceeded without the consent of indigenous people and has been accompanied by forced resettlement, despite the fact that around 200,000 people rely on the river's annual flood for their survival (*Id.*). The construction of dams on Burma's Salween River, some of which are in areas where conflict is continuing between ethnic resistance forces and the Burmese Army, would threaten the livelihood of at least 13 indigenous groups (Salween Watch, *Current Status of Dam Projects on Burma's Salween River*, 13 March 2013, <http://www.salweenwatch.org/images/PDF/english-salween.pdf>). Projects such as the Tasang, Nong Pha, Ywathit and Hat Gyi Dam have been accompanied by forced resettlement of, and lack of consent or consultation by, tens

2. Right to Protest

26. In the face of this injustice, the four Indigenous groups formed a united movement to save the river, their livelihoods, and their unique cultures.⁶² The locals were aggrieved by the government's failure to employ Honduran workers, despite its promise that 70 per cent of the jobs would be given to nationals.⁶³ On 22 April 2013, protestors occupied buildings belonging to China-based Sinohydro's Patuca III project.⁶⁴ However, the protests organized were halted by police and military personnel forcibly evicted residents in order to prepare for the first phases of dam construction.⁶⁵

3. Rights to Food and Water

27. The Patuca River project will threaten food security and the cultural survival of the Tawahka people, [and] disrupt transportation and commerce for in the Moskita.⁶⁶ The indigenous people use the fertile soil near the river to grow cocoa, oranges, rice, beans, plantains, cassava, and other crops for subsistence and sale, while the fish from the river is one of the main source of dietary protein.⁶⁷ Lorenzo Tinglas, the president of the Tawahka people's governing council, explained: "The river is our life. Any threat to the Patuca is a threat to four Indigenous Peoples in and we will fight to the death to protect it."⁶⁸

28. Construction of the dams would irreparably harm the indigenous peoples. The Patuca is their only means of transportation and communication.⁶⁹ The planned dams would obstruct [the indigenous peoples'] commerce and trade, thus limiting their access to food, water and other goods.⁷⁰

of thousands of local residents, huge militarization of the areas, detrimental and uncalculated environmental impact, violence, reawakening of destructive ethnic conflicts and even numerous murders (Id.). Lastly, the downstream effects stand to alter the lives of over half a million people, including soil erosion, altering river flows, destroying agriculture, threatening the food sources etc (Id.).

⁶² Jack Edit, *Honduras: Patuca River Dams Threaten Indigenous Survival* (July 26, 2011), WilderUtopia, <http://www.wilderutopia.com/environment/honduras-patuca-river-dams-threaten-indigenous-survival/>.

⁶³ Cultural Survival, supra at note 56.

⁶⁴ Allan, supra at note 53.

⁶⁵ Cultural Survival, supra at note 56.

⁶⁶ *List of Dam-Threatened World Heritage Sites*, International Rivers, <http://www.internationalrivers.org/list-of-dam-threatened-world-heritage-sites>.

⁶⁷ Edit, supra at note 62.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

4. Environmental Impact

29. Although the Ministry of Natural Resources (SERNA) approved the Patuca hydroelectric projects,⁷¹ reports indicate that the construction will flood 42 km of intact rain forest, all of which was on the legislative track to either become part of the Patuca National Park or the Tawahka Asangni Biosphere Reserve.⁷² Moreover, the impact of the Patuca III Dam on migratory fish species, as well as species living above the dam site, has not been evaluated⁷³ in spite of the vast amount of information supporting the project's expected negative impact on the diverse ecosystem through the change in the river's volume, flow and temperature.⁷⁴ The dam projects will exacerbate the impacts of global warming, alter a vital river ecosystem, and put at risk the invaluable biological diversity of the Rio Platano Biosphere Reserve.⁷⁵ Lastly, the construction of roads necessary for the dam pose significant threat to the natural resources, particularly as a result of inevitable land clearing for farms and logging.⁷⁶

30. With respect to the potential environmental impact, Dr. Erik Nielsen explained: "There exist almost no biological, hydrological, physical, or social data for the downstream affected region of the project. [This project] will require at least two years of data collection and a year of public review to meet the minimum requirements and develop a comprehensive mitigation plan. Given the unknown yet potentially extensive downstream environmental and social consequences of damming the second largest river in Central America and the potential indirect impacts of creating access to the largest expanse of tropical rainforest north of the Amazon Basin and consequent effects on indigenous peoples, the environmental studies to date are insufficient against any international standard or quality or protections for dam building."⁷⁷

5. Right to Culture

31. Numerous archeological sites are located in Moskitia, the largest, most biodiverse expanse of tropical wilderness north of the Amazon Basin,⁷⁸ and they still remain to be excavated including of the Mayan Civilization and other unknown pre-Columbian culture.⁷⁹ The dam projects threaten this cultural heritage.

C. Oil Exploration and Drilling in Kenya

32. Kenya is set to be East Africa's first oil exporter by 2016, with an estimated 10 billion barrels in deposits. To date, Kenya has secured \$5 billion worth of Chinese Investment to exploit

⁷¹ Born in Honduras, *supra* at note 55.

⁷² International Rivers, *supra* at note 66.

⁷³ *Id.*

⁷⁴ *Edit*, *supra* at note 62.

⁷⁵ International Rivers, *supra* at note 66.

⁷⁶ *Id.*

⁷⁷ Cultural Survival, *supra* at note 59.

⁷⁸ *Edit*, *Supra* at note 62.

