

Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the situation of human rights in Cambodia; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the right to food; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

REFERENCE:
AL OTH 83/2020

23 December 2020

Dear Mr. Lim Bunsour,

We have the honour to address you in our capacities as Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the situation of human rights in Cambodia; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the right to food; Special Rapporteur on the rights to freedom of peaceful assembly and of association; and Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, pursuant to Human Rights Council resolutions 43/14, 44/15, 42/37, 37/8, 32/8, 41/12 and 45/17.

We are independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective. We are sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received. Special Procedures mechanisms can intervene directly with Governments and other stakeholders (including companies) on allegations of abuses of human rights that come within their mandates by means of urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a communication to the concerned actors identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

In this context, we write to bring to your attention the information we have received regarding **an urban development project carried out by ING Holdings that involves the reclassification and in-filling of the Tompoun/Cheung Ek wetlands, which are used for housing, fishing and farming by at least 1,000 families, in southern Phnom Penh, Khans Mean Chey and Dangkao, and Kandal province, near Ta Khmao city, without consultation with the affected families.** Allegedly, not

only does the project threaten the livelihoods and homes of these families, but it will also cause irreparable damage to the wetlands ecosystem, place more than a million people at increased risk of flooding and pollute the Mekong and Bassac rivers with untreated sewage and harmful pollutants posing serious risks for the communities living along the rivers and relying on them as a source of income and food.

According to the information received:

Background

The wetlands in southern Phnom Penh, commonly referred to as Boeung Tompoun, Boeung Cheunk Ek, or the Tompoun Cheung Ek wetlands, and hereafter to as “the wetlands”, have been continuously used by communities living in the area as a place for fishing, aquatic agriculture, and as an area to live since the late 1970s. Some communities claim they have lived and use the wetlands area for farming since before the Khmer Rouge (pre-1970).

Approximately 370,000m³ per day of water is reportedly pumped from Phnom Penh into the wetlands, much of which is raw sewage. If the wetlands continue to be infilled, it is likely that nearly half of Phnom Penh, roughly 1.2 million people, will be at increased risk of flooding from sewage contaminated flood waters. The wetlands are essential in providing storage capacity for flood waters, as well as naturally treating Phnom Penh’s wastewater through the planting of aquatic agriculture on the wetlands’ surface. Without the wetlands, more than one million people are at risk of flooding and exposure to contaminated water.

Allegedly, the wetlands can be considered as state public land under article 15 of the 2001 Land Law, either under the term “lakes” or as a “course of navigable or floatable water”. If the wetlands are state public land, then they can only be leased to private companies following the legal procedures for reclassification and subsequent leasing to private companies in special circumstances, which are outlined below.

Lease to ING Holdings

In 2004, ING Holdings began developing the wetlands area by infilling it with sand to create real estate for the ING City project. Since then, the ING City has been re-leasing plots of land to other companies such as Star Auto (Cambodia), the International School of Phnom Penh, Urban Village, R & F Group, Chip Mong Group, and Borey Peng Huoth, Lingnan Garden, Maritime Group, AEON Mall, and Versaille Square.

The leasehold of ING Holdings in order to develop the wetlands area, which constitutes at least 1,500 hectares, has not been released publicly. However, plans for ING City’s development indicate that the majority of the wetlands will be destroyed. ING City project plans located on its website indicate that the city would develop in phases, and would include Government buildings as well as private developments. There appear to be no plans of resettlement in place for

communities living nearby the wetlands or within the boundaries of the ING City project.

In addition, the project would involve preserving a 520-hectare area of the wetlands, out of the 1500-hectare wetlands. The 520-hectare area in question received legal protection through demarcation of the area as a lake, named Boeung Cheung Ek, in 2008, under sub-decree No. 124 on the “Establishment of Cheung Ek Lake and Canals, Located in Mean Chey and Dangkao Districts of Phnom Penh and Ta Khmao Town of Kandal Province as Public Properties”.

Leasing of Boeung Cheung Ek

Since its protection through demarcation as a lake in 2008, Boeung Cheung Ek has been reduced by 80% through private leases to companies and individuals. Companies that received the rights to develop the lake include Orkide Villa, ING Holdings, and Chip Mong Group. In addition, several private persons received plots of land inside the previously protected lake area.

