

Destruction at Dawn:

The Rights of Indigenous Peoples in the Republic of Nepal



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Acronyms

CERD	UN Committee on the Elimination of Racial Discrimination
EIA	Environmental Impact Assessment
EW/UA	Early Warning / Urgent Action procedure of CERD
FPIC	Free, prior and informed consent
FPP	Forest Peoples Programme
GGMO	Good Governance (Management and Operation) Act (2008)
GRXXIII	The UN Committee on the Elimination of Racial Discrimination's General Recommendation XXIII (1997)
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of Racial Discrimination
IDA	International Development Association
ILO	International Labour Organisation
LAHURNIP	Lawyers' Association for Human Rights of Nepalese Indigenous Peoples
MoU	Memorandum of Understanding
NEA	National Electricity Authority
NFDIN	National Foundation for the Development of Indigenous Nationalities
NGO-FONIN	Federation of Nepalese Indigenous Nationalities
SVJN	Satluj Jal Vidyut Nigam power company
THDP	Ten-year Hydropower Development Policy
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VDC	Village District Committees

Preface

The impetus for this study came from a growing concern by the affected indigenous peoples and their communities, which they communicated to the NGO Federation of Nepalese Indigenous Nationalities (NGO-FONIN) and the Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP), about the Arun III Hydro Electric Project. This fed into existing broader concerns about protection for the rights of indigenous peoples in relation to hydropower projects in Nepal more generally. The Arun III project was, at the time of its inception and prior to its cancellation in 1995, the largest infrastructure project being planned in Nepal. However, the project was inconsistent with the rights of indigenous peoples as guaranteed by international instruments applicable to Nepal, and the World Bank's Inspection Panel also found it to be non-compliant with World Bank safeguard policies. Despite these serious flaws, which led to the project's cancellation in 1995, on 3 March 2008 the Government of Nepal signed a Memorandum of Understanding (MoU) with India's state-owned Satluj Jal Vidyut Nigam power company (SJVN) to revive and extend the 402 MW Arun III Hydro Electric Project. The "new" Arun III project is controversial because it raises many of the same issues that emerged when it was first considered. These include economic, social and cultural, environmental and ecological issues and, more broadly, a range of human rights concerns.

This report is based on a field study conducted in Nepal between 28 March and 14 April 2009. The findings illustrate significant problems with the proposed project, including non-compliance with international standards on the rights of indigenous peoples. The deeply flawed process of reviving this dam includes the failure to carry out proper consultation with the affected communities, inadequate provision of information about the project, and failure to respect the right of indigenous peoples to free, prior and informed consent, all of which deny indigenous peoples their rightful role in decision making related to this dam.

The study also found that almost all the communities which participated in the discussions and meetings had serious reservations about the Arun III project. They expressed real and serious concerns about the potential for adverse economic, social, cultural and environmental impacts, and specifically about how these will affect their rights to own and control their traditional land and resources.

This report is intended to support indigenous peoples, their communities and their organisations, to highlight their concerns about the Arun III hydropower project. These concerns are linked, among other things, to securing their rights, particularly to land and other natural resources, through the effective implementation of the standards set out in various international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples.





Introduction

The rights of indigenous peoples are guaranteed in a range of international instruments applicable to Nepal, such as the International Convention on the Elimination of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), and International Labour Organisation Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169).¹ These rights are restated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which was endorsed by Nepal when it was adopted by the General Assembly of the United Nations in 2007. Ratification of these instruments commits the government to uphold the rights of Nepal's indigenous peoples, a commitment that is also affirmed in national law. Specifically, Section 9 of the *1991 Treaty Act* states that international treaties ratified by Nepal are incorporated into Nepali law and, in the case of a conflict between national and international law, international law shall prevail.²

However, as emphasised by Professor S. James Anaya, the United Nations Special Rapporteur on Indigenous Peoples, when he visited Nepal in November–December 2008, overt support by the state and its agencies is required if indigenous peoples' rights are to be secured and protected in reality.³ While indigenous peoples' organisations have commenced negotiations about implementation of ILO 169, there remains a lack of adequate attention to these rights in practice.⁴ Moreover, indigenous peoples in Nepal face the linked problems of poverty,

¹ Under the law of Nepal, Section 2 of the *Foundation for the Development of Indigenous Nationalities Act 2002*, recognises the collective nature of indigenous peoples and defines them as groups with distinct mother tongues, traditions, customs, identities, social structures, and their own oral or written histories.

² In this regard, the Supreme Court of Nepal held, in the case of *Rabindra Prasad Dhakal v. Nepal Government, Ministry of Home Affairs and Others*, that Nepal has no immunity from the obligations contained in international treaties according to Sec. 9 of the 1991 Treaty Act, which provides that the provisions of international treaties ratified by Nepal have an equivalent status to the national laws of Nepal.

³ See, *United Nations Press Release*, "UN expert urges Nepal to act on commitments to indigenous rights", 2 December 2008. Available at: <http://www.un.org/apps/news/story.asp?NewsID=29152&Cr=>

⁴ More information can be found on the websites of Lawyers Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) and the Forest Peoples Programme (FPP) respectively at: www.lahurnip.com and www.forestpeoples.org.

marginalisation, and discrimination, as well as a lack of secure access to resources such as basic health facilities and services, political representation, and economic and education opportunities.⁵

There have been improvements in recent years, since the end of panchayat rule in May 1991 and the abolishment of the formal state doctrine of “one nation, one culture, one language”.⁶ In fact, in the last Constitution of the Kingdom of Nepal, the nation was redefined as a “multiethnic, multilingual” state.⁷ Indigenous peoples’ movements were also recognised by the government after the establishment of multi-party democracy in 1990 in the 8th and 9th National Five Year Plans. The *Local Self-Governance Act 1998* also states that local governance structures must include indigenous peoples’ representatives. An Indigenous Development Committee was formed in 1995 and the National Foundation for the Development of Indigenous Nationalities (NFDIN) was established in 2002.⁸

Since the fall of the monarchy and the establishment of a republic in Nepal, further gains have been possible. The 2007 *Interim Constitution* addresses the rights of indigenous peoples from two angles, firstly in Article 3 as a distinct people within a multiethnic, multilingual and multicultural nation and secondly from the angle of exclusion, where Article 21 enshrines the right to equality and inclusion and identifies indigenous peoples as part of the “excluded groups” of Nepal. Efforts were also made to incorporate indigenous participation in the drafting of the new constitution by encouraging indigenous membership of the Constituent Assembly tasked with drafting the new constitution. However, participation was limited to persons willing to participate under the aegis of a political party and therefore bound by party priorities. This lack of opportunity for indigenous peoples to self-select their representatives has resulted in a writ petition pending before the Nepal Supreme Court arguing that the process is incompatible with Nepal’s international obligations.⁹ Lack of *representative* inclusion in the constitution process is one of several contemporary challenges facing the indigenous peoples of Nepal, a problem that is echoed in the context of the Arun III project.

5 *Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal*. UN Doc. A/HRC/4/97, 17 January 2007, para. 68, stating that “Discrimination on the basis of caste, ethnic, gender, geographic and other considerations has marginalised and excluded millions of Nepalese people from full participation in political processes and State institutions as well as equal access to housing, water, land and other such rights”; and stating that “A long history of oppression and marginalisation has excluded indigenous peoples from political representation and decision-making, full citizenship, and economic and educational opportunities; and their distinct cultures and languages have been continuously threatened”.

6 The panchayat system was a centrally controlled non-party council system of government devised in 1962 by King Mahendra Bir Bikram Shah Dev when Nepal existed as a kingdom. The panchayat system was established at the village, district, and national levels and served as an instrument by which development plans and other policies came under the control of directives of the King, lasting for some 30 years. However, in the late 1980s and early 1990s, widespread political unrest and pro-democracy movements arose against the monarchy and the panchayat system. The ban on political parties was lifted in April 1990, the prime minister resigned and the Council of Ministers and the national panchayat dissolved. A multiparty interim government was introduced in 1990 to undertake reforms in the post-1990 democratic era.

7 As a way of identifying the diverse population, the National Foundation for Development of Indigenous Nationalities (NFDIN) has produced two volumes, one based on language groups (linguistic minorities) and the other on ethnic and caste groups. The language groups are further distinguished by their linguistic and ethnic affiliations. NFDIN’s classification is very much in line with the Population Census of Nepal (2001), which recorded a total of 103 ethnic and caste groups, and 93 language groups. For a detailed description of the ethnic and caste and language groups in Nepal, see, *Nepal Atlas of Ethnic & Caste Groups and Nepal Atlas of Languages* by Harka Gurung, Yogendra Gurung and Chhabi Lal Chidi, 2006.

8 NFDIN is a state agency established by the parliamentary act *National Foundation for Development of Indigenous Nationalities Act 2002*.

9 This issue was raised with the UN Committee on the Elimination of Racial Discrimination (CERD) in 2009. The Committee viewed the exclusion of self-selected representatives as threatening irreparable harm to the rights of indigenous peoples and issued two letters to the Government of Nepal to this effect, available at: <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm>. See also the original submissions and corresponding letters from CERD at: <http://www.forestpeoples.org/resources/results/taxonomy%3A2%2C365.373>.

This study seeks to examine the situation of indigenous peoples in Nepal, focusing particularly on their human rights, and to develop this examination through a focused consideration of the Arun III hydropower project. Specifically, the study looks at the extent to which indigenous peoples in the affected areas are aware of their rights, and the extent to which these rights are being promoted, respected and protected in relation to the Arun III dam and its associated facilities. The study also analyses the possible impacts of the Arun III project and local perceptions of likely impacts. It is hoped that the study will provide legislators, policy makers, state agencies and others with a useful tool for considering and implementing the measures necessary to ensure that the rights of indigenous peoples in Nepal are adequately respected and protected.

It is also hoped that this study will provide a fresh perspective on issues that have previously been raised, predominately from an environmental and developmental point of view.¹⁰ The few studies that have looked at involuntary resettlement and water projects from a legal and policy perspective have not adequately included human rights law.¹¹ This level of investigation is especially important given Nepal's incorporation of international law into domestic law by statute,¹² its ratification and the ongoing process of implementing ILO 169, the constitution revision process, and the recent findings of the UN Committee on the Elimination of Racial Discrimination (CERD) relating to Nepal's treatment of indigenous peoples.

This study was undertaken jointly by the Lawyers Association for the Human Rights of Nepalese Indigenous Peoples (LAHURNIP) and the Forest Peoples Programme (FPP).

10 See, among others, Khatri, Sridhar K. & Uprety, Hari (eds.) (2002) *Energy Policy: National and Regional Implications*, NEFAS & CASAC, Kathmandu; Rajendra Pradhan, Franz von Benda-Beckmann, Keebet von Benda-Beckmann (eds.) (2000) *Water, Land and Law: Changing Rights to Land and Water in Nepal*. Proceedings of a workshop held in Kathmandu, 18–20 March 1998, Legal Research and Development Forum (FREEDEAL), Kathmandu, Wageningen Agricultural University (WAU), Wageningen, and Erasmus University Rotterdam (EUR), Rotterdam; and Regmi, Amreeta (2004) *Democratising Micro-Hydel: Structures, Systems and Agents in Adaptive Technology in the Hills of Nepal*, Wageningen University Resources Series, Orient Longman Ptd Ltd, New Delhi.

11 For a review of existing studies and publications on this theme, see Bisangkhe, Shiva (2003–04) "Water project related involuntary displacement in Nepal" in: *Water Nepal*, Vol. 11 No. 1, pp.86–105.

12 See Article 33 (m) of the Interim Constitution of Nepal, 2007 and Nepal Treaty Act 1991. See also *Rabindra Prasad Dhakal v Government of Nepal*, Nepal Kanoon Patrika 2064 (holding that the 1991 Treaty Act incorporates international treaties, including human rights treaties, into domestic law and that international law shall take precedence over national law where there is a conflict).



Background

The Thirst For Energy

Nepal is experiencing a serious power shortage and the government is seeking to manage this by “load shedding”: enforced power cuts to reduce the power demand on the grid. In November 2008, the National Electricity Authority (NEA) imposed 10-hour-per-day load shedding and further increased this to 12 hours in mid December. The cause is the large – and increasing – disparity between demand for power and its supply, despite the fact that large portions of Nepali society, about 60% of the rural population, do not have access to electricity from the national grid.¹³ Already overwhelming the current inadequate production capacity, demand is predicted to grow by 10% annually and this will rise sharply if greater areas of Nepal are brought into the national grid.¹⁴

For much of the rural population and some urban dwellers, off-grid power sources remain far more important than grid supply. Fuelwood comprised about 80% of rural energy supply in the late 1990s, a figure unlikely to have changed much since.¹⁵ Other fuel types include animal waste and agricultural residue. Some local energy demand is also increasingly met by solar cells and micro-hydro plants (below 100 kW), as observed during the field visits for this study. In fact, only about 12% of the total consumption of the country is met by commercial fuels such as imported petroleum products, coal and electricity.¹⁶

13 Dharmadhikary, Shirpad (2008) *Mountains of Concrete: Dam Building in the Himalayas*, International Rivers, Berkeley, p.8.

14 *The Himalayan Times*, 26 December 2008.

15 Rijal, Kamal (ed.) (1997) *Implications of National Policies on Renewable Energy technologies: Report of the Regional Experts' Consultation*, 3–4 July, Kathmandu, p.7; Shrestha (2002) “Energy as a Security Issue: A Nepalese Perspective” in: Khatri, Sridhar K. & Uprety, Hari (eds.), *Energy Policy: National and Regional Implications*, NEFAS & CASAC, Kathmandu, p.78.

16 Shrestha (2002)op. cit., pp.77–92.

The most likely response to the scale of the current and predicted energy shortage is further development of hydroelectricity. The government has indicated that this is its preferred approach, declaring its intention to develop 10,000 MW of hydropower within the next 10 years for domestic use, while independent researchers note an additional 12,000 MW are planned for export to India.¹⁷ Currently Memorandums of Understanding (MoUs) have been signed for the construction of the 750 MW West Seti (SMEC International), 300 MW Upper Karnali (GMR Consortium) and 900 MW Arun III (Satluj Jal Vidyut Nigam Ltd) projects. All three of these projects are primarily intended to produce energy for export to India, for which the Nepal government plans to expedite construction of inter-country transmission lines. Future partnership with India will potentially include the 245 MW Naumure hydro project, and the 10,800 MW Karnali-Chisapani and 6,000 MW Pancheswhor Multipurpose Projects, all intended to contribute both to foreign exchange earnings and to easing the domestic energy crisis.