⁷⁹ International Rivers, *supra* at note 66.

those reserves.⁸⁰ These loans have been approved by various Chinese SOEs, including the CDB, which loaned \$50 million to Kenya Equity (Kenya's largest equity bank). In 2006, the Kenyan government gave China National Offshore Oil Company (CNOOC) exclusive rights with no competitive bidding to six out of eleven total oil exploration blocks; effectively giving CNOOC control of 28 per cent of the total oil exploration coverage area.⁸¹ The coverage area granted to CNOOC substantially overlap with lands traditionally held by the tribal Samburu peoples.⁸²

1. Rights to Food and Water

33. Attacks on Samburu villages began in 2009, by hostile tribes, mercenaries and Kenyan governmental armed forces on the disputed lands; lands simultaneously held by the Samburu and leased to CNOOC. On 21 February 2009, 300 cows held by the Samburu were stolen and two Samburu children kidnapped.⁸³ The next day, Kenyan Special Security Forces opened fire on Samburu villagers, bombed schools, clinics and water holes.⁸⁴ Over 2000 cattle were confiscated and the two missing Samburu children were found dead hanging from a tree with their throats cut and bodies skinned.⁸⁵ On 5 September 2009, 4000 cattle and 2,6000 goats were further confiscated.⁸⁶ On 12 October 2009, the Kenyan government announced awarding a \$26 million lease to China to drill oil on lands located in the center of Samburu territory.⁸⁷

2. Forced Evictions

34. The violence inflicted on the Samburu and the extraordinary confiscation of millions worth of cattle is clearly aimed at coercing the Samburu to leave their ancestral lands, and as such amount to constructive forced eviction in violation of Article 11 of the ICESCR and Article 43 of the Constitution of the Republic of Kenya. Moreover, under *Awas Tingni v. Nicaragua*, decided by the Inter-American Court of Human Rights, "Indigenous peoples are recognized as having a right to the property over their lands and territories which they have traditionally possessed and utilized."⁸⁸

35. Because the cattle that comprises 90 per cent of the Samburu's food, economy and currency, have been continuously confiscated, hundreds of Samburu have died from starvation and malnutrition.⁸⁹ To date, the confiscated cattle have a valuation of more than US \$5

⁸⁰ James Macharia, *Kenya Signs Infrastructure, Energy Deals worth \$5 bln with China* (Aug. 19, 2013), Reuters, <http://www.reuters.com/article/2013/08/19/kenya-china-idUSL6N0GK2MT20130819>

⁸¹ Id.

⁸² Id.

⁸³ *Observations on the State of Indigenous Human Rights in Light of the Declaration on the Rights of Indigenous Peoples*, prepared by Cultural Survival, <http://www.marshgroupkenya.org/blog/2009/11/27/human-rights-violations-of-the-samburu-people-by-the-government-of-kenya-a-report-to-the-united-nations-human-rights-council-submitted-on-november-1-2009-by-cultural-survival/>

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

million.⁹⁰ A significant portion of oil deposits are located on lands held by the Samburu, and the exclusive extraction leases given to Chinese firms and their significant financial interests in these lands, is encouraging the Kenyan government to forcibly and violently evict the Samburu. The Samburu people have suffered definite and quantifiable economic harms as well as the immeasurable suffering from the violent displacement from their lands to further Chinese oil interests.

D. Mining in the Democratic Republic of Congo

36. The first Congo-China agreement was signed in 2007 between Congo and China Railway Group Ltd and Sinohydro Corporation.⁹¹ These Chinese companies are backed by revolving credit loans by China EXIM bank, while the investments are secured by copper and cobalt deposits in the province of Katanga.⁹² The total investment is US\$6 billion, of which US\$3 billion is invested in infrastructure related to transport of extracted resources, and the remaining US\$3 billion invested directly in the Sicomines Mining Joint Venture.⁹³ The joint venture gives 68 per cent control to Chinese entities, 33 per cent to China Railway Group, 30 per cent to Sinohydro and the remaining 5 per cent to Zhejiang Huayou Cobalt Company.⁹⁴ The US\$6 billion investment and 68 per cent ownership could potentially generate US\$40 - US\$120 billion of revenue to China. An additional condition is the right to extract 10.6 million tons of copper and 626,619 tons of cobalt under the joint venture; again 68 per cent of which belongs to the Chinese companies in their respective shares. Other Chinese entities involved in extraction projects in the Katanga mining sector, although their respective ownership stake is not currently publicly available. Two SOEs, Jinxuan (JNMC), China's largest producer of copper, and China Non-ferrous Metal Corporation (CNMC) and several smaller private companies including South China Mining, East China Mining, Titan Mining, Jian Xing are known to be actively involved in mining projects in the DRC.

37. China relies on the DRC to satisfy its resource shortage, and it imports significant amounts of cobalt and copper from the country.⁹⁵ According to some reports, the DRC has twenty-four trillion dollars in resources such as copper, cobalt, coltan and tin.⁹⁶ In order to secure at least a share of these resources and hasten their retrieval, China has agreed to provide US\$9 billion dollars in resources, later decreased to six billion at the direction of the World Bank, for

⁹⁰ Cultural Survival, *Human Rights Violations of the Samburu People by the Government of Kenya: a Report to the United Nations Human Rights Council Submitted on November 1, 2009* by Cultural Survival, Mars Group Kenya <http://www.marsgroupkenya.org/blog/2009/11/27/human-rights-violations-of-the-samburu-people-by-the-government-of-kenya-a-report-to-the-united-nations-human-rights-council-submitted-on-november-1-2009-by-cultural-survival/>

⁹¹ Global Witness, 2011, *China and Congo: Friends in Need*: http://www.globalwitness.org/sites/default/files/library/friends_in_need_en_lr.pdf

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Amnesty International, 2013, *Chinese Mining Industry Contributes to Abuses in Democratic Republic of the Congo* <http://www.amnesty.org/en/news/chinese-mining-industry-contributes-abuses-democratic-republic-congo-2013-06-19>.

⁹⁶ Nathan William Meyer, *Can China's Deal of the Century Save Congo?* (July 20, 2012), World Policy, <http://www.worldpolicy.org/blog/2012/07/19/can-china%E2%80%99s-%E2%80%98deal-century%E2%80%99-save-congo>.