Under the 2001 Land Law, in order for state public property - which includes a “lake” according to article 15 - to be sold or leased, it must have lost its public interest use, as stipulated in article 16 of the Land Law. The Royal Decree on ‘Provisional Guidelines and Principles Regarding the Reclassification of the State Public Properties and of Public Entities’, No. 339 of 2006 clarifies that state public property can be reclassified as state private property only when the property is: no longer in the public interest; has lost its full functionality in the service of public interest; or is no longer used directly by the public.

According to the information received, the wetlands are in the public interest to protect Phnom Penh and Ta Khmao from flooding, and in treating the waste water of Phnom Penh. They continue to perform both of these public interest functions and are vital in doing so, as no other lakes exist to assist in flood protection and no wastewater treatment plant currently exists in Phnom Penh. The wetlands are continuously being used by the public, both as a flood protector and natural wastewater treatment plant, as well as by local farmers and fishing families.

In-filling of wetlands with sand and wetlands environmental destruction

In order to infill the wetlands, 77,660,000m³ of sand will be required. Infilling of the wetlands with sand began in or around 2004 and has continued until today. According to the latest information received, over 30%, or more than 500 hectares, of the wetlands area has now been destroyed by sand-infilling. The information we have received points to three key human rights concerns over the practice of sand in-filling.

Firstly, the destruction of the wetlands by sand infilling is an irreversible process that will render the utilities of the wetlands void. These utilities are flood protection, wastewater treatment, and land for economic activities, especially fishing and farming. The current documents suggest that only 107 hectares of the 1,500-hectare wetlands will survive the ING City and other developments.

The 107 hectares are not considered to be enough to mitigate against flooding, or to provide for adequate wastewater treatment.

Secondly, the wetlands may be a critical area for migratory fish, some of which have been identified by your Excellency's Government as endangered. 52 species of fish, 20 species of reptiles and amphibians, 43 species of birds, and two mammals have been identified as living in the area. Of particular concern are the Isok Barb fish (*Probarbus jullien*) and the Giant barb fish (*Catlocarpio siamensis*) which are considered as endangered under sub-decree No 123 of 2009. If these fish are found to breed in the wetlands area, then its destruction may place them at greater risk of extinction, and food security for villagers depending on these fish may suffer.

Thirdly, it is alleged that the sand used to infill the wetlands is being taken from the Mekong and the Bassac rivers, presenting considerable environmental risk to the rivers themselves and a human rights risk to the communities living along and using the rivers as a source of income and for food. The sand dredging companies providing sand to the ING City project are Hero King and Global Green (Cambodia) Energy Development. Both of these companies are owned by prominent businessmen in Cambodia, Mr. Ly Yong Phat, and Mr. Try Pheap, or their family members.

Sand dredging practices have been linked with river embankment collapse; increased flood risk; fish death; groundwater table retention reduction; changes in flow velocity; loss of land; and animal habitat loss. The extraction of the amount of sand required to infill the wetlands' area presents risks for communities living near to, and reliant upon, the rivers where the sand is being extracted from. Safeguards currently do not exist or are not adequate to protect against the risks outlined here.

Land and housing issues

There are more than 1,000 estimated families who are living in or near the wetlands area, and/or are dependent on the wetlands area for income generation activities. Some communities living in the area have been doing so for many years including the following communities: Prek Takong Mouy (1986), Prek Takong 60meters (1990), Prek Takong Bei (1990), Prek Tanou Muoy (1981), Prek Tanou (1999), and Cheung Ek (1999). These communities are not the only communities who have longstanding land-use and ownership claims to the area.

Only the families in Prek Takong Mouy have received land titles for their houses, but according to the information provided, their circumstances are unique. Other communities living in the area have not received land titles and are vulnerable to eviction. Some communities have been threatened with eviction and have heard rumours about their impending eviction. In some cases, communities are living in the ING City boundaries but have not been informed by ING Holdings, other companies, or the Government, of any plans for their resettlement or how ING Holdings intends to develop the area.

Loss of land and work

Of the 1,000 households living in the area, more than half are reliant on the wetlands as a primary or secondary source of income. Fishing and aquatic agriculture are the most common forms of work performed on the wetlands. The direct risk of income loss because of the infilling of the wetlands area is a serious concern and the information received has suggested that no communities have received compensation or been consulted on the wetlands infilling. Many of the families living in the area are also indebted and use the wetlands area as a way to generate income to repay their debts.