However, there remain many unanswered questions about how and when these projects will go ahead; how they will be funded; the precise mechanisms and conditions under which the dams will be proposed and built; and how their long-term operation will be managed. Experience of management of existing transnational dam and electrical generation facilities in Nepal has proven that these questions are not easy to answer, and have not always been effectively answered in previous projects.¹⁸ Previous major hydropower projects planned in Nepal in bilateral agreements with India are viewed with much scepticism by the Nepali public, who perceive that “India ha[s] deceived Nepal and always benefited India at the cost of Nepal”.¹⁹ The story of the 269-metre Kosi High Dam is illustrative. The dam was built near the Nepal–India border under a bilateral agreement. Construction costs were covered by India. However, several decades after construction was complete Nepal was still receiving only a small part of the promised quantity of electricity generated and only a fifth of the promised water flowing in the western irrigation canal.²⁰ On 18 August 2008 the Koshi River broke its embankment, triggering massive floods in the surrounding areas of the two countries. An estimated 3.2 million people lost their homes and livelihoods, both in Nepal and the Indian state of Bihar.²¹ The Nepalese blamed India for unilaterally controlling the project to address north Bihar’s floods and irrigation woes with little or no consideration of the risks to or the needs of the Nepali. The history of this project requires that a study into the impacts of a mega-dam address the possible disparity between meeting the needs of those far away while neglecting local needs and aspirations. This proved to be a resonant point with interviewees, as expressed by one woman, “We have also heard of the Kulekhani project where electricity is being produced by a dam but the local area is in darkness”.²² In another VDC a similar concern was echoed: “We have heard about Kulekhani, local people have suffered high losses and we don’t want to suffer like them”.²³

17 *Hydro Nepal*, January 2009 and Dharmadhikary (2008) *op. cit.*, pp.6–7.

18 This issue is all the more interesting since a number of countries in the South Asian region have in the past talked about planned capacity expansions pertaining to regional cooperation, including cross/trans-border power trading and hydropower development for meeting energy needs or shortages, particularly in India. Seven of these countries – Bangladesh, Bhutan, Maldives, India, Nepal, Pakistan and Sri Lanka – met in Dhaka, Bangladesh in December 1985 and established the South Asian Association for Regional Cooperation (SAARC). The fundamental question is whether there is willingness among these SAARC countries, as well as conducive geopolitical environments, to harness resources and equitably share the costs and benefits.

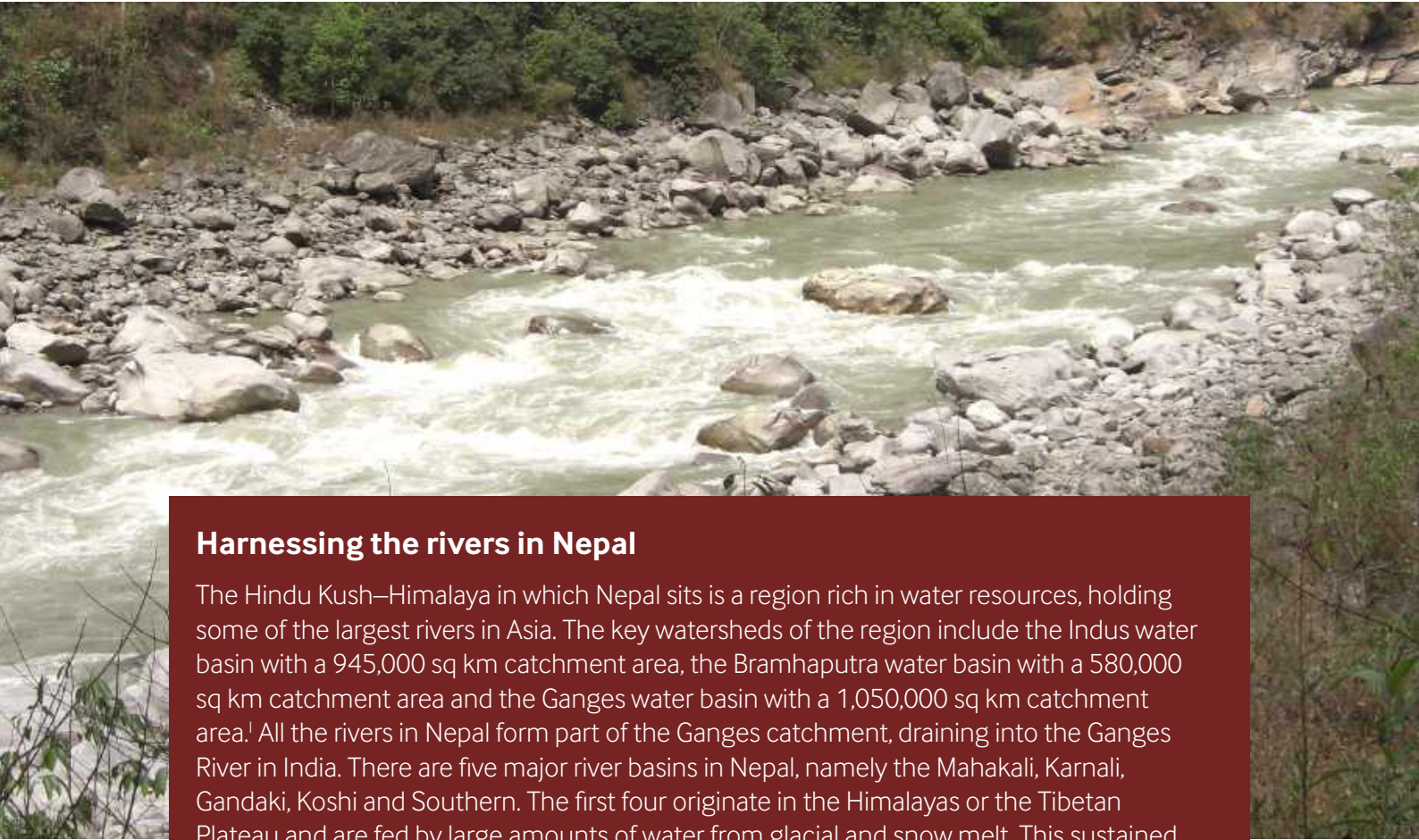
19 Kansakar, Vidya Bir Singh (2002) Comments on Kamal Rijal’s paper, “Role of Nepalese Water Resources for Meeting Energy Needs in South Asia” in: Khatri, Sridhar K. & Uprety, Hari (eds.), *Energy Policy: National and Regional Implications*, NEFAS & CASAC, Kathmandu, p.120; Dharmadhikary (2008) *op. cit.*, pp.37–38 emphasises the same point, writing that “Ordinary citizens in Nepal often harbour deep resentment toward the Indian government believing that it has pressured the Nepali government into accepting treaties preferential to Indian interests”.

20 Shivakoti, Murari (1995) “High on Dam, Law on Debate” in *The Rising Nepal*, 19 May 1995.

21 <http://www.gits4u.com/water/water-index.htm> accessed on 3 March 2009. It was also reported that almost 1,250 miles of highways and 250 road bridges, estimated at around US\$523 million, were damaged. There were also many deaths and cases of waterborne diseases (pneumonia, diarrhoea and high fevers).

22 Women’s focus group discussion, Sitalpati Ward 6, 30 March 2009.

23 Mixed group discussion, Num Ward 4, 7 April 2009.



Harnessing the rivers in Nepal

The Hindu Kush–Himalaya in which Nepal sits is a region rich in water resources, holding some of the largest rivers in Asia. The key watersheds of the region include the Indus water basin with a 945,000 sq km catchment area, the Brahmaputra water basin with a 580,000 sq km catchment area and the Ganges water basin with a 1,050,000 sq km catchment area.^I All the rivers in Nepal form part of the Ganges catchment, draining into the Ganges River in India. There are five major river basins in Nepal, namely the Mahakali, Karnali, Gandaki, Koshi and Southern. The first four originate in the Himalayas or the Tibetan Plateau and are fed by large amounts of water from glacial and snow melt. This sustained, predictable and high flow combined with the natural presence of steep gorges and valleys in the lower reaches opens the potential for high dam reservoirs. Rising demand for energy is common to Nepal, India, southern China and Bhutan – all countries that share the Hindu Kush–Himalayan region. This rise in demand, coupled with the decreasing popularity of fossil fuels, has led to increased planning by these countries for dam construction on these major rivers as a source of hydropower electricity, irrigation, flood control, and other purposes.^{II}

I. Rijal, Kamal (2002) "Role of Nepalese Water Resources for Meeting Energy Needs in South Asia" in: Khatri, Sridhar K. & Uprety, Hari (eds.), *Energy Policy: National and Regional Implications*. NEFAS & CASAC, Kathmandu, p.93.

II. Dharmadhikary (2008) *op. cit.*

Forests, Land And Resources: What The Law Says

Prior to 1964 the land and natural resource rights of indigenous peoples were recognised either by a specific treaty with the state or by other special arrangements, such as the Kipat system used by the Limbus, Rais, Tamangs, Majhis, and others. The Kipat system encompassed all territorial rights, including rights to land, forest, minerals and waters. Over time, however, various laws have been enacted that have abolished indigenous peoples' collective land and natural resource rights, irrespective of the different political arrangements between the people concerned and the Nepali state. The first widespread legal removal of land rights occurred on 27 January 1957 when private

forests were nationalised under the *Private Forest Nationalisation Act*.²⁴ This Act was amended on 24 January 2010, introducing clearer provisions for transferring the ownership of all forests to the government (Section 3.1) and repealing a range of documents that had previously been used to grant rights over forests to individuals (Section 3.2). Moreover, the Act specifically states that no one is entitled to compensation if the private forest is nationalised under this Act (Section 5). In 1964, the second major removal of land rights occurred with the introduction of the *Land Reform Act*, abolishing communal title.

The surge of commercial logging that followed the *Private Forest Nationalisation Act* led to a rapid decrease in forest cover in Nepal.²⁵ Forest loss also occurred as a result of increasing numbers of tourists on trekking routes, placing pressure on already limited sources of fuel. There is a popular perception that rural communities and indigenous peoples are a major source of deforestation, although this view has been roundly refuted in research and studies. As Chowdhury writes "... there is a mistaken belief that deforestation is largely due to the growing rural (poor) population and their fuel wood and fodder needs. Actual studies have shown that, whereas poor rural people use twigs and leaves and dung, it is the urban market that prompts contractors, often with the connivance of the guardians of the forest, to fell the trees illegally for a growing and a very profitable urban market".²⁶

Despite this, the Government of Nepal responded to rising deforestation by introducing new legislation aimed largely at regulating the activities of the rural poor. The first attempt to regulate forest use in this way was when the *National Forestry Plan (1976)* was enacted, followed two years later by the *Panchayat Protected Forest Act (1978)*. The Act recognised community forestry and lay down a strict set of rules by which communities could manage their forests, although ultimate ownership remained with the state. The results have been disappointing, partly due to the lack of expansion of involvement and participation in forest management under the new rules.²⁷

A further refinement of community management policy came with the *Government Forest Act 1992* which assigned most of the accessible hill forests (with certain exceptions such as religious forests and protected areas) to the management of local Forest User Groups (FUGs). Under this system, any community member who wants to harvest or use local resources must register as a member of the local FUG. All registered FUGs are regulated and managed by the Forest User Committee which, in turn, is overseen by the relevant Forest authority.

There are doubts about this latest approach too. Dahal argues that two gaps remain: firstly, that communities can be compelled to alter their forest management plan if it is judged to be deleterious to the environment, although there is no definition of what this means; and secondly, the law gives the District Forest Officer a major role in making final decisions about what actions are or are not allowed.²⁸ Further, the law also states that "Notwithstanding anything contained in this Act, in case there is no alternative except to use the Forest Area for the implementation of the

24 This includes fully or partially revenue-exempt forest known as *Parti Jagga*, or land with no official title.

25 UNDP/Nepal 1997; UNCED 1992, cited in Dahal, Govinda Prasad (2000). "Population and environment issues in Nepal and the need for community development policy" in *Contributions to Nepalese Studies*, 1 January.

26 Cited in Dahal (2000), *op. cit.*, accessed 21 April 2009.

27 As Dahal explains, the government's own review was of the opinion that "...the impractical nature of the Panchayat protected forest rules, which failed to create an environment for the full participation of all users. ... In effect the management authority was transferred from the District Forest Officer (DFO) to the Pradhan Pancha (chairperson of the Panchayat) while the status of custodial element remained the same. The forest remained as Government Forest in another name" (Community and Private Forestry Division 1997:16 cited in Dahal (2000), *op. cit.*

28 Dahal (2000), *op. cit.*

plan having national priority and if there shall be no significant adverse effect in the environment while conducting such plan, His Majesty's Government may give assent to use any part of the Government Managed Forest, Community Forest, Lease hold Forest or Religious Forest for the implementation of such plan".²⁹

The widespread reforms of 1964, legal changes of 1976 and 1978, and the *Forest Act 1993* have affected every aspect of local management. New systems of management, such as the Forest User Groups and Committees have severely undermined traditional tenure systems and outlawed community-owned land systems. Moreover, it is not assured that these forest laws and systems will improve management and protection of local degraded forests, as they were intended to do. On the contrary, they have created new vested interests by bringing in a number of new players whose mandates include levying taxes on forest products collected by the communities or forest users, such as cardamom, which is widely farmed in the study area.

The biggest single political change to occur in Nepal in the recent past has been the abolition of the 240-year-old monarchy and the establishment of the Republic of Nepal in 2007. The impact this will have on forest tenure systems is not yet clear. However, what is clear is that these political changes were rooted partly in deep dissatisfaction with the centralisation of power and control of the land being in the hands of the high castes and political elites. In the establishment of the Republic, by means of the *Interim Constitution* of 2007, a number of articles emphasise the need to decentralise power and prioritise local communities and "excluded groups". For instance, Article 35 (4) of the *Interim Constitution* specifically stipulates that the State "shall, while mobilising the natural resources and heritage of the country that might be useful and beneficial to the interest of the nation, pursue a policy of giving priority to the local community".³⁰ While responding to a history of disempowerment of all communities, this provision is problematical for indigenous peoples as it provides no recognition of the traditional and customary land rights of indigenous peoples that were effectively removed under the Land Reform of 1964. The prioritisation of community rights in this way opens an avenue for land to be gathered yet again into the hands of dominant peoples and castes within Nepal. In addition, it obstructs the enactment of legislation providing for recognition of indigenous peoples' land rights.