DRC's infrastructure in 2007.⁹⁷ This investment was divided in two halves, with half going to mine development and half to infrastructure projects.⁹⁸ Some of the infrastructure projects promised by China in exchange for 10 million tons of copper and 600,000 tons of cobalt, include, but are not limited to, 2,400 miles of roads and 2,000 of rail, 145 health clinics, 432 hospitals, two universities, and two hydroelectric dams, as well as renovation of the transportation system and an electricity distribution network.⁹⁹ The investment in the mining sector will mainly focus on copper and cobalt mines.¹⁰⁰ The Chinese State-owned Export-Import Bank was supposed to finance the loans for the infrastructure investment, but it pulled out in 2012.¹⁰¹ This agreement created the Sino-Congolese mining joint venture, Sicominex, in which the Chinese partners are the major shareholders.¹⁰² The Chinese consortium received majority stakes in two of the biggest mines in the country, which makes this deal more like a commercial one rather than an aid project.¹⁰³ Numerous reports and interviews indicate that the Chinese companies have not done any work at the aforementioned mines for two years.¹⁰⁴

38. The investment in the DRC raises numerous concerns because of the current situation in this country. DRC's 2012 Mining Code stipulated that artisanal miners should sell their minerals to Congolese trading posts or *negociants*, who then sell to Congolese or foreign trading houses.¹⁰⁵ The provincial government of Katanga, in 2007-08, halted the export of raw materials, thus forcing traders to develop smelters and processing facilities, which has prevented the artisanal miners from selling the minerals they acquire to another mining site or a company.¹⁰⁶ Instead, the artisanal miners are compelled to sell the minerals to traders of the company in charge of the mining site.¹⁰⁷

39. The UN has expressed concern that, over 50 per cent of the region's 200 mines are controlled by armed forces which employ illegal taxation, extortion, forced labor, and violence to ensure the flow of mineral wealth.¹⁰⁸ Katanga's Governor Moise Katumbi explained that more than 60 of Katanga's [a raw material-rich region in the DRC] 75 processing plants are owned by Chinese companies and 90 per cent of the region's minerals go to China.¹⁰⁹

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ *Profits and Loss: Mining and Human Rights in Katanga, Democratic Republic of the Congo* (2013), Amnesty International, <http://www.amnestyusa.org/sites/default/files/afr620012013en.pdf>.

¹⁰² Id.

¹⁰³ Nick Long, *Congo-China Mines Deal Hits Rough Patch* (May 16, 2013), VOANews, <http://www.voanews.com/content/congo-china-mines-deal-hits-rough-patch/1662105.html>.

¹⁰⁴ Id.

¹⁰⁵ Amnesty International, *supra* at note 101.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Meyer, *supra* at note 96.

¹⁰⁹ Simon Clark, *China Lets Child Workers Die Digging in Congo Mines for Copper* (July 22, 2008), Bloomberg, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aW8xVLQ4Xhr8>.

40. The investments in the mining sector in the DRC are accompanied by numerous forced evictions as well as dangerous and exploitative working conditions for the miners.¹¹⁰ Moreover, the operations have restricted communities' access to water, thus endangering their livelihood.¹¹¹ Most of the workers in this sector are artisanal miners, who work using hand-held tools [and] receive very little for the minerals they extract.¹¹²

1. Forced Evictions

41. Although the domestic law of the DRC stipulates that landowners have to be consulted and compensated when companies are granted mining concessions, the law applies only to people with rights to the land they occupy.¹¹³ Such ownership is conditional upon recognition by the government.¹¹⁴ Thus, if the government has not officially recognized the ownership of the land, the people living on the territory are considered to have no rights to the land and do not have any security of tenure.¹¹⁵ In practice, people can be evicted from their homes without any due process or subsequent compensation, in contravention of the right to adequate housing which requires that everyone have a minimum degree of security of tenure sufficient to prevent forced evictions or other human rights violations.

42. The provision of mining rights to the Chinese Company Congo International Mining Corporation (CIMCO) in Luisha was accompanied by the forced eviction of 300 families from their homes with only two weeks notice.¹¹⁶ The evicted families were deported to an area with no housing or other facilities.¹¹⁷ When the communities protested the eviction, the official told them they did not have [any] rights to the plots of land.¹¹⁸ This situation also violates other economic, cultural and social rights including the right to work, education, water and food. One of the victims explained:

We have to start again from scratch. That's why we are living in tents even though the rainy season is fast approaching. Life is much more difficult here than in the old place. We sleep outside, there is no school or local market nearby. Our children and wives have to make long journeys. Water is also a problem.¹¹⁹

¹¹⁰ Amnesty International, *supra* at note 95

¹¹¹ *Id.*

¹¹² Amnesty International, *supra* at note 101.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

2. Working Conditions

43. Workers, particularly artisanal miners, face numerous abuses and scores [of them] die or are seriously injured every year.¹²⁰ The working conditions are dangerous and exploitative, and workers often work with bare hands, without protective clothing and in poorly ventilated underground shafts where temperatures can be extremely high.¹²¹ These conditions are also accompanied with landslides, falling boulders and asphyxiation due to a lack of adequate ventilation.¹²² Patricia Feeney, executive director of Oxford, England-based Rights and Accountability in Development, explained that the Chinese smelter plants ignore the health and safety of their workers or the children who dig the ore.¹²³

44. In addition to the frequent fatal accidents, the miners are also subjected to threats, physical assault and ill-treatment on mine sites at the hands of the mine police, or private security guards working for those who control the sites.¹²⁴ Moreover, the minerals are ultimately sold outside of the country í through a number of actors and processes, in an often complex and opaque supply chainö that does not benefit the workers.¹²⁵ The artisanal miners are often forced to sell minerals to specific individuals or companies under threat of being denied access to the mining site in the future.¹²⁶

45. In the Huachin smelter in Likasi, workers are employed as day labourers and receive limited training for their jobs.¹²⁷ Most of them have no protective gear and work in their everyday clothes, handling radioactive minerals with their bare hands and breathing in the corrosive dust.¹²⁸ In addition, workers do not receive sick pay and have to pay for their treatment in the case of accidents.¹²⁹ Numerous reports indicate that Chinese workers earn ten times as much as the Congoleseö and receive weekly bonuses that are the equivalent of an entire monthly wage for a Congolese worker.¹³⁰ At the Jia Xing Depot in Kolwezi, Congolese workers do the arduous menial jobs í [while] the Chinese do the trading and supervision.¹³¹

46. Workers' attempts to complain about the conditions or mistreatment often results in termination from the job.¹³² Jean, a worker in Jia Xing mining company, was fired í for having had the temerity to explain why he and a group of workers had arrived a few minutes late

¹²⁰ Id.