Increased flooding of Phnom Penh and Ta Khmao

More than one and a half million residents of Phnom Penh and Ta Khmao are being placed at increased risk of flooding due to the destruction of the wetlands. The wetlands area takes 370,000m³ of water per day from Phnom Penh's drainage canals. Without the wetlands, there is a serious risk that this water cannot be managed safely and will inundate thousands of homes, both in Phnom Penh and Ta Khmao, placing people at risk of diseases that the flood waters can cause. There are also huge economic costs expected for persons affected by floods, who will likely lose or have their property damaged. Flooding will have greater negative effects upon the poorer residents of Phnom Penh and Ta Khmao, who are not able to use cars or other adequate forms of transport to avoid flood waters.

Wastewater pollution

The wetlands are currently semi-effective at treating wastewater. This is done by the crops being planted on the water's surface by local farmers. As the wetlands are destroyed, the capacity of the wetlands to act as a natural wastewater treatment plant is reduced, exposing the communities living on and near the wetlands to more pollutants.

It was reported by fishing families that the water quality has already led to fishing being less viable in the northern parts of the wetlands, where the sand-infilling is most prominent. In addition, fishing families reported smaller fish, less fish, and therefore, less income generation from fishing activities in those areas since the development of ING City began.

It is unclear how the treatment of the wastewater will be ensured, after the wetlands are filled in. Plans about the construction of a plant in Cheung Ek to treat the wastewaters from Phnom Penh are reported although the treatment capacity of this plant is unclear and is allegedly inferior to the capacity of the wetland system. Concerns have been raised that the construction of this plant, which has reportedly not been properly consulted with locals, will be used as a pretext to destroy the wetlands.

Freedom of expression and assembly

Several communities have attempted to organize themselves and express their concerns to the Government, company representatives, and the general public. In 2018, during a peaceful ceremony to celebrate World Habitat Day, a community member from Prek Takong 60 meters community was arrested by police, taken to the Commune Chief's office and made to sign a document prohibiting the community member from organizing events of that nature in the future.

While we do not wish to prejudge the accuracy of the above-mentioned information, we wish to express our serious concerns about the alleged grave impacts of the project, on at least 1,000 families who rely on the Tompoun/Cheung Ek wetlands for their housing, food security and livelihood; on the communities living near Mekong and the Bassac rivers, whose food security depends on the resources of the rivers and is likely to be jeopardized by the sand dredging; and on the more than one and a half million residents of Phnom Penh and Ta Khmao who will be exposed to an increased risk of flooding due to the destruction of the wetlands, in violation of international human rights obligations, including those related to the right to an adequate standard of living, including adequate food, clothing, housing, water and sanitation, the right to work and the enjoyment of a safe, clean, healthy and sustainable environment. While we have also conveyed these and other concerns to the government of Cambodia, we would like to emphasize that, as noted in the commentary to the Guiding Principles on Business and Human Rights, "the responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights" (A/HRC/17/31, Principle 11). We would thus like to draw the attention of ING Holdings to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

In connection with the above alleged facts and concerns, please refer to the Annex on Reference to international human rights law attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned information.
2. Please provide information about the human rights policies and processes put in place by your company to identify, prevent, mitigate and remedy adverse human rights impacts of your activities, in line with the UN Guiding Principles on Business and Human Rights, including any policies relating to human rights due diligence.

3. Please provide information about specific due diligence or impact assessment measures taken by your company concerning the urban development project (ING city) and the associated development projects on Boeung Cheung Ek area and on their results, including measures taken to prevent, and mitigate any negative impacts caused through your company' activities including considering any alternatives to the possible eviction of the affected people. Please provide a copy of such impact assessments. Please include as well in your response steps you have taken to ensure that other businesses with whom you have relationships relating to the ING City project, are not causing or contributing to human rights abuses. If impact assessments were not undertaken, please indicate the reason why they were not undertaken.
4. Please provide information regarding how your company is respecting the right to an adequate standard of living, including adequate food, clothing, housing, water and sanitation, the right to work and the enjoyment of a safe, clean, healthy and sustainable environment of the people in the areas affected by the project and what measures of reparation have been foreseen in favour of those persons who have lost their land, housing, possessions or livelihoods, or suffered any other economic or cultural impacts as a result of the ING City project.
5. Please indicate whether the monitoring of water quality in the affected areas has been carried out prior to and during the construction of ING City and whether an impact assessment has been conducted related to water quality.
6. Please indicate whether the monitoring of the environmental, social and human rights impacts of sand dredging along the Mekong river and the Bassac river for the purposes of infilling the wetlands and Boeung Cheung Ek is being conducted. Please provide information on any findings and measures adopted in response.
7. Please highlight how your company conducted meaningful consultation with affected stakeholders with regard to the design and implementation of the development projects and the related human rights, environmental and social impact assessments. Please also indicate what special measures, if any, have been adopted to ensure the meaningful participation of women and groups, including persons with disabilities, who may be experiencing discrimination and marginalization.
8. Please provide information on whether your company has established an operational-level grievance mechanism, in line with the UN Guiding Principles, to address adverse human rights impacts caused by your company throughout your operations globally. Please also provide any information on whether such grievance mechanisms has been used to address any of the concerns or impacts identified by the stakeholders concerning the urban development project (ING city) and the associated development projects on Boeung Cheung Ek area, and any outcomes or remedy provided as a result.