A Short History Of Mega-Dams

During the past 50 years an estimated 40 to 80 million people across the globe have been adversely affected by large dams,³¹ most of whom are indigenous peoples and minorities.³² The construction of large dams has far-reaching impacts on ecosystems and river basins and on millions of people living above and below dam sites. The adverse effects of large dams have been widely discussed both in scholarly and activist works and the roles of such dams have been questioned.³³ Yet they continue to be built and planned with inadequate environmental and social impact assessments.

29 Forest Act 1993, clause 68 accessible at: http://www.forestrynepal.org/images/Forest_Act_of_Nepal_1993.pdf

30 Article 35 (4) *Interim Constitution of Nepal* (2007), accessible at: <http://www.nic.gov.np/download/interim-constitution.pdf>

31 The International Commission on Large Dams (ICOLD) defines large dams as those higher than 15 metres or more from their foundation or, if between 5 and 15 metres high, has a storage capacity of over 3,000,000m³.

32 World Commission on Dams (WCD) (2000) *Dams and Development: A New Framework for Decision-Making*, Earthscan, London; Yong Ooi Lin, Carol (2006) "Dam-based Development in Malaysia: the Temenggor and Sungai Selangor Dams and the Resettlement of the Orang Asli", Unpublished doctoral thesis submitted to the University of Sussex, Brighton.

33 See, for example, McCully, Patrick (2001) *Silenced Rivers: the Ecology and Politics of Large Dams*, Zed Books, London; Scudder, Thayer (2005) *The Future of Large Dams: Dealing with the Social, Environmental and Political Costs*, London: Earthscan; World Commission on Dams (WCD) (2000) *op. cit.*; Yong Ooi Lin (2006) *op. cit.*; The Corner House (www.thecornerhouse.org.uk); International Rivers (www.internationalrivers.org).

Dams are built to fulfil specific purposes and may be able to provide much needed energy supplies at a lower social, environmental and economic cost than the alternatives, but the widespread evidence of the potential damage done by mega-dams in particular requires that a decision to build such a dam is carefully considered and scrutinised.

A brief look at the potential costs of dams backs this up. At their worst, large dams usurp the livelihoods and human rights of indigenous peoples, a majority of whom are dependent on subsistence-based economies and derive their basic needs from their land and other natural resources. Dams also destroy the free flow of rivers which provide indigenous peoples and others with free access to water for drinking and various domestic and agricultural uses. When dams involve land acquisition and resettlement, those who are resettled suffer the loss of land, homes, fields and forests. They also suffer loss of income through their inability to collect forest produce and other natural resources, e.g. bamboo, rattan and resin. Indigenous peoples' rights to customary lands and resources can be undermined, or in some cases nullified, impacting on every aspect of their cultural, social and economic survival.³⁴ Finally, damming free-flowing rivers exposes people to a higher degree of illnesses and disease because of outbreaks of parasitic and vector-borne diseases, such as malaria, and new types and strains of diseases. In other words, large dams can impose significant environmental, ecological and social costs, which are often not explained clearly in advance of construction, whereas projected benefits tend to be highlighted and exaggerated.

Studies have shown that the majority of those affected by large dam projects, particularly the projects involving involuntary resettlement, end up being worse off than before.³⁵ Indigenous peoples tend to be hit harder than non-indigenous, and within indigenous groups the impacts on women tend to be worse than on men. Indigenous peoples in general continue to face discrimination, and indigenous women are doubly discriminated against by virtue of their indigenous status and their gender. Official state ideologies on gender and the household have affected gender relations and land and resource ownership due to gendered ideas about the public being the preserve of men and formal land titles being in the man's name. Resettlement further heightens gender inequalities when formal institutional arrangements favour men, assuming them to be the head of the household.³⁶

There is growing recognition among development agencies of the special vulnerabilities of indigenous peoples to large-scale development or, indeed, any actions impacting on their relationship to their land and resources. Increasingly, standards exist to guide development that affects indigenous peoples. The World Commission on Dams, in a comprehensive and multi-year study of dams, concluded that indigenous and tribal peoples have historically suffered disproportionate displacement and livelihood loss and consequently require specific protections to ensure that such damage does not occur.³⁷

However, many new and ongoing dam projects fail to comply with existing and emerging national and international laws and standards. In the Nam Theun 2 Dam in Laos, for example, it was reported that "legal agreements have been violated and social and environmental commitments have been

34 As Brody (1981 p.xiv) observes, "Indigenous peoples for the most part live in poverty and endure a sense of profound cultural and spiritual loss, watching their resources, the homes of their gods – be they forests, mountains, fish or the earth itself – being used to make others wealthy . . . Alongside losses of land are parallel losses to other sources of wellbeing: languages, belief systems, links between generations and self respect." Brody, Hugh (1981) *Maps and Dreams*, London, Faber and Faber.

35 Scudder (2005) *op. cit.*; Yong Ooi Lin (2006) *op. cit.*

36 Yong Ooi Lin (2006) *op. cit.*

37 World Commission on Dams (WCD) (2000) *op. cit.*

broken”.³⁸ The Nam Theun 2 project will displace some 6,200 indigenous people living on the Nakai Plateau, and around 100,000 people in downstream communities. Similarly, the push to build dams in the Himalayas, particularly in Pakistan, India, Nepal and Bhutan, will have grave implications for the landscape, ecology, economy, culture and identity of the local peoples, who are often distinct ethnic groups, numerically considerably smaller than the dominant populace.³⁹

Damming the Arun

The Arun River originates in the Tibetan region of D’ing-ri and Khamba, works its way through Nepal, flows into India where it joins the Ganges, and finally empties into the Bay of Bengal. Inside Nepal, the Arun has cut a deep gorge, considered one of the world’s deepest,⁴⁰ and flows 155 km after which it joins the waters of the Koshi River. It has significant potential for generating hydroelectric power; indeed it is said that, “Among the Himalayan basins, the Arun River has the highest concentration of potential per kilometre of its length making it very promising for run-of-river type of hydropower development projects”.⁴¹

The original 402 MW Arun III hydroelectric project was agreed between the (then) Kingdom of Nepal and the International Development Association (IDA – part of the World Bank Group), in August 1989.⁴² It incorporated two different elements: the hydroelectric dam itself and a large road-building component. Two other projects were also planned, namely the Upper (335 MW) and the Lower (308 MW) Arun projects, but Arun III was the first project considered for implementation. It was estimated that these three projects combined would have a total generation capacity of 1,045 MW.⁴³

A 50-hectare reservoir was to be created by building a 155m-long and 68m-high dam in the river, from which the water was to be conveyed by two 11.5 km tunnels to an underground powerhouse for electricity generation. The project site was located in a remote area in Num Village Development Committee in the eastern region of Nepal,⁴⁴ necessitating the construction of road access to allow construction to begin. The cost of the 122 km access road escalated the project costs significantly. In reaction to the increased construction costs for the entire project, the dam proponents scaled down the plans to just 201 MW, and the new dam was dubbed “Baby Arun”, with a total project cost of US\$797 million. However, delays in implementation re-inflated the costs to US\$1.82 billion.

While construction was intended to begin in 1994 and power generation in 2001, the project swiftly generated significant concern and anger among civil society groups both within Nepal and internationally. Complaints included the failure to adhere to the World Bank’s standards on

38 See, “New Directions in Hydropower?” available at: <http://www.internationalrivers.org/en/node/4403/>

39 See, Dharmadhikary (2008) *op. cit.*

40 It is believed that “the river drops 4000 feet”. See Morris, Captain C.J. (British Gurkha Rifles) (1923), “The Gorge of Arun” in *The Geographical Journal*, Vol.LXII No.3, September 1923.

41 The run-of-river type of hydropower project depends upon the water level in the rivers for power generation. Rijal (2002) *op. cit.*, p.97.

42 The project was to be financed by a consortium of international agencies, including the World Bank (US\$175 million), Asian Development Bank (ADB) (US\$127.6 million), Japanese Overseas Economic Cooperation Fund (US\$163.3 million) and Germany’s KfW (US\$124.4m).

43 Chetty, Laxman K. (2007) *EIA as applied in the case of the 402 MW Arun-III Hydroelectric project*. Available at: http://eia.unu.edu/wiki/index.php/EIA_as_applied_in_the_case_of_the_402_MW_Arun-III_Hydroelectric_project, p.295, accessed 9 March 2009.

44 The Village Development Committee (VDC) is the local level of the government system of political and administrative organisation for development of a particular area. It is registered under the Local Self-Government Act 2055 and Regulation 2056 (HMG/N: 1998 & 1999 / 2055 & 2056).

environmental assessment and the threat of significant social and cultural harm to the affected indigenous peoples. As a result of these very real concerns, a Nepal-based group called Arun Concerned Group submitted a request to the Inspection Panel of the World Bank in October 1994.⁴⁵

The Inspection Panel is the Bank's internal complaints mechanism that may be used if there is a question about whether the Bank is failing to comply with its safeguard policies. The request to the Panel highlighted violations of numerous Bank policies. One of the key complaints registered with and upheld by the Inspection Panel was the failure to fully assess alternative project designs, including the possible development of numerous small-scale hydroelectric dams, and measures to avoid the large-scale flooding that would be caused by the size of the proposed Arun III dam. In June 1995 the Inspection Panel released a damning investigative report on the project, highlighting multiple and serious problems which exacerbated the vulnerability of the peoples of the Arun Valley.⁴⁶ For this and other reasons, the World Bank pulled out of the project in 1995 and, through lack of finance, the project was cancelled.

The project was resurrected on 3 March 2008 when the Government of Nepal signed an MoU with India's state-owned Satluj Jal Vidyut Nigam Ltd. (SJVN) to build the Arun III Hydro Electric Project, now expanded to 900 MW capacity.⁴⁷ The new plans are highly controversial, with a resurgence of all the unresolved issues of the first attempt. Access to information about the new Arun III dam has proved extremely difficult, both for Kathmandu-based researchers and for communities in the impact zone. This study seeks, therefore, to examine the extent to which required information about compensation, construction plans, road routing or plans for consultation and discussion with affected communities, has been provided to the communities. Without provision of this information, the basic foundations of the consent processes are lost and the human rights of the peoples in the valley placed at great risk, exacerbating their vulnerability in the face of rapid development.

45 Udall, L. (1995) "Arun III Hydroelectric Project In Nepal: Another World Bank Debacle?", International Rivers Network, available at: <http://www.hartford-hwp.com/archives/52/054.html>, accessed 4 March 2009.

46 Inspection Panel, World Bank (1995) *Proposed Arun III Hydro-electric Project and Credit 2029-NEP Investigation Report June 21, 1995*. http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Investigation_Report_62195.pdf

47 See, http://sjvn.nic.in/projects/projects_arun.asp. Accessed Jan 2009 [and again at time of writing, with no change in the documents available].



Research Findings

The field study focused on indigenous peoples in the Sankhuwasabha district in eastern Nepal where the Arun III dam and associated facilities are planned to be located. The population of Sankhuwasabha district is 159,203, just 0.6% of the national population (see Annex 2 for more detailed demographic information).⁴⁸ The four Village District Committees (VDCs), where the research for this report was carried out and which will be most affected (namely Diding, Num, Sitalpati and Yaphu) have a total population of 13,904 or 8.7% of the total population of Sankhuwasabha district.⁴⁹

Clear information about the revived plans for the Arun dam has been very difficult to come by. The potentially affected communities report that they have so far been given very little information about the nature, scale or implementation schedule of the project. Although the focus of the study and the questions asked of communities were regarding the possible impacts of the new Arun III, many of the responses given by the women and men were based on information provided at the time of the original Arun III proposal, as no up-to-date information had been made available to them.

The Peoples Of Arun Valley

All the communities involved in this study described their traditional communal land tenure systems. However, the communal powers which once prevailed within communities have now been transferred to formal village councils, known as Panchayats, and other decision-making authorities and institutions established by the state.⁵⁰ These legal reforms have altered local

48 Central Bureau of Statistics (CBS) 2001 Census, cited in <http://www.sankhuwasabha.com>.

49 Nepal Census Data 2001.

50 In Nepal, the term 'village', as in the Village Development Committee (VDC), covers an area far larger than that which would be implied in the usual English understanding of the term. The VDCs involved in this study contained up to 15 distinct settlements spread over a large area of forest, hills and creeks.

power relationships and the exercise of access rights, with individuals now needing to register as members of Forest User Groups in order to access resources. Meaningful control over resources rests with government officials, from local to central levels, and members of the village elite.

Many settlements of indigenous peoples in Sankhuwasabha district are spread across the upper and lower areas of the Arun River. The study found high levels of individual land tenure and ownership over certain types of cultivable land. For example, it was found that in Ward 6 of Sitalpati VDC (Hilawasi), almost 75% of families own their land while about 25% are tenant farmers. In Ward 7, all 36 families own their land, with an average holding of about 70 *ropanis*.⁵¹ Participants in the discussions in Diding, Num and Yaphu also reported that all the households have access to land, whether as landowners or tenants.

Communications within and between the settlements in the eastern region, as in other remote regions of Nepal, are difficult due to the physical environment. Of the four VDCs chosen for this study, Num was the last visited, via the foot trails connecting it with Yaphu across the other side of the Arun valley. However, the valley also contains long-term trading routes which pass through a number of the settlements, including those adjoining Tibet, and along these routes flow regular and detailed interactions between the various groups. Constant and complex relationships between communities are maintained through these trade relations, and in some instances through inter-marriage between the different linguistic and ethnic groups. A small number of foreign trekkers also use the routes around and through Num VDC.

The communities visited are largely subsistence farmers engaged in swidden or hill-rice cultivation with some paddy cultivation in the lower reaches of the valley. Other crops for family consumption include millet, maize, oil seed or mustard seed, and vegetables (cabbage, onion, cauliflower), to name just a few. Land is of central importance to every aspect of the livelihoods of the communities we visited, a situation shared throughout the valley where the soil is very fertile and production levels are high. Access to land includes not only land under direct use, but also forested land used for gathering additional non-timber products. Fishing is also widely represented as a livelihood activity among the communities due to the high levels of fish in the Arun river. A few communities, typically those close to the district centre, also have village bazaars with small-scale trading, food sales and other small businesses catering to visitors. Some families along the main trekking trails also provide modest food and lodging to seasonal tourists.