¹²¹ Id.

¹²² Id.

¹²³ Clark, *supra* at note 109.

¹²⁴ Amnesty International, *supra* at note 101.

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ Samantha Goethals, Jean-Pierre Okenda Raphael Mbaya, *Chinese Mining Operations in Katanga Democratic Republic of the Congo* (Sept. 2009), RAID, <http://raid-uk.org/docs/ChinaAfrica/DRCCHINA%20report.pdf>.

¹²⁸ Id.

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id.

¹³² Id.

for work.¹³³ His attempt to explain that the company bus was delayed by a road accident led to him and the other twelve passengers led to the arbitrary detention, being locked up in a container from 7 am until 5 pm, after which they were fired.¹³⁴

47. Other reports indicate that the behavior of many Chinese managers and supervisors amounts to gross negligence.¹³⁵ Local authorities refrain from prosecuting Chinese companies or workers even for flagrant violations of workers' rights and Congolese law.¹³⁶ Some of these violations include verbal aggression and bullying – beating and in some cases extreme physical abuse.¹³⁷ Ilunga Mutumbo, a worker who collapsed while working and fell inside the furnace, was not fully paid for the five months he spent in treatment, and, when he went back to demand compensation because he was declared unfit to work by the hospital, he was asked to work in spite of his disability, was sprayed with boiling water on his shoulders, and was handcuffed and locked in a container on site all night.¹³⁸

3. Child Labor

48. Child labor is widespread in the underdeveloped mining sector of the DRC. In August 2008, approximately 20,000 of the artisanal miners were children.¹³⁹ Although Chinese companies do not directly employ children, many depots pay children to load bags and all of them buy minerals from children.¹⁴⁰ Some children, aged between 12 and 18, push bikes overloaded with bags, weighing between 70 and 90kg each, in order to earn enough to help their families or to, mainly, pay for their education.¹⁴¹

49. Adon Kalenga, a 13 year old who works seven days a week collecting minerals from the ground with his bare hands as a freelancer for US\$3 per day, summed it up: "My life is hard."¹⁴² He and many others sell the minerals to a broker, or middleman, who then sells it to different smelters, which, in this case is one run by a unit of Tongxiang, China-based Zhejiang Huayou Cobalt Co.¹⁴³ Adon added: "I want a normal life, like the people I see walking in the street. But I can't even afford to go to school. Things will never change."¹⁴⁴

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ Id.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ Id.

¹⁴² Clark, *supra* at note 109.

¹⁴³ Id.

¹⁴⁴ Id.

4. Rights to Food and Water

50. The construction of roads or other infrastructure for more efficient extraction and transportation of minerals has also led to the blockage of numerous roads that are crucial to the local communities' ability to access their fields or water sources. On 19 April 2012, a Chinese-Congolese joint venture, COMILU, accompanied by police, used bulldozers and diggers to excavate a deep trench which blocked off a rural road that has been used by locals for years to reach their fields and to access water, thus forcing them to take a much longer route.¹⁴⁵ In addition, the trench blocked numerous farmers' 15-20 minute walk to their fields and turned it into a two-hour journey.¹⁴⁶ The local people attempted to create a passage, but the police intervened by firing live ammunition and, in the process, killing a 25-year-old man, Jean Isuzi, a subsistence farmer.¹⁴⁷

E. Lamu Port Plan, Kenya

51. The Lamu Port is a massive project with a goal of improving Kenya's economy that is part of Kenya's Vision 2030 plan and LAPSSET (Lamu Port-South Sudan-Ethiopia Transport Corridor), whose cost is estimated at around US\$20 billion.¹⁴⁸ Kenya's Transport Minister Amos Kimunya explained that the Lamu Port Plan will open up Northern Kenya, connect it to Southern Sudan and Ethiopia, and thus help Kenya become a medium income economy by 2030.¹⁴⁹ Reports underscore the huge savings on transportation, new job opportunities, value addition, an increase in the export of cash crops and international tourist arrivals, and rising regional economic development and growth through facilitation of trade.¹⁵⁰ Moreover, proponents claim the plan will facilitate the transportation of oil from South Sudan to China, which buys more than 60 per cent of South Sudan's crude production.¹⁵¹

52. After a brief bidding for the construction of the first three berths at the Lamu Port, the contract worth US\$484 million was given to a consortium of companies led by China Communications Construction Company.¹⁵² The companies are expected to do the dredging, or the excavating under water, with the purpose of keeping the waterways navigable,

¹⁴⁵ Amnesty International, supra at note 95.

¹⁴⁶ Amnesty International, supra at note 101.

¹⁴⁷ Id.

¹⁴⁸ Hadija Ernst, *Opinion: Kenyan Paradise at Risk Over Government Oil Port Plans* (July 16, 2012), CNN, <http://edition.cnn.com/2012/07/13/opinion/lamu-kenya-port-oil/index.html>.

¹⁴⁹ Peter Leftie, *Kenya Poised to Roll Out Ambitious Sh2 Trillion Transport Corridor Project* (July, 22 2013), Daily Nation, <http://archive.is/jAAm>.