Land and Land Tenure

In all wards visited, frequent mention was made of the potential loss of land, forest, farms and grazing land to make way for the dam. The people know that the dam will submerge rich agricultural land and forest areas, although the precise location and extent are unknown. Some of the concerns raised related to compensation (which is dealt with below) but the majority were in relation to a perceived threat of forced cession of rights or access to land.

Many of the concerns expressed related directly to peoples' experiences during the first preliminary construction phase in the 1990s. At that time some families had suffered degradation or damage to their land by the construction activities, which they felt had not been addressed, saying that the contractors simply replied that their work was authorised by the state as a matter of "public

⁵¹ One *ropani* is 74 by 74 feet.

interest”.⁵² Some of the villagers recruited for labour say the contractors gave no prior notice nor did they obtain the consent of the affected families for use or acquisition of the land.⁵³ Further concerns about land were recounted to us by some of the women and men interviewed:

In 2040 (1983) there was a group of people who came to survey for Arun III, downstream from this village. Then, between 2043–45 (1986–88), there was continuous work on the project, mainly on the construction of the tunnel. After 2040 they began to work and continued until 2045. My land was surveyed along with many others. They surveyed the land and compensated us for one year of production from that land but not for the land itself; the land was returned. If the project comes again maybe they will take the land permanently.⁵⁴

The lowland areas are the most fertile. If the government relocates us, they cannot find this type of land or areas to replace our loss.⁵⁵

If the Arun III project comes, we are happy on one hand that there will be development but sad on the other hand because our land will be taken and we may lose access to our forests and the river might dry up.⁵⁶

Also of great concern to the villagers was the issue of possible underground resources. Should the activities at the dam site resume and the company find major underground mineral resources, what would happen to those resources?⁵⁷ Although the communities understand that their rights to their land include any underground resources, they expressed the fear that discovery of such resources could result in ownership of the land and resources contained therein being transferred from them without their consent.

Forest Resources and Non-Timber Products

The forest is also a vital part of life for these communities, providing them with a variety of products. The women say that they are most concerned about their access to and use of the forest, which they fear may be lost or restricted because of the Arun III dam project.⁵⁸ The uses for which the community members turn to the forest are manifold, from spiritual through to practical additions to their livelihoods. These communities depend to a great extent on subsistence agriculture and animal husbandry in breeding cattle, yak, fowls, pigs and goats, among others. Many villagers observe festivals and rituals in the forest such as *marg sokranti* (held in February) and during these festivals they collect wild yam to eat, whereas at other times they just collect edible moss for sale and for eating.⁵⁹ Another group of villagers expressed similar views:

There are many uses of the forests for us. We collect fuelwood, timber for houses, timber for sitting places (e.g. rest stops on the trails), grasses for our cattle, medicinal

52 Although not clearly explained to nor understood by the community members, this appears to be a reference to the right of the State to compulsorily acquire lands for the “public interest”, under Articles 19 (2) and (3) of the *Interim Constitution of Nepal*. Mixed group discussion, Diding Ward 7, 2 April 2009.

53 Men who participated in the mixed group discussion, Diding Ward 1, 1 April 2009.

54 Mixed group discussion (five wards represented), Dandalu Ward 7, Diding VDC, 2 April 2009.

55 Mixed group discussion, Yaphu Ward 3, 4 April 2009.

56 Women’s focus group discussion, Dandalu Ward 7, Diding VDC, 2 April 2009.

57 Men who participated in the mixed group discussion, Sitalpati Ward 7, 31 March 2009.

58 Women’s focus group discussion, Dandalu Ward 7, Diding VDC, 2 April 2009.

59 Women who participated in the mixed group discussion, Yaphu Ward 3, 4 April 2009.

herbs ... some rituals take place in the forests and we collect from the forests the items we need for our rituals, such as bamboo and a variety of grass, plants, bark and leaves.⁶⁰

Many of the households were found to be involved in cardamom cultivation on land demarcated in the forest and under the management of the Community Forest Committee. In fact, cardamom is the single biggest source of cash income from forest use for the affected communities. Diding VDC alone has cardamom exports worth two crore per year.⁶¹ The cardamom harvest lasts from September to October, depending on the amount harvested, and households can make about 200 rupees per kilogram of cardamom.⁶² This is not the only forest product sold. The medicinal plant *chirata* (indigenous term *ciraita*, *Swertia chirata*) also generates cash income.⁶³ The villagers say *chirata* is worth about 50,000 rupees per year.⁶⁴ Villagers also collect beads which can be sold for a small profit.

Various studies show that when women's and men's access to and control over land and other resources is lost or reduced – whether through displacement, deforestation or other land development projects – their livelihoods are severely affected and their fears aggravated.⁶⁵ When communities who depend on land and forest for their livelihoods are deprived of their resource base, the consequent effects on food security generally put children and women at higher risk than men. The loss of land and forest areas also affects activities with cash income potential, and consequently the economy of the villagers. Some villagers have also expressed concern over the likelihood of air, water and soil pollution as a direct result of the project, for example, from the use of machinery which may also cause sound disturbances and health hazards. Again, experience from the 1990s does not bode well: when the tunnelling works started, some families found that the company did not allow the community to use products from some parts of the forest.⁶⁶

Fishing

Fishing plays an important role for the local peoples in this hilly eastern region, including in the four study sites. The cold water fish of the area, particularly in the Sankhuwa, one of the two tributaries of the Arun River, are well known.⁶⁷ The villagers mainly fish in the Arun River between February and

60 Mixed focus group discussion, Malingtar Ward 6, Sitalpati VDC, 31 March 2009.

61 To have the right to collect cardamom the farmer must be a member of the Community Forest Committee. A contractor then goes house to house to collect the produce. Community forestry activities were initiated for local people enlisted as members of the Community Forest User Groups, but managed and regulated by the Community Forest Committee. One of the regulations includes the requirement that all families who are members of the Community Forest Group have to pay 200 rupees as community tax per 40 kgs of cardamom collected and sold. One crore equals ten million rupees.

62 Mixed group discussion, Ward 1, Diding VDC.

63 Gaenszle (2000, p.44) has noted that the *chirata* plant is highly sought after for its medicinal value particularly for the treatment of malaria: see Gaenszle, Martin (2000) *Origins and Migrations: Kinship, mythology and ethnic identity among the Mewahang Rai of east Nepal*, Mandala Book Point, The Mountain Institute, Kathmandu.

64 Further information about income from this plant: *chirata* is normally sold for about 600 rupees per kg. On average, a family can produce about one kg a month. Once the broker has collected the produce from each family, the amount of 600 rupees is the net price.

65 Thukral, Enakshi Ganguly (ed.) (1992) *Big Dams Displaced People: Rivers of Sorrow, Rivers of Change*, Sage Publications, in association with Book Review Literary Trust, New Delhi; Suara Rakyat Malaysia (SUARAM) (1999) *Empty Promises, Damned Lives: Evidence from the Bakun Resettlement Scheme in Sarawak*. Final Report of the Fact Finding Mission of the Coalition of Concerned NGOs on Bakun, 7–14 May, SUARAM, Petaling Jaya; Yong Ooi Lin, Carol (2003) *Flowed Over: the Babagon Dam and the Resettlement of the Kadazandusuns in Sabah*, Centre for Orang Asli Concerns, Subang Jaya; Yong Ooi Lin, Carol (2008) "Autonomy Reconstituted: Social and Gender Implications of Resettlement on the Orang Asli of Peninsular Malaysia" in Resurreccion, Bernadette P. and Elmhirst, Rebecca (eds.) *Gender and Natural Resource Management: Livelihoods, Mobility and Interventions*, Earthscan, London and Sterling, VA, pp.109–126.

66 Men who participated in the mixed group discussion, Diding Ward 1, 1 April 2009.

67 Many types of fish are caught, for example, *asala* (trout), *sau* (a big fleshy fish), *chucheha*, *katle* (a scaly fish), *kabre/gardi*,

April when the water levels are low and the weather is dry. Damming the Arun raises concern over possible serious impacts on fishing in the river on which many indigenous communities depend and which is one of the primary sources of protein in their diet.

The people participating in the discussion groups in Ward 6, Sitalpati VDC, stated that about 40% of families fish in the river. It was reported that some families depend entirely on fishing, while for others it supplements their agricultural crops. It was also mentioned that the estimated numbers of people fishing may be low in some communities as it is considered a low-caste activity and therefore may not have been admitted, or may have been underestimated, in the responses gained. On average, the typical catch was described as being about 2–3 kg of fish per day per individual. It appears that fishing is predominately a male activity, although young girls did assist their fathers with the catch.⁶⁸

Income gained is about 200 rupees per kg for fresh fish (less for dried or salted fish). Although most fishing is for domestic consumption, some families depend on fishing for cash income. For those that do, fishing can provide a decent supplementary income, and many families agreed that fishing is very important economically, providing cash which is then used to purchase items like school books or uniforms.

With the exception of a few, all the participants in the group discussions knew about the plan to revive the Arun III dam in the area and felt that the dam would cause harm to the river, and damage local people's livelihoods through its negative impact on fish resources. Similar projects elsewhere, such as the Ranganadi Hydro Electric project in Arunachal Pradesh, India, have demonstrated these forms of impact. In this particular case, the river was subjected to the serious problems of diminished water flow or sudden releases of water, which put communities in downstream areas at high risk of flooding and gravely disturbed fish stocks.

Similarly, the impoundment of the Arun River would have the effect of reducing the flow downstream, thereby changing the hydrology of the Arun basin and impacting on the aquatic environment of the river. The dam would also be likely to degrade the quality of water and affect downstream fishing activities. Water sources could be affected by the tunnelling and there could be an increase in landslides. Some of the men said they have seen examples already of these impacts. One of them described:

We were labourers for this tunnel and we saw that after about 400 metres the water drained out and the paddy nearby became dry. The tunnel was built in 2045–2046 (1988–1989) and many people from this village were involved If this happens on a bigger scale the high hills might be drained.⁶⁹

The exact extent of this impact is not confirmed, but in the long term this could have serious impacts on livelihoods and fishery in the region, as well as on the river itself.

bam (eel), *gouch*, *barsa*, *kande*, *lochori*, *tite*, *jalkapur*, *sate* and many others for which the names are not known. One elderly man who has been fishing for up to 50 years claimed that there are at least 60 species of fish in the Arun River. Many community members mentioned one type of fish in particular as being a highly sought after local delicacy: *Sukeko Machha* in Nepalese; *henkhenpmimpa nga* in Lohorung).

⁶⁸ One woman said that young girls may help their fathers, especially when there are no boys around. Another woman added that "this division is not traditional". Women's focus group discussion, Diding Ward 7, 2 April 2009.

⁶⁹ Mixed group discussion, Diding Ward 1, 1 April 2009.

River Sand and Stones

Another river resource is sand and stones, which most of the people are involved in extracting. The extracted sand and stones are used for the construction of houses, trails, fences, etc. In Ward 7 in Sitalpati VDC, the families not only use sand and stones from the river for domestic purposes, but additionally derive some income from the two materials. All 36 households in this settlement are involved in using sand from the river for construction work, as its main use is for local development activities like bridge construction, schools and other structures. To quote: "We started using the sand a long time ago, in 2047 (1990). We used the sand for the Koodarie projects and they paid us for the sand, but usually we would collect it and use it free of charge".⁷⁰ Access to these resources for local construction projects could be curtailed by the construction of the dam and subsequent changes to river flows.

Cultural and Religious Observance

All the villagers involved with this study spoke of their close relationship with the land and forest, not only economically, but culturally and spiritually. The Arun River is important in the folklore of the Kiranti people of eastern Nepal. The Lohorung, Kulung, Tulung, Bailung, Mewahang, and Dhumi from throughout Diding VDC all mentioned customs, traditions and religious observances closely related to the land, river and forest. This also applies to the other three sites, where households also regard the river as a deity to worship. In their own words:

We still have traditions and practices that worship the land, the river and the forests. The critical question for us is what will happen if these sacred places are destroyed?⁷¹

We want to conserve these places, the *devithan*, *bumiphuja*, *panchweli* [the main three deities associated with the river, the land and the forest respectively]. We are scared that if the project comes in then we will lose these places and are raising our voices to protect them.⁷²

With more people moving into the area, and more movement around here, our places will be destroyed. Every household worships the river as a deity with sacrifices, what will we worship if there is nothing there?⁷³

In addition to the river, spring water is also used to conduct rituals. Women and men from the *Cchawar* communities in Sitalpati, for example, conduct separate rituals at the spring and have personal and small rituals there that can be followed individually. The community shamans, called *yatomba*, also conduct rituals at the springs, but generally the bigger symbolic offerings. The underlying belief is that people sprang from the water of the spring and therefore the spring should be worshipped.

Similarly, objects from their surroundings in the settlements are recognised as sacred sites. These include objects like rocks, boulders, trees and other natural phenomena and should not be disturbed. For example, the scattered communities in Diding VDC each worship one big tree

70 "Koodarie" is an ex-British Army Nepali man who has donated significant amounts of money for various infrastructure projects in the Arun Valley, including bridges, water piping and path construction.

71 Mixed group discussion, Diding Ward 7, 2 April 2009.

72 Mixed group discussion, Diding Ward 7, 2 April 2009.

73 Men's group discussion (women joined later), Sitalpati Ward 7, 31 March 2009.

and two high springs. The sites are different for each cluster of houses, and are used for ritual observances three times a year, namely in April, September and October/November. Weddings and funeral rites also take place beside the high springs. In Yaphu, the belief is that on the day of observance, members of the community may not fell trees, plough fields or interfere with other families, otherwise this can lead to conflict.

The land's religious or cultural significance is closely related to the villagers' natural area of habitation. From the information provided by the villagers, they worship at the beginning of spring (planting) and at harvest time. The spring ceremony, in the Kirati language, is called *Ubhaul*, which is the planting time or the time when the fish rise in the river. The harvest ceremony is called *udhau* and is defined as the time when the fish go down in the river. Traditional rituals can also be observed in most Lohorung houses, which have a domestic altar or *mangsuk* decorated with objects from the forest, including bamboo and leaves from a number of sacred plants. In addition, there is usually a gathering of relatives and friends from various settlements during these festivities, promoting the spirit of *iksammang* or kinship.

Culturally and ritually, the river and the mountain springs provide a way of communicating with the ancestors and gods. At present, since the project has not yet started, the proposed dam does not seriously interfere with the performance of rituals. However, the proximity of some villages to the proposed dam site or other villages in the way of the proposed tunnels and access route means that there is a strong likelihood that community water sources and flow of water will be badly affected. There are local concerns about the effects of the project on the cultural pattern and lifestyle of their communities. As one elderly man said, "We have our own traditions, rituals and customs which we do not want to be affected by the construction of the dam".

In-Migration and Social Disturbance

There are serious local concerns about the impact of large numbers of outsiders coming into the local area. People are particularly concerned about an influx of long-term residents in addition to the shorter-term transient workers. Almost all the respondents noted that "these new settlers may have many different groups who may disturb our social systems".⁷⁴ In response to queries about customary approaches for dealing with people coming from outside the village, village elders in Diding noted that the circumstances had previously been different: "We had traditions then, practices, but at that time no outsiders really came in, just people from neighbouring settlements. At the time, our village could give land to newcomers, namely of two types – unoccupied paddy land or other land. The outsiders would then have to pay a prescribed amount of tax into the village system".⁷⁵ However there were no practices that were described for managing the behaviour of outsiders or levying penalties for misbehaviour, with most respondents stating that misbehaviour would need to be dealt with in the district centre.

In order to understand these fears, a series of questions were directed to a group of women and men regarding their views on having outsiders coming to the settlements. The findings revealed that both women and men felt that the sudden influx of outsiders may pose a serious threat to their cultural identity, language, traditional ceremonies, rituals and cultural observances. For example, one man said, "Here we worship monkeys, trees, soil, stones, rivers, many things. This is our belief, and these beliefs must not be disrespected by outsiders". In addition, there may be disrespect for

⁷⁴ Mixed group discussion, Sitalpati Ward 6, 30 March 2009.

⁷⁵ Mixed group discussion, Diding Ward 7, 2 April 2009.

local settlements and customs, or worse, the prohibition of fishing or gathering of forest products by the workers, as happened in the 1990s when tunnelling works were done.

Most of the villagers believe that they have strong social cohesion in their communities at the moment, but with an influx of people from outside they are worried that it will impact on their community strength, cultures and language. In Diding, for instance, the composition of most settlements is predominantly Lohorung. The group of Lohorung who participated in the group discussions complained that if many people from outside come to the settlement “We will need to use other languages and our language will be dominated by these new languages – also our sacred sites might be disturbed”. In other communities, elders had already noted that although they spoke their mother tongue as young men and women, the younger generation did not consistently do so now, and instead focused mainly on Nepali and rudimentary English.

The study findings also revealed that the men in particular were worried that once the project starts, outsiders will come in big numbers and, as a result, there will be large gap in economic standards between newcomers and local peoples. Villages within close proximity to the construction camps or worksites could potentially experience disturbance from construction workers, which generally put girls at higher risks than boys. As one woman noted, “We have young girls here. As a group they may affect or disturb the young girls”, referring to the potential workers of the project, or opportunist job-seekers. The adverse impacts of this situation has been seen in other cases, as in Malaysia. For example, in the Sungai Selangor dam in Peninsular Malaysia, there were many foreign as well as local male workers in the dam site and the village girls were at risk of “wooing” and sexual harassment from some of the workers, including illicit sexual relationships resulting in several cases pregnancy.⁷⁶

Gender Issues

An influx of mainly male short-term workers is not the only gendered type of impact that could be expected, nor the only one discussed by the community respondents. Significant changes to access and ownership of land – such as may be expected with a dam construction project – impact differently on men and women. One of the reasons for this relates to the way in which land is held and inherited. In one of the women’s discussions it was explained that people mostly inherit their land from their parents, although land is not acquired from the maternal side nor inherited by daughters.⁷⁷ Members of the family inherit land from their fathers, who in turn will have inherited the land from their forefathers. The general rule is that land is inherited from, and passed on to, men. Even if a family only has daughters, the nearest male relative usually inherits the property. As one woman put it: “Usually in practice it is only the men who officially hold land title; a woman can only hold it in guardianship for her sons. It has been the same for our forefathers and we have not heard about any change in the laws”.⁷⁸

Since women and men share all the farm work, apart from ploughing which is predominantly men’s work, the general feeling in all communities was that women and men have equal access to and use of the land. However, this assumes a situation without stresses on the family structure, and such stresses naturally occur. On the journey from one village to another during this field work, we met a widowed mother living with her six children below the age of twelve in a very small house on

⁷⁶ Yong Ooi Lin (2006), *op. cit.*

⁷⁷ Women’s focus group discussion, Diding Ward 7, 2 April 2009.

⁷⁸ Women’s focus group discussion, Diding Ward 7, 2 April 2009.

the edge of a settlement. Since her husband's death she had had no access to land of her own. She had found a relative willing to take in her two other older children on the understanding that they would help in the fields, but this was not a possibility for her younger children who had therefore not found new homes. Inheritance rules mean that this woman and her children have no choice but to offer their labour to others as they have no claim to land of their own.⁷⁹

Compensation Issues

Studies have shown that in the context of dams, the issue of compensation is highly controversial because it is dependent on authority over property and ownership rights.⁸⁰ It can create or aggravate tensions in the community without the community itself realising it. The village of Tampasak, previously home to an indigenous community displaced by the Babagon dam in Sabah in East Malaysia, is a case in point.⁸¹ Disunity and competition emerged in the negotiation of compensation and the sum to be received by each family, especially between the dominant leaders and their relations, and the poorer households.

The topic of compensation elicited numerous and different responses from the men and women in the focus group discussions, largely relating to their experience of the preliminary construction activities of the first Arun III project. The compensation paid to villagers at that time was for the acquisition of land for the road construction via the hill route, but there was no discussion of benefit sharing. This means that, though local people affected by the dam were offered monetary compensation (through outright purchase of land or compensation for a year's crop loss), no attention was paid to providing good substitute land or for other benefits such as skills training, shares in the project or local electrification.

Compensation was viewed by some as an opportunity: a chance to gain capital. Nonetheless, this was a minority view as many participants felt that compensation alone is not enough. One man explained, "They may give us compensation, but it's not enough, we need a place to live and to build our house". People feared that payments may be insufficient. One respondent felt keenly that these issues were the responsibility of the company: "If someone in a small village is displaced, where does he go and how to support the family? Arrangements should be made".⁸² People also expressed concern about their access rights and that their previous work in managing forest resources would go uncompensated:

We manage and own the forest through the Community Forest Act and we have invested a lot of time and work in preserving this forest. The building of the tunnel will affect a lot of paddy and forest land and no one has spoken to us about compensation for this.⁸³

79 Land ownership laws are changing in Nepal. Inheritance law has recently been amended to allow daughters to inherit land. This new legal provision, the 11th amendment to the Civil Code, is not yet fully accepted and established, but in theory it means that in future daughters will also be able to inherit. Nevertheless, the provisions are limited, as an older woman explained, "Women can inherit if they are unmarried at 35 years of age but on marriage the tradition is that the women move to the village of their husband's family".

80 Hirsch, Philip 1996, "Dams and Compensation in Indo-China", in Howitt, Richard, Connell, John and Hirsch, Philip (eds.), *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia*, Oxford University Press, Melbourne, pp.212–22.

81 Yong Ooi Lin (2003) *op. cit.*

82 Mixed group discussion, Yaphu Ward 3, 4 April 2009.

83 Mixed group discussion, Ward 1, Diding VDC, 1 April 2009.

The experience of the 1990s is instructive. One senior village leader told us that, about 20 years ago, the land along the banks of the Arun was surveyed and a document was given to each household surveyed.⁸⁴ They were told compensation would be paid for people to leave their land. Apparently the surveyors did not say how much they would pay, only that they would pay later on (which did not happen as the project was cancelled). In a different discussion, one woman said they were told what the exact route would be for one of the options for the access road, and told if that route was selected some houses would be lost and compensated. Some households did actually receive payments although obviously the road was not constructed. The amount of compensation paid was unknown as the money went to the men, although she estimated around 11,000 rupees, for three *ropanis* of land.

This example raises the gendered nature of compensation. Examples from other dam construction sites also reveal that women are often denied compensation as they are not named title holders although this runs counter to women's informal right to land, which is recognised under indigenous customary law. In the case of the Sardar Sarovar project in India, for example, only those households headed by the senior male members of the family or by the eldest son were deemed eligible to receive land as compensation whereas female-headed households, including widows, were excluded from the resettlement package.

Due to the lack of discussion between SJVN and the communities about the new proposed project, it is unknown whether compensation will be on a similar basis to that of the first construction phase. However, those in the communities who remember the previous assessments are unanimous in their concern over both the process and the conclusions of those studies.

Waged Employment

Employment is often considered to be an important potential benefit that a dam project can bring to local residents. People living in areas local to a dam site often expect to be given preferential employment during the construction of the dam and any ancillary works. In the 1990s, the Arun III project led people to believe that the potential benefits of the project would be significant. Some of the people in the group discussions stated that they had been in favour of the Arun III dam in their area in the 1990s, in the belief that it would benefit the local people through the provision of jobs, training schemes and roads which would provide better access to the district centre for sale of produce, high schools and hospital care. Although many of the community members expressed similar expectations from the new Arun III project, little information has been provided about possible waged employment or other forms of direct income. As one man commented:

Satluj [SJVN] told people that when the project will come is not yet clear, but the project is coming so we better support them, and they will give priority to local people to work. They also said that as local people do not have skills for driving big vehicles and so on they will have to bring some skilled workers in from outside.⁸⁵

In reality, only a minority are likely to benefit from job opportunities offered by the new Arun III project, even if the company does plan to recruit local young men in large numbers to work on the dam site. Evidence from the 1990s shows that waged employment contributed only a small amount of income to the local area, and only over a short time period. For example, the men recruited

84 Some households still have this document, which we were shown.

85 Men's focus group discussion, Num Ward 4, 7 April 2009.

to work on the tunnel by a company called Himal Hydro (a Nepali firm contracted to do some of the preparatory construction for Arun III) were only paid 70 rupees per day for the 8am–5pm day shift, and double wages for the 5pm–8am night shift. Moreover, when the Arun III project was cancelled after the withdrawal of World Bank support in 1995, all site jobs were stopped, leaving the local people jobless. Given the specific focus on employment in construction as the main financial benefit from the project, women will find it difficult, if not impossible, to access any employment that may be generated from the new Arun III. Equally important is the question of the influx of outsiders and their impact on the local indigenous communities, as discussed above.

Although it is clear that if the new Arun III project were to take place, employment would be more sustained than it had been in the minor tunnelling works of the 1990s, such construction employment would be limited to the construction cycle of the dam, which is unlikely to extend beyond a few years. Once construction of a major hydro-power dam is complete, there is negligible or no long-term employment available at the dam site, as management of the dam requires only minimal, highly skilled, labour.

Finally, it should be noted that Num VDC, and in particular the Num Bazaar, is an important focal point for local people and visitors alike. The Num Bazaar is where many Nepali and neighbouring traders' groups, with their goods stacked on mules or carried on porters' backs, take a rest from hours of trekking through the hilly areas. Num VDC is also the transit point for climbers to Mount Makalu. Asked if they would expect to lose this trekking trail if the dam were to come, the villagers in the FGD considered that trekking would flourish due to the easier access provided by the new road. In addition, they anticipated that people would want to come and see the dam itself, leading to opportunities for work in tourism.

Assessing the Impacts

Even this brief evaluation of the potential environmental and social impacts on land, forest access and use, fishing and river use, is sufficient to highlight the very serious concerns raised by community members throughout the valley. With the revival of the Arun III project, it is appropriate to ask whether updated studies have been carried out to accurately assess the extent of potential impacts. Our research indicates the answer is currently no.

When the pre-feasibility study of the Arun III project was carried out in 1987, national environmental impact assessment (EIA) guidelines were non-existent.⁸⁶ The National Conservation Strategy (1988) was then in force and did require an EIA for major development projects but did not provide guidelines for this. The World Bank procedure for EIAs was therefore the only requirement in place at the time, and under this procedure an EIA was conducted. However, this EIA was found to be deeply flawed and was one of the reasons for the cancellation of the project in 1995.

There is no way of ascertaining whether the current proposed Arun III project will be reassessed in an integrated and comprehensive manner in order to guide the decision on its feasibility. One reason is that no requirement for this has been placed on the company in the contract (MoU) signed between the Government of Nepal and SJVN. As one group of villagers said, "because of a lack of knowledge and experience with dams we don't really know what the implications of the dam will be".⁸⁷ This position does not necessarily mean that the villagers are content with the project. On

⁸⁶ According to Chetty (2007), *op. cit.*, p.297.

⁸⁷ Mixed group discussion, Sitalpati Ward 6, 31 March 2009.

the contrary, the majority of the local peoples view the project with apprehension and scepticism. They worry that “SJVN will use the outdated EIA study done more than 20 years ago!” which will be inadequate for addressing the impacts of the new Arun III project. They are also concerned about whether the Government of Nepal will incorporate all their concerns, fears and expectations of the Arun III project, in the ongoing implementation of ILO 169 and the constitution revision process.



Legal and Human Rights Context: Is There Compliance In The Arun III Project?

During the field work for this report, a series of community-level workshops were held on international law and the rights of indigenous peoples. These workshops helped to widen discussions of these issues and significantly contributed to the villagers' understanding of international processes and laws. Many questions were raised and opinions expressed about the rights of indigenous peoples under these international instruments in relation to the Arun III project. Specifically, community members raised issues such as the lack of opportunity for them to participate in the project, because of the company's failure both to carry out impact assessments and to make information available, and generally, through inadequate attention being paid to the rights of the affected indigenous peoples, including that of free, prior and informed consent (FPIC). Furthermore, they pointed out that a comprehensive and transparent assessment of benefit sharing has yet to take place. Given such concerns, it is helpful to review Nepal's legal obligations, both in national and international law, especially the latter.

The relevance of examining international law as it applies to Nepal is not only because Section 9 of the *Treaty Act (1991)* states that international obligations are given immediate effect at the national level upon ratification (and enforced above any conflicting national law) but also because of the current political situation in Nepal in the aftermath of the civil war. Many of the existing laws governing people's right to participate in their governance, control over resources and other laws relevant to this study may well be under review soon – if they are not already – to bring them into conformity with the new Constitution and the new national identity. Nonetheless, laws have been passed since the conflict ended in 2006 and the federal democratic republic was established in 2008, which are directly applicable to the situation in the Arun Valley.