¹⁵⁰ Id.

¹⁵¹ Abdirizak Arale Nunow, *The Displacement and Dispossession of the Aweer (Boni) Community: The Kenya Government dilemma on the new Port of Lamu* (Oct 17-19, 2012), Land Deal Politics Initiative, <http://www.cornell-landproject.org/download/landgrab2012papers/nunow.pdf>.

¹⁵² Chinese companies have also been awarded contracts for the updating of Kenya's railways, which was worth \$2.66 billion, as well as a \$66.7 million deal for the expansion of the Mombasa port. Drazen Jorgic, *Kenya says Chinese firm wins first tender for Lamu Port project* (Apr 11, 2013), Reuters, <http://www.reuters.com/article/2013/04/11/kenya-port-lamu-idUSL5N0CX38D20130411>.

reclamation, and constructing port facilities and three berths for ship mooring.¹⁵³ Reports indicate that the Development Bank of Southern Africa has expressed interest in contributing as much as US\$1.5 billion to the project.¹⁵⁴

53. The Lamu Port Plan includes a transport corridor to link it with regional neighbors, an oil refinery and railway line connected to Juba.¹⁵⁵ Moreover, there are plans to build a two-lane highway from Lamu through Isiolo to Nakodok, a pipeline to transport crude oil from South Sudan to a refinery at Lamu, three airports at Lamu, Isiolo and Lokichogio and resort cities in the area.¹⁵⁶ A feasibility study of the project has highlighted the economic benefits that it would allegedly provide, and it has estimated the total cost at around US\$23 billion, although other reports indicate that the cost goes up to as much as US\$30 billion.¹⁵⁷

54. The agency in charge of the realization of this project is the Lamu Port Southern Sudan Ethiopia Transport Corridor Development Authority, which is headquartered in Nairobi and will be run by a director-general under an 11-member board that includes five State officials, five private sector representatives and a chairman appointed by the President.¹⁵⁸

55. In February 2013, South Sudan's government voiced their discomfort with the pace at which the project was being developed, and the chairperson of the New Sudan Federation, Costello Garang Ring, explained that the country could consider going to Djibouti or Tanga, at the speed with which the Kenya government is constructing Lamu port and doing the railway does not change dramatically.¹⁵⁹ Such threats can be detrimental to any attempts at preserving the rights of the local residents, since accelerating the pace of construction can lead to even greater human rights violations. Moreover, the slow pace of the construction has been linked to the rampant corruption in the construction industry.¹⁶⁰

56. Lamu's historical significance as an epicenter for trade in the East African Region and its living embodiment of Swahili cultural heritage has provided it a place on the United Nations Environmental World Heritage list.¹⁶¹ The economic benefits from the project might lead to unwanted damage to the marine ecology, the natural environment, limited fresh water supplies and the inadequate and dilapidated infrastructure of Lamu Town.¹⁶² The World Heritage

¹⁵⁴ Jogic, supra at note 152.

¹⁵⁵ Leftie, supra at note 149.

¹⁵⁶ Id.

¹⁵⁷ Id.

¹⁵⁸ Allan Odhiambo, *Kenya Sets Up Agency for \$29bn South Sudan, Ethiopia Project* (Apr 1, 2013), Africa Review, <http://www.africareview.com/Business---Finance/Kenya-sets-up-agency-for-regional-mega-project/-/979184/1736032/-/11awm31z/-/index.html>.

¹⁵⁹ *S. Sudan Denies it Plans to Abandon Lamu Port Project* (Feb 21, 2013), Sudan Tribune, <http://www.sudantribune.com/spip.php?article45603>.

¹⁶⁰ *Corruption in Tenders Causes Delays in the Construction Industry*, African Building, <http://www.africanbuilding.com/index.php/infrastructure/transportation/18-blogs/41-corruption-in-tenders-causes-delays-in-the-construction-industry>.

¹⁶¹ Sarah M. Wiggins, *Cultural Heritage Preservation Meets Modern Port Development: Securing the Integrity and Authenticity of the Lamu Town World Heritage Site in the Face of Current and Future Challenges* (Apr 1, 2010), SIT Graduate Institute, http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=1823&context=isp_collection.

¹⁶² Id.

Committee, during its meeting in 2012 in St. Petersburg, called on the Kenyan government to halt the project until an Environmental and Historical Impact Assessment report is provided by UNESCO.¹⁶³ The locals have raised numerous concerns over the project, including the loss of land, economy and power, the environmental destruction, the cultural erosion, the potential competition for new jobs and the increase in crime.¹⁶⁴ Moreover, Justin Willis, a historian and professor at UK's Durham University explained:

The real challenge is how to realize LAPSET's transformative prospect in terms of regional integration, wealth and opportunities while safeguarding the environment, the rights and livelihoods of those whose lands the project will cross.¹⁶⁵

1. Right to Free, Active and Meaningful Participation and Free, Prior and Informed Consent

57. There is no evidence that the local residents have been consulted or that their consent has been granted for the project. Shakila Abdalla, a Lamu member of parliament, mentioned that land is owned communally [and] this ought to be the route to negotiation over LAPSET.¹⁶⁶ A Chinese-financed feasibility study by the Japan Port Consultants of Tokyo still remains secret from the general public, but the President of Kenya has nonetheless pushed for the project to commence.¹⁶⁷ Reports indicate that the government has only carried out a sensitization meeting with stakeholders, but none with the affected communities.¹⁶⁸

58. Information about the project has been restricted to the Provincial Administration and select community leaders and government officers in Lamu and Nairobi high offices.¹⁶⁹ The aforementioned committee that will oversee the construction was created after the government of Kenya already ploughed through farms to make way for the port area.¹⁷⁰ The secrecy around the project has mobilized local residents because they have not been made aware of any potential benefits accruing to them from the project.¹⁷¹ Although the local residents are not completely against the construction of the project, their exclusion from the deliberations will allow only the elite to benefit.