National Laws and Policies

Participation and Consultation

At present the highest national law is the *Interim Constitution*, adopted in 2007 and in force until a long-term constitution is finalised by the Constituent Assembly. Addressing a history of exclusion and discrimination, Article 21 of the *Interim Constitution* specifies the right of indigenous peoples to be included in the “structures of the state” and to share in public decision making.⁸⁸

Shortly after the fall of the monarchy and before the establishment of the new federal democratic republic, the interim government passed the *Good Governance (Management and Operation) Act (2008)* (henceforth GGMO Act). The Act was intended to address concerns about governance in the country in the aftermath of civil conflict, and to promote transparency.⁸⁹ It further provides the key principles for governance in Nepal, namely: (a) the wider interest of nation and states; (b) equity and inclusion; (c) rule of law; (d) guarantee of human rights; (e) transparency, subjectivity, accountability as well as good faith; (h) access to administrative mechanism and decision making; and (j) popular participation and optimum utilisation of local resources.

The GGMO Act also specifically addresses the government’s obligations towards affected peoples in the context of development projects.⁹⁰ It requires the government to consult with stakeholders and civil societies, where necessary, prior to implementing a major project or development activity. The government is also bound to conduct (or receive) impact assessments for the proposed activity, including analysis of positive and negative impacts, and to show due regard for the views of affected peoples after appropriate consultations have taken place.⁹¹

The requirement to ensure consultation with affected peoples, to receive and share impact assessments and to show appropriate regard for the views of affected peoples is triggered by an action being considered “a matter of public concern”, which the Arun III project is deemed to be under the GGMO Act.⁹² The Supreme Court of Nepal has confirmed that such “matter[s] of public concern” also place on the government an obligation to consider and protect both the collective and individual rights of affected peoples.⁹³

The principle of participation is therefore enshrined in both the *Interim Constitution* and the GGMO Act, intended to reform governance in Nepal in the republican era. Furthermore, the government is obligated under the *Interim Constitution* and the GGMO Act to consider the interests of the affected

88 Article 21 also refers to other groups in Nepali society who have faced historic discrimination. *Interim Constitution of Nepal*, available from the Nepal Law Commission: <http://www.lawcommission.gov.np/index.php/en/consitution>.

89 The GGMO Act states as its purpose, “it is expedient to make legal provision in relation to good governance by making public administration of the country pro-people, accountable, transparent, inclusive and participatory and make available its outcome to the general public” Good Governance (Management and Operation) Act (2008), Legislature Parliament of Nepal, 2064/10/23(February 6, 2008).

90 Section 20, *Consultation may be made with Civil Society or Stakeholders while Implementing the Matters of Public Concern*, Good Governance (Management and Operation) Act (2008), *op. cit.*

91 Section 20 states in full, “(1) Government of Nepal may make necessary consultation with stakeholder and civil society, if necessary, before the implementation of any matter of public concern. (2) While making consultation pursuant to Sub-section (1) the possible impact assessment that can be attained from the proposed subject shall be made by overall analysis of positive and negative aspects. (3) Government of Nepal, while executing the subjects of public concern, shall give due attention to the suggestion received from the consultation with stakeholders pursuant to Sub-section(1) or (2) during execution of the matter of public concern”. *Ibid.*

92 Good Governance (Management and Operation) Act (2008), *op. cit.*

93 The Supreme Court of Nepal (Division Bench), in its decision No. 4895, Gopal Siwakoti vs HMG, Ministry of Fiscal, et.al.

peoples, conduct consultations with them, consider their recommendations for alterations to projects and to do all this while recognising not only the individual but also the collective rights of the peoples involved. The National Water Plan, approved in 2005, also places popular participation in water resource development as one of its central “doctrines”.⁹⁴ However, compare these provisions with the reality as experienced by community members in their interaction with SJVN:

Three people came by helicopter, in October 2008. They walked around but didn’t tell villagers anything, then they went to Makalu. In a subsequent visit, in January 2009, seven people came. This time they met with some locals, but only the prominent persons of the village.⁹⁵

This account is symptomatic of all interactions with the company as described during the course of the research for this report. Participation by the affected peoples in the decision-making process is difficult to see at any level or at any point of planning for the revived Arun III project.

Dissemination of Information

The right to information is enshrined in the *Interim Constitution*, which states: “Every citizen shall have the right to demand or receive information on any matter of his or her interest or of public interest”.⁹⁶ In addition, the Ten-year Hydropower Development Policy (THDP), the most relevant overarching policy for this sector, emphasises well-managed information dissemination at the policy and implementation levels, effective information dissemination processes, and establishment of a grievance mechanism and the resolution of grievances and other problems.⁹⁷ Yet it is clear that many of the people who participated in the discussion groups had little understanding or knowledge of the project, let alone the potential impacts.⁹⁸ Some of this confusion arose from the cancellation and subsequent re-establishment of the project:

It was said long ago that the project was going to happen, then it went away... we also don’t know what the potential benefits will be.

There has been no visit, no information provided to the VDCs or to the people living in the VDCs. The first time the project was going to be done there were people from the government who came to discuss the project with us, but then they stopped coming and we heard later that the project was cancelled.

We don’t know how high the dam will be or how big, or what will happen if the dam breaks. No one has answered these questions for us, but we think the central government is deciding these things.

We have seen helicopters flying overhead but we don’t know why they have come.

Despite national legal obligations and the time lapse since the signing of the MoU in March 2008,

94 National Water Plan - Nepal, HMG Nepal, Water and Energy Commission Secretariat (WECS) 2005 pp.14–16. Available at: http://www.moir.gov.np/pdf_files/national_water_plan.pdf.

95 Focus group discussion held in Num Ward 4, 7 April 2009, with participants from Num 1,2,3,4, and 6.

96 Article 27, *Interim Constitution of Nepal*.

97 Government of Nepal, Ministry of Energy, *Working Report of Ten-Year Hydro Development Plan*, 2008, p.84.

98 Mixed group discussion, Ward 6, Sitalpati, 30 March 2009. Among others, all group conversations and discussions at village level revealed similar levels of confusion.

the revived Arun III plan and other related studies have yet to be disclosed to the local communities and general public. The company has made a few visits to the VDCs but there have been no visits by local government or any national-level government department. One community teacher said that the only information available is from rumours, despite the fact that he lives only 1.5 km from the site of the proposed power station.⁹⁹ Some said they had heard a little information, mainly from the radio in the village and local newspapers. Others said they got information from political parties and non-governmental organisations (e.g. LAHURNIP, Arun Rights Forum).

Benefit Sharing

The *Interim Constitution* requires that priority be given to the needs and interests of local communities when developing any natural resource.¹⁰⁰ In addition, the Nepali government's Ten-year Hydropower Development Policy (THDP) specifies that local rights over resources be respected and benefits shared in the creation of a favourable environment for hydro-development.¹⁰¹ The National Water Plan likewise provides for benefit sharing, specifically that economic benefits of water resource development should be shared equitably within society (women and socially excluded classes in particular).¹⁰² However, neither the government nor the project holders have observed these provisions, and no publicly available presentation of compensation planning has been forthcoming.

The affected people in the Arun Valley are very clear about their need to view a benefit-sharing agreement:

We want to see the Government of India and the Government of Nepal to agree on how the project will be and how the benefits will be allocated.¹⁰³

We've been here since time immemorial, though we don't know how long ago ... we Lohorung have established rights to the area. We want some sort of ownership and management over the project, we are entitled to these benefits because we are indigenous peoples or Adivasis.¹⁰⁴

We are proud of having the project but it may impact on the environment and cause landslides and things ... The agreement with the foreign company should establish benefit-sharing agreements with the affected indigenous peoples.¹⁰⁵

A Nepali newspaper also reported in similar vein:

Claiming that they "inherit" certain rights on the proposed Arun III Hydro-electricity Project that is to be constructed in their districts, locals of Bhojpur and Sankhuwasabha claimed that they must acquire certain percent of the total share of the project. They also stressed on the need of locals' participation and investment in any project in any

99 Personal conversation with a teacher from Ward 3, Diding, held in Ward 6, Sitalpati, 30 March 2009.

100 *Interim Constitution of Nepal*, Article 35 (4): "The State shall pursue a policy of according priority to the local communities while mobilising the natural resources and heritages of the country in such a manner as to be useful and beneficial to the interests of the nation."

101 Government of Nepal, Ministry of Energy, *Working Report of Ten-Year Hydro Development Plan*, 2008, p.85.

102 National Water Plan – Nepal (2005), *op. cit.*, p.11.

103 Discussion with a teacher (Kaji Bahedur Rai) from Ward 3, Diding VDC, 30 March 2009.

104 Mixed group discussion, Sitalpati Ward 6, 31 March 2009.

105 Mixed group discussion, Sitalpati Ward 6, 31 March 2009.

part of the country. Satluj [SJVN] is now at the construction site of Num VDC of the district. The company has been saying that the locals should obtain the shares from the 21.9 percent shares which have been provided to the government.¹⁰⁶

Without clarity regarding equitable sharing of benefits from the resources being developed, local communities risk falling through the cracks – SJVN arguing that the government should share its revenue, and the government arguing that it is the company’s responsibility. It is essential that mutually agreed benefit-sharing arrangements are finalised prior to the construction phase of the project.

International Human Rights Law

This section surveys and summarises relevant international human rights law as it applies to Arun III. It focuses primarily on United Nations human rights instruments in force for Nepal and on ILO 169. As noted, these international instruments have been formally incorporated into domestic law and should, therefore, be considered part of the law of Nepal that binds the government and, derivatively, governs the conduct of private parties, including corporate entities. As these instruments express and guarantee fundamental rights, other provisions of law should be read conjunctively so as to inform their content and application. The same may also be said for the rights expressed in the 2007 *Interim Constitution*.

A. Rights to Land, Territories and Resources

For indigenous peoples, secure, effective and collective rights to their lands, territories and resources are fundamental to their economic and social development, to their physical and cultural integrity, and to their livelihoods and sustenance.¹⁰⁷ Secure land and resource rights are also essential for the maintenance of their worldviews and spirituality and, in short, to their very survival as viable territorial and distinct cultural communities.¹⁰⁸ As the Inter-American Court of Human Rights explained in 2005, indigenous peoples’ culture “directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity”.¹⁰⁹ Protection of these relationships between indigenous peoples and traditional territory therefore transcends mere protection of property rights: a fact that is recognised by CERD’s specification that the “encroachment on the lands of indigenous peoples” is one of the triggers of its early warning and urgent action procedure¹¹⁰ and its 1999 decision on Australia, which states that “the land rights

¹⁰⁶ “Locals demand shares in Arun III”, by Surendra Subedi (kp 07/07/2008), available at: <http://www.kantipuronline.com/kolnews.php?&nid=152674>, downloaded on 29 June 2009.

¹⁰⁷ For a detailed treatment of indigenous peoples’ rights to lands, territories and resources in international law, see, Gilbert J. (2006) *Indigenous Peoples’ Land Rights under International Law. From Victims to Actors*, Transnational Publishers Inc, Ardsley, New York.

¹⁰⁸ *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. UN Doc. E/CN.4/2002/97, para. 39–40. See, also, *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21.

¹⁰⁹ *Yakye Axa Indigenous Community v. Paraguay*, Judgment of the Inter-American Court of Human Rights of 17 June 2005. Series C No. 125, at para. 135.

¹¹⁰ *Prevention of racial discrimination, including early warning and urgent procedures: working paper adopted by the Committee on the Elimination of Racial Discrimination*, UN Doc. A/48/18, Annex III, at para. 9. See, also, *Manual on Human Rights Reporting*, Geneva: United Nations 1997 (HR/PUB/91/1 (Rev.1)), at 302.

of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land that has been generally recognised”.¹¹¹

Convention on the Elimination of Racial Discrimination

The UN Committee on the Elimination of Racial Discrimination’s General Recommendation XXIII (1997) (GRXXIII) recognises the fundamental nature of indigenous peoples’ rights to maintain and develop the full spectrum of their relationships to their traditional lands, territories and resources. Paragraph 5 includes strong language that calls on states parties to “recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories”.

Rights to Lands, Territories and Resources Derive From Indigenous Peoples’ Customary Tenure

In common with all other human rights bodies, CERD holds that indigenous peoples’ property rights derive from their own customary laws and forms of land tenure and exist as valid and enforceable rights absent formal recognition by the state. This is consistent with inter-American jurisprudence,¹¹² which often cites GRXXIII to support the conclusion that a major manifestation of racial discrimination “has been the failure of state authorities to recognise customary indigenous forms of land possession and use”.¹¹³ Elaborating further, the Inter-American Commission explained in a case against Suriname that the lack of constitutional and legislative recognition or protection of indigenous peoples’ collective rights “reflects unequal treatment in the law”, and that this amounts to a failure to provide the necessary protection for full exercise of the right to property, “on an equal footing with the other citizens of Suriname”.¹¹⁴

In the same vein, CERD has objected to Guyana’s practice of granting land titles “on the basis of numerical and other criteria not necessarily in accordance with the traditions of indigenous communities concerned, thereby depriving untitled and ineligible communities of rights to lands they traditionally occupy”.¹¹⁵ The corresponding recommendation urged Guyana to

recognise and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy. ... [And,] in consultation with the indigenous communities concerned, (a) to demarcate or otherwise identify the lands which they traditionally occupy or use, (b) to establish adequate procedures, and to define clear and just criteria to resolve land claims by indigenous communities

111 Decision 2 (54), Australia, 18/03/99, UN Doc. A/54/18, para. 21(2).

112 *Sawhoyamaya Indigenous Community v. Paraguay*, 29 March 2006. Series C No. 146, para. 248; *Report No. 40/04*, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), Inter-American Commission on Human Rights, 12 October 2004, para. 117; and *Mayagna (Sumo) Awas Tingni Community Case*, Judgment of the Inter-American Court of Human Rights of August 31, 2001. Series C No. 79, para. 148–151.

113 *Inter alia*, *Report No. 09/06*, Case 12.338, Twelve Saramaka Clans (Suriname), Inter-American Commission on Human Rights, 2 March 2006, at para. 235. See, also, *Concurring Opinion of Judge Sergio Garcia Ramirez, in the Judgment on the Merits and Reparations in the Mayagna (Sumo) Awas Tingni Community Case*, para. 12–4, at 13 (stating that the failure to recognise and protect indigenous peoples’ property rights, as derived from their customary laws, “would create an inequality that is utterly antithetical to the principles and to the purposes that inspire the hemispheric system for the protection of human rights”).