¹⁶³ Ernst, supra at note 148.

¹⁶⁴ Nunow, supra at note 151.

¹⁶⁵ *Livelihood Concerns as Kenya Kicks Off Regional Infrastructure Project*, IRIN, <http://www.irinnews.org/report/98908/livelihood-concerns-as-kenya-kicks-off-regional-infrastructure-project> .

¹⁶⁶ Id.

¹⁶⁷ *Lamu Port*, SaveLamu, <http://www.savelamu.org/issues/lamu-port/> .

¹⁶⁸ Id.

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ *Kenya: Disquiet over Lamu Port Project* (Oct 31, 2012), IRIN, <http://www.irinnews.org/report/96675/kenya-disquiet-over-lamu-port-project> .

2. Forced eviction and land security

59. Land ownership and forced displacement have been a huge source of injustice in Kenya since long before the initiation of this project.¹⁷² Perhaps not surprisingly, the project management plan wholly fails to consider how it will protect the historical and cultural livelihood of the community's denizens, as well as the local ecosystem.¹⁷³ The limited access to information regarding the construction of the project has allowed individuals with access to the plans to obtain land at the proposed development sites while locals remain internally displaced without any title deeds.¹⁷⁴ Such illegal acquisition has endangered the indigenous populations that live in customarily-held land for over one thousand years in spite of Kenya's Constitution's recognition and protection of marginalized communities and community tenure.¹⁷⁵

60. In 2012, the government destroyed numerous farms in the Kiliana area in preparation for the port launching site without informing, compensating, or relocating those affected even though the feasibility study of 2010 highlighted the necessity for a resettlement action plan.¹⁷⁶ Abdikadir Omar, a member of parliament for Balambala in Garissa County, explained that the project might have potential adverse effects on pastoral livelihoods with the blocking off of migratory routes.¹⁷⁷

61. Although the project developers have recognized some protected groups, the Boni community has not been recognized, despite the fact that 80 per cent of the designated land for port development and the other projects that are planned lie within the Boni occupied forests.¹⁷⁸ By destroying these forests, the project will negatively impact the livelihood of this community, and destroy their culture through the constructive eviction of community.¹⁷⁹

62. Although Kenya's Constitution specifies that the land where the port is being built is partially community land to be managed by local communities, and public land which is vested in the County Government, the government has arbitrarily taken over this land by claiming that it falls on government land.¹⁸⁰ Moreover, less than 20 per cent of residents at the coast have titles for the land they live in, a circumstance which is used to justify the forced evictions and land grabbing.¹⁸¹ UNESCO has raised concern over the mass transfer of housing property away from local families who are holders and protectors of the intangible heritage.¹⁸² This

¹⁷² *Briefing: Land Reform Key to Kenya's Future* (March 5, 2013), IRIN, <http://www.irinnews.org/report/97599/briefing-land-reform-key-to-kenya-s-future>.

¹⁷³ Wiggins, *supra* at note 161.

¹⁷⁴ Save Lamu, *supra* at note 167.

¹⁷⁵ Nunow, *supra* at note 151.

¹⁷⁶ Save Lamu, *supra* at note 167.

¹⁷⁷ *Livelihood Concerns as Kenya Kicks Off Regional Infrastructure Project*, *supra* at note 165.

¹⁷⁸ Nunow, *supra* at note 151.

¹⁷⁹ *Id.*

¹⁸⁰ Save Lamu, *supra* at note 167.

¹⁸¹ IRIN, *supra* at note 171.

¹⁸² Wiggins, *supra* at note 161.

practice has led to growing militancy over insecure land rights, insecurity, and economic disenfranchisement in Lamu.¹⁸³

63. The Ministry of Lands estimated that about 60,000 people will be displaced as a result of the project.¹⁸⁴ Moreover, human rights activists indicated that the issue of displacement could be used to instigate violence.¹⁸⁵ Hussein Khalid, the executive director of the NGO Muslims for Human Rights, explained that land ownership has been used by politicians every election year to incite communities against each other, all aimed at getting political support and to exclude those they think might not support them.¹⁸⁶ With the rising property values, numerous individuals, including politicians and businessmen, have opportunistically tried to seize vacant land illegally and resell it.¹⁸⁷ This occurs against the backdrop that Kenya has experienced politically instigated violence every election year ever since it introduced its multi-party democracy in 1992 and that has caused the deaths of thousands and the displacement of many more.¹⁸⁸

64. The lack of compensation for the displaced people will, according to Khalid, perpetuate the marginalization of the coastal people that they have suffered over the years.¹⁸⁹ The lack of title has made the local residents skeptical about the promised compensation by the government.¹⁹⁰ Despite the government's claim that land demarcation for the determination of the compensation is under progress, locals and NGOs have reported that no such practice has been implemented.¹⁹¹

3. Rights to Food, Water and Livelihood

65. The segment of the population denied information and consultation are the indigenous Bajun, Orma, Sanye and Aweer who are a marginalized community in Kenya having very low education levels.¹⁹² A significant portion of these peoples still depend on nature-based livelihoods such as: fishing, mangrove cutting, hunting and gathering, pastoralism, farming, eco-tourism operators, and many others.¹⁹³ Furthermore, the local people's Islamic religion is considered to be very similar to the earliest forms of Islam because of the relatively unchanged practices that have survived for centuries.¹⁹⁴

¹⁸³ Nunow, supra at note 151.

¹⁸⁴ Hellen Ndaiga, *Lamu Port Project Causes Anxiety* (Nov 1, 2012), Construction Kenya, <http://www.constructionkenya.com/2773/lamu-port-project-causes-anxiety/>.

¹⁸⁵ Id.

¹⁸⁶ Id.

¹⁸⁷ Wiggins, supra at note 161.

¹⁸⁸ IRIN, supra at note 171.

¹⁸⁹ Id.

¹⁹⁰ Id.

¹⁹¹ Id.

¹⁹² Save Lamu, supra at note 167.

¹⁹³ Id.

¹⁹⁴ Wiggins, supra at note 161.

66. The construction of the port and the population explosion that will accompany it, estimated from the current 101,000 to over 1.25 million, will inevitably endanger many of these indigenous populations, despite Lamu's designation as a UNESCO World Heritage Site.¹⁹⁵ The huge influx of people to the area will also threaten the already limited water supplies, which will likely disproportionately impact the uneducated and unskilled local population.¹⁹⁶ A coalition of local civic society organizations, Save Lamu, has sued the government because of its lack of consultation with the indigenous populations and a proper environmental impact assessment.¹⁹⁷ The project will also endanger Lamu Island's Shella water source which is already inadequate to satisfy the needs of the local residents.¹⁹⁸ The culture's dependency on a reliable and sustainable supply of potable water increases the importance of reaching a plan that will ensure the protection of the aquifers on which this culture depends.¹⁹⁹

67. The director of the NGO Mangrove Action Project, Alfredo Quarto, explained that the Lamu Port will destroy shallow waters and mangroves, a key habitat for fish, and many poor locals will lose their only source of livelihood.²⁰⁰ The project's dredging shallow inland channels and felling shoreline-stabilizing mangrove forests is projected to disrupt artisanal fishing, the main source of income for around 70 per cent of Lamu's 100,000 people.²⁰¹ Despite the government's call on firms to bid the impact assessment which was recommended by an early feasibility study, no firm has been awarded yet.²⁰² The National Environment Management Authority has received an environmental impact assessment study report from the Ministry of Transport, which has proposed mitigation measures for ten key areas, construction of fish ports, provision of modern fishing equipment, investment in cold storage facilities, construction of a maritime museum, and it further proposed for preparation and implementation of a resettlement plan and compensation to families that will be relocated from their farms.²⁰³

68. However, experts and local residents remain skeptical about the capability of the government, or its willingness, to go through with the report. Aboud Swaleh, a 45-year-old artisanal fisherman said: "There are areas we can't get fish because there is no water. We can't feed our families as we used to."²⁰⁴

¹⁹⁵ Save Lamu, *supra* at note 167.

¹⁹⁶ Wiggins, *supra* at note 161.

¹⁹⁷ Ernst, *supra* at note 148.

¹⁹⁸ Wiggins, *supra* at note 161.

¹⁹⁹ *Id.*

²⁰⁰ Ndaiga, *supra* at note 184.

²⁰¹ IRIN, *supra* at note 171.

²⁰² *Id.*

²⁰³ Danson Kagai, *NEMA Invites Public to Discuss Lamu Port Project* (March 22, 2013), Construction Kenya, <http://www.constructionkenya.com/2890/nema-invites-public-to-discuss-lamu-port-project/>.

²⁰⁴ IRIN, *supra* at note 171.

4. Right to a Clean Environment

69. Despite the fragility of the local ecosystem on which the Lamu communities are highly dependent, the project was initiated without a completed environmental impact assessment.²⁰⁵ Lamu's rich biodiversity, which includes some of the richest marine ecology on the Kenyan coastline, is close to the site of the port's construction, while coral reefs that are a major tourist attraction in the area are in the heart of the Manda Bay site where the ships would have to sail through.²⁰⁶ Despite the fact that the 2010 feasibility study stipulated the extensive effects of the port on both marine and terrestrial life, while also calling for a proper environmental impact assessment before starting the project, the Kenyan Government still has not conducted any of the aforementioned assessments.²⁰⁷ Lamu's rich history, its status as a World Heritage Site by UNESCO, its marine reserves and forests filled with endemic plants and animals will all be endangered by the continuation of the project.²⁰⁸

F. Merowe Dam, Sudan

70. The US\$1.8 billion Merowe dam, primarily funded by China Exim, has led to massive displacement of peoples living in the area, as well as causing environmental damage.²⁰⁹ Though China is not the sole investor in the project, its investment of US\$519 million makes it the largest financier of the project.²¹⁰ The local owner of the dam is Sudan's Ministry of Irrigation and Water Resources.²¹¹

1. Environmental Impact

71. The environmental impact concerning water levels of the Nile as well as access to this water resource to farmers and villagers for irrigation and sustenance has been devastating. To date, there has yet to be a proper environmental impact assessment for the dam, and construction in fact began and was completed without approval by Sudan's environmental ministry.²¹² Sudanese law requires Environmental Impact Assessment (EIA) approval of such projects through Sudan's Environmental Protection Act of 2001.²¹³ The impact on downstream flow is most notable in the lack of proper approval and subsequent remedial measures to mitigate environmental damages. The EIA requires that provisions be made in a dam's flow regime for releasing environmental flows to help maintain downstream ecosystem integrity and community livelihoods.²¹⁴ Such requirements have not been implemented and taken into account into the daily operation of the dam. During peak hours of operation, downstream water fluctuations of up

²⁰⁵ Save Lamu, *supra* at note 167.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Ernst, *supra* at note 148.

²⁰⁹ Peter Bosshard, International Rivers, <http://www.internationalrivers.org/campaigns/merowe-dam-sudan-0>

²¹⁰ Nicholas Hildyard, The Corner Yard, 2008, *Bystanders and Human Rights Abuses: The Case of Merowe Dam* <http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/MeroweSudanStudies.pdf>

²¹¹ *Id.*

²¹² Bosshard, *supra* at note 209.

²¹³ Nicholas Hildyard, *supra* at note 210.