114 *Report No. 09/06*, Case 12.338, *ibid.* at para. 236–37.

115 Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 16.

within the domestic judicial system while taking due account of relevant indigenous customary laws.¹¹⁶

Rights Must Be Secured And Protected In Fact As Well As Law

CERD also often holds that legal acknowledgment of indigenous peoples' rights to own and control their territories – although fundamental to the overall process¹¹⁷ – by itself does not satisfy ICERD's requirements: those rights must also be secured in fact and effectively protected.¹¹⁸ With regard to Argentina in 2004, CERD stated its concern about "the inadequate protection in practice of indigenous peoples' lands and recommended, *inter alia*, that Argentina adopt effective legal procedures to recognise indigenous peoples' titles to land and demarcate territorial boundaries and measures to safeguard indigenous rights over ancestral lands, especially sacred sites."¹¹⁹

Declarations Of Public Interest Are Not Sufficient Justification For Disregarding Indigenous Peoples' Rights

CERD has made clear to reporting states that their assertions of state ownership of resources or public/national interest declarations with respect to exploitation of resources on or around indigenous territories do not give the state a license to violate indigenous peoples' rights, including, as discussed below, indigenous peoples' right to give their informed consent to activities that affect their territories.¹²⁰ CERD's 2004 observations on Suriname, for example, explained that while that country's Constitution vests ownership of all resources in the state, "this principle must be exercised consistently with the rights of indigenous and tribal peoples".¹²¹ It added for good measure that "development objectives are no justification for encroachments on human rights, and that along with the right to exploit natural resources there are specific, concomitant obligations towards the local population".¹²²

Similarly, observing that the rights of indigenous peoples have been compromised "due to the

116 *Ibid.*

117 *Inter alia*, Sweden, 10/05/2004, CERD/C/64/CO/8, at para. 12 (welcoming the establishment of a "Boundary Commission to formulate proposals for the definition of the boundaries for Sami reindeer-breeding areas by the end of 2004 as an important step towards securing the rights of the Sami people, it remains concerned that issues related to Sami land rights remain unresolved," and recommending that Sweden "introduce adequate legislation, in consultation with the Sami people, regarding the findings of the Boundary Commission, in order to remove the legal uncertainty relating to Sami land rights").

118 *Inter alia*, Costa Rica, 17/08/2007, CERD/C/CRI/CO/18, para. 15 (stressing the need for delimitation, securing tenure, and recovery of lands lost through improper transfer); India, 05/05/2007, CERD/C/IND/CO/19, at para. 20 (recommending "that bans on leasing tribal lands to third persons or companies are effectively enforced, and that adequate safeguards against the acquisition of tribal lands are included in the Recognition of Forest Rights Act (2006) and other relevant legislation"); *Letter to Brazil, Urgent Action and Early Warning Procedure*, 24 August 2007, at p.2 (recommending the removal of illegal occupants and increased protection for indigenous peoples during the removal); Guatemala, 15/05/2006, CERD/C/GTM/CO/11, at 17 (recommending the "effective implementation of the national land register law so that indigenous community lands can be identified and demarcated") and; Guyana, 04/04/2006, CERD/C/GUY/CO/14, para. 19 (protection from environmental degradation caused by small-scale mining).

119 Argentina, 24/08/2004, CERD/C/65/CO/1, at para. 16.

120 See also *Report No. 09/06*, Case 12.338, Twelve Saramaka Clans (Suriname), Inter-American Commission on Human Rights, 2 March 2006, at para. 241–42 (observing that the public interest doctrine "substantially limit[s] the fundamental rights of the indigenous and Maroon peoples to their land *ab initio*, in favor of an eventual interest of the State that might compete with those rights. ... In practice, the classification of an activity as being in the 'general interest' is not actionable and constitutes a political issue that cannot be challenged in the Courts. What this does in effect is to remove land issues from the domain of judicial protection").

121 Suriname, 12/03/2004, CERD/C/64/CO/9, at para. 11.

122 *Ibid.* at para. 15. See also Indonesia, 15/08/2007, CERD/C/IDN/CO/3, para. 17; and Nigeria, 01/11/2005, CERD/C/NGA/CO/18, para. 19.

interpretations adopted by the State party of national interest, modernisation and economic and social development,” CERD’s 2007 observations on Indonesia recommend that the state ensure that these concepts “are defined in a participatory way, ... and are not used as a justification to override the rights of indigenous peoples”.¹²³ CERD has also stressed that the use by a state of a “margin of appreciation in order to strike a balance” between indigenous and non-indigenous land and resource rights is limited by the obligations assumed under ICERD.¹²⁴

Restitution Of Traditional Lands May Be Required

Considering that indigenous peoples continue to suffer from the legacy of systematic discrimination that has resulted in the loss of vast areas of their traditional territories, GRXXIII importantly recognises a right to restitution in cases “where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent...”.¹²⁵ CERD has raised this issue on a number of occasions in its concluding observations and has explained that where restitution is not possible, compensation, preferably in the form of lands and territories of equal quality, is required.¹²⁶

International Covenant On Civil And Political Rights And ILO 169

CERD’s jurisprudence is largely the same as that adopted by the Human Rights Committee in its reviews of states parties to the International Covenant on Civil and Political Rights and is further reflected in the standards set in ILO 169.¹²⁷ Articles 13–15 of ILO 169, for example, require that the state recognises and legally guarantees indigenous peoples’ rights of ownership and possession of their traditionally owned lands, territories and resources and requires that such guarantees are made effective in fact through demarcation, titling and the establishment of prompt and effective remedies through which indigenous peoples can assert and defend these rights in practice. These standards should also be read together with Articles 25–29 of the UNDRIP, which largely restates CERD and related jurisprudence.

123 Indonesia, 15/08/2007, *ibid.* at para. 16.

124 Australia. CERD/C/AUS/CO/14, 14 April 2005, at para. 16. The Human Rights Committee has explicitly stated that a state’s freedom to encourage economic development is strictly limited by the obligations it has assumed under international human rights law rather than by a margin of appreciation. *I. Lansman et al. vs. Finland (Communication No. 511/1992)*, CCPR/C/52/D/511/1992, para. 10. See, also, African Commission on Human and Peoples’ Rights, *Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights /Nigeria*, at para. 58 (stating that the “intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities”).

125 Theo van Boven, UN Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights, states in his UN study on reparations that a “coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples. Against this background it is therefore necessary that, in addition to individual means of reparation, adequate provision be made to entitle groups of victims or victimised communities to present collective claims for damages and to receive collective reparation accordingly.” *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur.* UN Doc. E/CN.4/Sub.2/1993/8, at para. 14.

126 *Inter alia*, Guatemala, 15/05/2006, CERD/C/GTM/CO/11, at para. 17 (reiterating GRXXIII with regard to restitution); Costa Rica, 17/08/2007, CERD/C/CRI/CO/18, para. 15 (stressing the need for recovery of lands lost through improper transfer); and Bolivia, 10/12/2003, CERD/C/63/CO/2, para. 13 (referring the right to restitution in relation to lands allotted to private companies).

127 See Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada, *Report of the Human Rights Committee*, 45 UN GAOR Supp. (No.43), UN Doc. A/45/40, vol. 2 (1990), 1. See also, Kitok vs. Sweden, *Report of the Human Rights Committee*, 43 UN GAOR Supp. (No.40) UN Doc. A/43/40; and General Comment No. 23 (50) (art. 27), *adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994.* UN Doc. CCPR/C/21/Rev.1/Add.5.

Application to Arun III

While Nepal has ratified ILO 169 and has begun an internal process of discussing how to implement it, and is party to other relevant human rights instruments as discussed above, it has yet to legislate guarantees for indigenous peoples' lands, territories and resources and has yet to secure their rights of ownership and control in practice. This is the case nationally as well as in the area of the proposed Arun III dam. The rights require that indigenous peoples' traditionally owned lands, territories and resources are delimited, demarcated and titled in accordance with their customary tenure systems and laws. Should traditional lands be occupied by non-indigenous persons, an assessment of the applicability of restitution measures is also required. These rights and the rights discussed below cannot be disregarded simply because the State has declared Arun III to be in the public interest.

B. Relocation or Resettlement

Involuntary or forcible resettlement "is considered a practice that does grave and disastrous harm to the basic civil, political, economic, social and cultural rights of large numbers of people, both individual persons and collectivities".¹²⁸ This is also recognised in a World Bank study on resettlement, which states that "[t]he potential for violating individual and group rights under domestic and international law makes compulsory resettlement unlike any other project activity. ... Carrying out resettlement in a manner that respects the rights of affected persons is not just an issue of compliance with the law, but also constitutes sound development practice".¹²⁹

For indigenous peoples, forcible relocation can be disastrous, severing entirely their various relationships with their ancestral lands.¹³⁰ As observed by the former UN Sub-Commission, "where population transfer is the primary cause for an indigenous people's land loss, it constitutes a principal factor in the process of ethnocide;"¹³¹ and, "[f]or indigenous peoples, the loss of ancestral land is tantamount to the loss of cultural life, with all its implications".¹³²

Due to the importance attached to indigenous peoples' cultural, spiritual and economic relationships to land and resources, international law treats relocation as a serious human rights concern. In international instruments, strict standards of scrutiny are employed and indigenous peoples' free and informed consent must be obtained.¹³³ Relocation may only be considered as an exceptional measure in extreme and extraordinary cases. The implicit statement contained in these standards is that forcible relocation is prohibited as a "gross violation of human rights".¹³⁴ CERD is clear that

128 *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1993/8, p.10. See, also, *Forced evictions: Analytical report compiled by the Secretary-General*, UN Doc. E/CN.4/1994/20, for an enumeration of the various human rights implicated by resettlement; and, *Report of the Representative of the Secretary-General on legal aspects relating to the protection against arbitrary displacement*, UN Doc. E/CN.4/1998/53/Add.1.

129 World Bank (1996) *Resettlement and Development: The Bankwide Review of Projects Involving Involuntary Resettlement 1986–1993*, The World Bank, Environment Department, Washington D.C., pp.1–4.

130 For an extensive overview of the impact on indigenous peoples of relocation caused by dams, see International Work Group on Indigenous Affairs (IWGIA) and Forest Peoples Programme (1999) "Dams, Indigenous Peoples and Ethnic Minorities" *Indigenous Affairs*, Vol. 3–4, especially, Colchester, Marcus, "Introduction", pp.4–55.

131 *The human rights dimensions of population transfer, including the implantation of settlers. Preliminary report prepared by Mr. A.S. Al-Khasawneh and Mr. R. Hatano*, UN Doc. E/CN.4/Sub.2/1993/17, para. 101.

132 *Ibid.* para. 336.

133 Among others, ILO 107, art. 12, ILO 169, art. 16(2), Proposed American Declaration, art. XVIII(6), and Committee on the Elimination of Racial Discrimination, General Recommendation XXIII. See, also, *Progress report prepared by the Special Rapporteur on the human rights implications of population transfer, including the implantation of settlers*, UN Doc. E/CN.4/Sub.2/1994/18, paras. 24–5.

134 UN Commission on Human Rights resolution 1993/77 states that the practice of forced evictions constitutes a "gross

relocation may only take place with indigenous peoples' consent.¹³⁵ In communications adopted under its early warning and urgent action procedures CERD has explicitly applied this standard to dams proposed to be built in indigenous peoples' territories. In the case of India, it expressed

concern with regard to the impact of dam projects on the indigenous communities ...in particular in light of information that the Government has now issued an "environmental clearance permit" allowing for the construction of the Tipaimukh dam without meaningful efforts to obtain proper informed consent of the affected communities.¹³⁶

In 2010, it reminded Brazil

of the importance of obtaining free, prior and informed consent of the indigenous peoples in the RSS with regard to any measure or project that might affect their livelihood. In this light, it requests information from the State party as to whether their consent has been sought regarding plans to build new dams along the Cotingo River (based on legislative decree No. 2540/2006) [and] plans to build the Paredao hydroelectric facility on the Mucajai River in Roraima....¹³⁷

Also in 2010, the Committee requested information from Costa Rica on the

measures taken to ensure the effective participation of the Térraba people and the other indigenous peoples affected by decisions regarding all aspects and stages of the planned Diquís dam, and to obtain the free, prior and informed consent in relation to this project.¹³⁸

Likewise, forcible relocation very likely constitutes a violation of article 27 of the ICCPR and article 30 of the Convention on the Rights of the Child in that, in most cases, it amounts to a *denial* of the right of indigenous persons and children, respectively, to enjoy their culture.¹³⁹ Addressing this issue, the Human Rights Committee stated that

the Committee is concerned by hydroelectric and other development projects that might affect the way of life and the rights of persons belonging to the Mapuche and other indigenous communities. *Relocation and compensation may not be appropriate in order to comply with article 27 of the Covenant.* Therefore: When planning actions that affect members of indigenous communities, the State party must pay primary

violation of human rights" and urged governments to undertake immediate measures, at all levels, aimed at eliminating the practice.

135 *Inter alia*, India, 05/05/2007, CERD/C/IND/CO/19, para. 20 (stating that the "State party should also ensure that tribal communities are not evicted from their lands without seeking their prior informed consent and provision of adequate alternative land and compensation..."); and Botswana, 04/04/2006, CERD/C/BWA/CO/16, para. 12 (recommending that the state "study all possible alternatives to relocation; and (d) seek the prior free and informed consent of the persons and groups concerned").

136 India, Communication adopted by CERD, 28/09/2009.

137 Brazil, Communication adopted by CERD, 31/05/2010.

138 Costa Rica, Communication adopted by CERD, 27/08/2010.

139 Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada, *Report of the Human Rights Committee*, 45 UN GAOR Supp. (No.43), UN Doc. A/45/40, vol. 2 (1990), 1. See also Kitok vs. Sweden, *Report of the Human Rights Committee*, 43 UN GAOR Supp. (No.40) UN Doc. A/43/40; Lovelace vs. Canada (No. 24/1977), *Report of the Human Rights Committee*, 36 UN GAOR Supp. (No. 40) 166, UN Doc. A/36/40 (1981). *I. Lansman et al. vs. Finland* (Communication No. 511/1992); *J. Lansman et al. vs. Finland* (Communication No. 671/1995), UN Doc. CCPR/C/58/D/671/1995; and General Comment No. 23 (50) (art. 27), *adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5.*

attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions that affect them.¹⁴⁰ (emphasis added)

The Committee on Economic, Social and Cultural Rights frequently expresses concern about forcible relocation and has urged states to abandon the practice as incompatible with the obligations assumed under the Covenant.¹⁴¹ In its *General Comment on the Right to Adequate Housing*, the Committee stated that it “considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law”.¹⁴² As discussed above, in the context of indigenous peoples, the relevant principles of international law include the right to free, prior and informed consent.

In General Comment No. 7, which exclusively addresses forced evictions, the Committee noted that indigenous peoples suffer disproportionately from the practice of forced eviction.¹⁴³ Observing that forcible relocation often occurs in relation to “large-scale development projects, such as dam-building and other major energy projects,”¹⁴⁴ the Committee further stated that it

is aware that various development projects financed by international agencies within the territories of State parties have resulted in forced evictions. In this regard, the Committee recalls its General Comment No. 2 (1990) which states, *inter alia*, that “international agencies should scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account.”¹⁴⁵

The norms listed above are restated in Article 10 of the UNDRIP, which unambiguously provides that “Indigenous peoples shall not be forcibly removed from their lands or territories. 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”.

Application to Arun III

From the preceding, it is clear that, in the case of indigenous peoples, both general and convention-based international law require that consent be obtained prior to resettlement. It is also clear that international law accords indigenous and tribal peoples, given their unique connection with their lands and resources, a higher standard of protection than applies to others. This higher standard in part entails a substantial, if not complete, limitation on the exercise of eminent domain powers by the state, at least to the extent that relocation is involved. The same is also the case with respect

140 *Concluding observations of the Human Rights Committee: Chile. 30/03/99. CCPR/C/79/Add.104. (Concluding Observations/Comments) CCPR/C/79/Add.104, 30 March 1999, para. 22*

141 *General Comment No. 4, The Right to Adequate Housing (Art. 11(1) of the Covenant)*, adopted at the Committee’s Sixth session, 1991.

142 *Ibid.* at para. 18. See, also, *General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions*, adopted at the Committee’s Sixteenth session, 1997, para. 1.

143 *General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions*, para. 10.

144 *Ibid.* at para. 18.

145 *Ibid.* at para. 17.

to Article 16 of ILO 169, which requires indigenous peoples' consent for relocation. Thus, in the case of Arun III, Nepal must ensure that indigenous peoples effectively participate, at all levels and stages of the project, and that their right to free, prior and informed consent is closely adhered to, including with respect to any potential relocation.

C. Effective Participation and FPIC

Article 5(c) of ICERD guarantees the right, without discrimination of any kind, to participate in elections and to take part in government and the conduct of public affairs at any level. With respect to Article 5(c), GRXXIII¹⁴⁶ calls on states parties to "Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".¹⁴⁷ Consistent with this CERD's concluding observations and decisions routinely refer to indigenous peoples' right to informed consent. Its observations on Ecuador, for instance, state that

As to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured.¹⁴⁸

CERD emphasises indigenous peoples' right to give their informed consent both in general¹⁴⁹ and in connection with specific activities, including: mining, oil and gas operations;¹⁵⁰ logging;¹⁵¹ the establishment of protected areas;¹⁵² dams;¹⁵³ agro-industrial plantations;¹⁵⁴ resettlement¹⁵⁵

146 The UN Committee on the Elimination of Racial Discrimination's General Recommendation XXIII (1997) (GRXXIII), para. 4(d).

147 *Inter alia*, Guatemala, 15/05/2006, CERD/C/GTM/CO/11, at 16 (referring to ICERD Article 5(c) and stating that "bearing in mind paragraph 4(d) of its general recommendation 23, recommends that the State party redouble its efforts to ensure the full participation of indigenous peoples, especially indigenous women, in public affairs and that it take effective measures to ensure that all indigenous peoples, particularly the Xinka and Garifuna, participate at all levels"); and Australia, 24/03/2000, CERD/C/304/Add.101, at para. 9 (highlighting indigenous peoples' right to "effective participation . . . in decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of ensuring the 'informed consent' of indigenous peoples").

148 Ecuador, 21/03/2003, CERD/C/62/CO/2, para. 16.

149 *Inter alia*, Australia, CERD/C/AUS/CO/14, 14 April 2005, para. 11 (recommending that Australia "take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its general recommendation XXIII")

150 *Inter alia*, Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 19 (recommending that Guyana "seek the informed consent of concerned indigenous communities prior to authorising any mining or similar operations which may threaten the environment in areas inhabited by these communities"); Guatemala, 15/05/2006, CERD/C/GTM/CO/11, para. 19; and Suriname, 18/08/2005, Decision 1(67), CERD/C/DEC/SUR/4, para. 3.

151 *Inter alia*, Cambodia, 31/03/98, CERD/C/304/Add.54, paras. 13 and 19 (observing that the "rights of indigenous peoples have been disregarded in many government decisions, in particular those relating to citizenship, logging concessions and concessions for industrial plantations" and recommending that Cambodia "ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent").

152 *Inter alia*, Botswana, 23/08/2002, UN Doc. A/57/18, paras.292–314, para. 304 (concerning the Central Kalahari Game Reserve); and Botswana, 04/04/2006, CERD/C/BWA/CO/16, para. 12.

153 *Inter alia*, India, 05/05/2007, CERD/C/IND/CO/19, para. 19 (stating that the India "should seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects and provide adequate compensation and alternative land and housing to those communities").

154 *Inter alia*, Indonesia, 15/08/2007, CERD/C/IDN/CO/3, para. 17 (recommending that Indonesia "ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in the Plan"); and Cambodia, 31/03/98, CERD/C/304/Add.54, paras. 13 and 19.

155 *Inter alia*, India, 05/05/2007, CERD/C/IND/CO/19, para. 20 (stating that the "State party should also ensure that tribal

and; compulsory takings¹⁵⁶ and other decisions affecting the status of land rights.¹⁵⁷ In August 2007, it observed in a letter to the Philippines under the EW/UA procedure that, although the right to consent was recognised in that country's 1997 Indigenous Peoples' Rights Act, CERD was nevertheless concerned that this right has been negatively affected by implementing regulations adopted under the Act.¹⁵⁸ It also expressed concern about alleged manipulation of the right to consent related to a government agency's "creation of a body with no status in indigenous structure and not deemed representative" by the affected people, and which had "concluded an agreement with a Canadian mining company (TVI Pacific) in order to authorise mining activities" on the indigenous people's sacred mountain.¹⁵⁹

CERD's emphasis on indigenous peoples' right to informed consent has informed the jurisprudence of the Inter-American human rights system and is also reflected in Article 32(2) of UNDRIP (see below). With regard to extractive industries, for instance, the Inter-American Commission on Human Rights confirmed in the *Twelve Saramaka Clans Case*, a case involving logging and mining concessions, that "in light of the way international human rights legislation has evolved with respect to the rights of indigenous peoples that the indigenous people's consent to natural resource exploitation activities on their traditional territories is always required by law".¹⁶⁰ The Inter-American Court of Human Rights confirmed this in the *Saramaka People v Suriname* case.¹⁶¹

CERD further applies Article 5(c) to indigenous peoples' right to participate in state institutions and has also raised the right to informed consent in this context, including in relation to legislative and constitutional reform processes and whether indigenous peoples participated therein.¹⁶²

International Covenant on Civil and Political Rights

The Human Rights Committee has "stress[ed] the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them".¹⁶³ Likewise, in its case law under the Optional Protocol I, the Committee has held in *Angela Poma Poma v.*

communities are not evicted from their lands without seeking their prior informed consent and provision of adequate alternative land and compensation..."); and Botswana, 04/04/2006, CERD/C/BWA/CO/16, para. 12 (recommending that the state "study all possible alternatives to relocation; and (d) seek the prior free and informed consent of the persons and groups concerned"). See, also, Laos, 18/04/2005, CERD/C/LAO/CO/15, para. 18.

156 Guyana, 04/04/2006, CERD/C/GUY/CO/14, para. 17 (recommending that Guyana "confine the taking of indigenous property to cases where this is strictly necessary, following consultation with the communities concerned, with a view to securing their informed consent...").

157 Australia, CERD/C/AUS/CO/14, 14 April 2005, para. 11 (recommending "that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land"); and United States of America, 14/08/2001, A/56/18, paras. 380–407, para. 400 (concerning "plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples").

158 *Letter to the Permanent Mission of the Philippines, Urgent Action and Early Warning Procedure*, 24 August 2007, p.1. Available at: http://www2.ohchr.org/english/bodies/cerd/docs/philippines_letter.pdf.

159 *Ibid.*, p.2.

160 *Report No. 09/06*, Case No 12.338 *Twelve Saramaka Clans (Suriname)*, 2 March 2006, para. 214. See also *Report N° 75/02*, Case N° 11.140, *Mary and Carrie Dann (United States)*, Dec. 27, 2002, OEA/Ser.L/V/II.116, Doc. 46, para. 130 and; *Report No. 40/04*, *Maya Indigenous Communities of the Toledo District*, Case 12.053 (Belize), 12 October 2004, para. 142.

161 *Saramaka People v Suriname*, Judgment of 28 November 2007. Series C No. 172, paras. 34, 37; and *Saramaka People v. Suriname*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs, para. 54–5 (available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf).

162 See also Article 19 of the UNDRIP, which provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

163 *Concluding Observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 22.

Peru that “participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community”, in relation to “the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community...”.¹⁶⁴ This would clearly apply in the case of Arun III. As noted above, it has considered that it is likely that relocation of indigenous peoples in connection with dams does not comply with the states’ obligations not to deny indigenous peoples the right to enjoy their culture, including the relationship they enjoy with their traditional lands. As Nepal has ratified Optional Protocol I to the ICCPR, indigenous peoples may file formal complaints with the Human Rights Committee should these rights be disregarded.

ILO 169

Articles 6 and 15 of ILO 169 both require consultation with indigenous peoples and such consultation must be undertaken with indigenous peoples’ freely chosen representatives, in a culturally appropriate manner and with the aim of reaching an agreement. Article 35 of ILO 169 provides that the Convention cannot be read in way that may affect rights recognised in other international instruments or national law. Therefore, the right to consent recognised in ICERD and the ICCPR are not affected by the lower standard in ILO 169 and the latter should be read conjunctively with the former, the result still being that FPIC is required. Additionally, it is ILO policy to read ILO 169 together with the UNDRIP, which also requires FPIC in relation to projects that may affect indigenous lands, territories and resources (see below).

UNDRIP

The UNDRIP restates the jurisprudence of CERD and the Human Rights Committee, providing in Article 32(2) that

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, utilisation or exploitation of mineral, water or other resources.

Application to Arun III

The international human rights law standards accepted by and applicable to Nepal all require that indigenous peoples’ FPIC be obtained in relation to the proposed Arun III dam. This right shall also be exercised through indigenous peoples’ freely chosen representatives and close scrutiny is required to ensure that there is no manipulation. To date, as discussed above, indigenous peoples’ right to effective participation and FPIC has not been respected and even relatively simple mechanisms for sharing information that is vital to indigenous peoples’ decision-making processes have not been established. The right to effective participation also extends to involvement in the design and conduct of environmental and social impact assessments. Such assessments should also conform to the highest international standards and best practice, which, in the case of indigenous peoples include the *Akwe:Kon Guidelines*, adopted by the Conference of Parties to the Convention on Biological Diversity.¹⁶⁵ The guidelines apply “whenever developments are proposed to take place

¹⁶⁴ *Ángela Poma Poma v. Peru*, Communication No. 1457/2006. UN Doc. CCPR/C/95/D/1457/2006, 24 April 2009, para. 7.6.

¹⁶⁵ *Akwe:kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments* See <http://www.cbd.int/>

on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities”.¹⁶⁶

[doc/publications/akwe-brochure-en.pdf](#).

¹⁶⁶ *Ibid.* at p.5.



The Lessons Lost

The fate of the original Arun III hydropower project provides rich lessons for any company planning to resurrect plans for hydro-electricity production in the Arun Valley. The World Bank and other funders in the 1990s confronted serious and multi-sector concerns over the project, including problems with inadequate assessment of potential social and environmental impacts and large-scale public opposition to the project. Plans by SVJN Ltd. to resurrect the dam, and indeed expand it, show little regard for the lessons learnt during this earlier attempt to dam the valley, and indeed are taking place with little public consultation or outreach at all.

Field work shows clearly that the project plans are shrouded in a lack of information. Communities are, at best, partially aware of the plans to resurrect the dam. Almost all information received from the communities during field work related to World Bank information of the 1990s, brief announcements over the local radio stations in 2009 or individuals' observations of company site visits. In such a context it is unrealistic to talk in terms of processes and procedures for free, prior and informed consent being realised: a key right of indigenous peoples in Nepal remains unachieved and unrecognised.

Further to the lack of informed consent in making decisions about this project, there is an almost complete lack of information regarding the details of the project itself. There is no available evidence that the project will establish benefit-sharing agreements with the affected communities. There is no discussion by the project proponents of the need for a local grievance mechanism to address legitimate problems that may occur in construction. Such grievance mechanisms should be established with the full consultation and consent of the peoples affected and with due regard to their customary laws and mediation traditions, yet in the Arun Valley it is unclear as to whether they will be established at all.

Assessment of potential impacts – both positive and negative – with the informed participation of the potentially impacted peoples is a key requirement for international best

practice on project development. These social and environmental impact assessments provide key opportunities for information to be given to communities as well as, in return, receiving information about potential impacts. However, it appears from interviews in the field that SVJN intends to rely largely on impact assessments carried out in the early 1990s – over 15 years ago – for the World Bank project.¹⁶⁷

Having adopted the UN Declaration on the Rights of Indigenous Peoples, and ratified ILO 169 and the UN Convention on the Elimination of Racial Discrimination, the Government of Nepal is well aware of the vulnerabilities and special requirements for protection for indigenous peoples if they are to enjoy their human rights on a par with the rest of society. However, government monitoring of the Arun III project is scant or non-existent.

The peoples of the Arun Valley fear the loss of their resources, their lands and their livelihoods and nothing has been forthcoming from the government, or the company, to alleviate this fear. If Nepal is to realise the potential of its hydropower resources, then the process and practice of developing such resources must be completely rethought and redesigned. As it stands at the moment, the proposed development violates the basic rights of those it is intended to benefit, the peoples of Nepal.

¹⁶⁷ Meeting with the Arun Rights Forum, Khandbari, 30 March 2009.



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