²¹⁴ *Id.*

to 4.9 meters affect irrigation pumps on the riverbanks and further threaten individuals working on the riverbanks.²¹⁵ Equally concerning is the estimated 2 per cent evaporation rate of the annual flow of the Nile River caused by the Dam and the impact this reduction has on downstream ecology and access to water.²¹⁶

2. Forced eviction and displacement

72. The Merowe dam has displaced between 50,000 ó 78,000 people thus far, the majority of which consist of the Manasir tribe who have been forcibly evicted from their ancestral lands to desert resettlement sites.²¹⁷ The promised resettlement plans have failed to adequately provide for those displaced and has led to an increase in violence. The resettlement sites themselves are primarily located in desert locations including the Bayuoda Desert, where the growth of crops or feed for livestock is impossible due to the poor soil found on these sites.²¹⁸ Additionally, many of the resettlement sites are poorly equipped and not fit for human habitation for the number of people forced to move into these sites. A case in point is the New Amri resettlement site, where only half of the housing requirements have been built and there is insufficient land to meet the legal resettlement entitlements of the affected communities.²¹⁹

73. Those who attempted to remain on their land were forcibly evicted due to the rising waters of the reservoirs.²²⁰ On 7 August 2006, without any formal flood warning by the Dam Implementation Unit, over 100 Amri families, were forced to abandon their homes due to flooding.²²¹ By 23 August 2006, it is estimated that 2,740 children, 4,795 women, and 2,005 elderly were forced to move and were without water, shelter or food.²²² A further estimated 700 homes were destroyed and 380 homes located on higher ground severely damaged.²²³ Due to the severe flooding, an estimated US\$5 million of crops and fodder have been destroyed and up to US\$1.2 million of livestock lost due to the rising flood waters.²²⁴ Whether the flooding was a part of the dam's daily operation or was intentionally used to cause the flooding remains contested. The Amri complaint alleged that the flooding was part of a deliberate strategy by the Dam Implementation Unit to force the Amri communities to accept a resettlement package which they had previously rejected.²²⁵

74. Displaced individuals have also been subject to violence by the government, arbitrary arrests, intimidation and torture. In September 2003, a group of farmers wishing to return to their original villages were met by government troops using live bullets and forced back to the ill

²¹⁵ Id.

²¹⁶ Id.

²¹⁷ Id.

²¹⁸ Id.

²¹⁹ Id.

²²⁰ Nicholas Hildyard, The Corner Yard, 2008, *Bystanders and Human Rights Abuses: The Case of Merowe Dam*

<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/MeroweSudanStudies.pdf>

²²¹ The Amri Committee, *Forced Eviction Due to Flooding*, www.hlrn.org/img/violation/Merowe%20AMRI%20COMPLAINT.doc

²²² Id.

²²³ Id.

²²⁴ Id.

²²⁵ Id.

prepared Nubian Desert site.²²⁶ In October of the same year government troops opened fire on women and children, and four protestors were subsequently arrested, detained and tortured for five days.²²⁷ In 2006, during a peaceful gathering, the militia opened fire instantly killing 3 people and injuring more than 50.²²⁸ Because of the 2006 attacks, the government entered negotiations with those affected to provide adequate compensation to communities affected by violence and displacement. Though Sudanese law requires that loss of land which was previously farmed for ten years or more to be compensated in full, thus far there has been refusal to compensate for any land farmed for less than 20 years.²²⁹ As such, compensation for the loss of a quava tree for example was reduced from US\$233 to US\$4.5. Moreover, reports indicate that villagers critical of the resettlement program or compensation programs are intimidated through discrimination by receiving little to no supplies including limited health center supplies and no ambulances.²³⁰

IV. Conclusion

75. This Parallel Report should be read in conjunction with the Parallel Report submitted by the Global Initiative for Economic, Social and Cultural Rights which lays out the extra-territorial legal obligations of the State Party under to the Covenant on Economic, Social and Cultural Rights.

76. Here the Global Initiative for Economic, Social and Cultural Rights and the International Human Rights Clinic at Western New England University School of Law reiterate the recommended Concluding Observations in that Parallel Report, namely:

21. The State Party should ensure that those individuals, groups and entities acting under its authority respect Covenant rights outside the territory of the State Party.

22. The State Party should ensure that those individuals, groups and entities, including corporations and other business entities incorporated or domiciled in its territory and/or its jurisdiction, respect Covenant rights outside the territory of the State Party.

23. The State Party is urged to adopt a human rights-based approach to its policies on official development assistance and on agriculture and trade, by:

(a) undertaking a systematic and independent human rights impact assessment prior to making funding decisions;

²²⁶ Id.

²²⁷ Id.

²²⁸ Id.

²²⁹ Id.

²³⁰ Nicholas Hildyard, The Corner Yard, 2008, *Bystanders and Human Rights Abuses: The Case of Merowe Dam* <http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/MeroweSudanStudies.pdf>

(b) establishing an effective monitoring mechanism to regularly assess the human rights impact of its policies and projects in the receiving countries and to take remedial measures; and

(c) ensuring that there is an accessible complaint mechanism if violations of economic, social and cultural rights occur in the receiving countries.

24. The State Party should ensure that the proposed BRIC Development Bank incorporates a human rights based approach to its activities.

25. The State Party is urged to ensure that all economic, social and cultural rights are fully respected and rights holders adequately protected in the context of corporate activities including corporate activities abroad, including by establishing appropriate laws and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations, as underlined in the Committee's statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights (E/C.12/2011/1).

26. The State Party should ensure that, in the event Covenant rights are violated by individuals, groups and entities acting under its authority or by other individuals, groups and entities, including corporations and other business entities incorporated or based in the State Party, there exist accessible accountability mechanisms and effective remedies for victims of those violations.

27. The Committee calls on the State party to take all appropriate measures to ensure the effective applicability of the provisions of the Covenant in national courts, including by promoting training on economic, social and cultural rights as contained in the Covenant and their justiciability among the professionals of the justice system. Such measures should include the extra-territorial obligations under the Covenant. The Committee requests the State party to provide, in its next periodic report, information on concrete measures taken in this regard, as well as on court cases invoking the provisions of the Covenant.