This communication and any response received from your company will be made public via the communications reporting website after 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt and prevent the alleged violations and ensure that the operations of your company are in full conformity with applicable international human rights standards and the UN Guiding Principles on Business and human rights. In case an internal investigation is undertaken, please indicate measures taken by your company to prevent the reoccurrence of such human rights violations.

Please note that a letter expressing similar concerns was sent to the Royal Government of Cambodia.

Please accept, Mr. Lim Bunsour, the assurances of our highest consideration.

Balakrishnan Rajagopal
Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Anita Ramasastry
Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Rhona Smith
Special Rapporteur on the situation of human rights in Cambodia

David R. Boyd
Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Michael Fakhri
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Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Marcos A. Orellana
Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your attention to the UN Guiding Principles on Business and Human Rights, which were unanimously endorsed in 2011 by the Human Rights Council in its resolution (A/HRC/RES/17/31) after years of consultations involving Governments, civil society and the business community.

The Guiding Principles were established as a global authoritative norm for all States and companies to prevent and address the negative consequences related to companies on human rights. The responsibility to respect human rights is a global standard of conduct applicable to all companies, wherever they operate. It exists regardless of the ability and/or willingness of States to meet their own human rights obligations and does not reduce those obligations. It is an additional responsibility to comply with national laws and regulations for the protection of human rights.

“The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” (Guiding Principle 13).

The Guiding Principles clarify that business enterprises have an independent responsibility to respect human rights. Principles 11 to 24 and Principles 29 to 31 provide guidance to business enterprises on how to meet their responsibility to respect human rights and to provide for remedies when they have cause or contributed to adverse impacts. The commentary of Guiding Principle 13 notes that business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties.(...) Business enterprise’s “activities” are understood to include both actions and omissions; and its “business relationships” are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services”.

Business enterprises, in turn, are expected to carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their impacts on human rights. Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Similarly, where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible (commentary to Guiding Principle 19). Moreover, where business enterprises “identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes” (Guiding Principle 22).

Furthermore, business enterprises should remedy any actual adverse impact that they cause or to which they contribute. Remedies can take a variety of forms and may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome (commentary to Guiding Principle 25).

In connection with the above, we would therefore like to draw your attention to the relevant international norms and standards that are applicable to the issues brought forth by the situation described in this letter and require to be respected by business enterprises.

Firstly, we would like to recall that article 11.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and stipulates that States shall take appropriate steps to ensure the realization of this right. This article must be read in conjunction with Article 2.2 of the Covenant, which provides for the exercise of any right under the Covenant without discrimination of any kind.

In its General Comment No. 4 on the right to adequate housing, the Committee on Economic, Social and Cultural Rights has clarified that the right to housing should not be interpreted in a narrow or restrictive sense, such as merely having a roof over one's head; rather, it should be seen as the right to live somewhere in security, peace and dignity. It includes, among others, the availability of services, materials, facilities and infrastructure essential for health, security, comfort and nutrition, including sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

We also wish to recall that, as clarified by the Committee on Economic, Social and Cultural Rights, in its General Comment No. 7, forced evictions are a gross violation of the right to adequate housing and may also result in violations of other human rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions. Paragraph 15 of the same General Comment provides that if an eviction is to take place, procedural protections are essential, including, among others, genuine consultation, adequate and reasonable notice, alternative accommodation made available in a reasonable time, and provision of legal remedies and legal aid. Under no circumstances, evictions should result in homelessness. We wish to underscore that, notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. Prior to carrying out any evictions, and particularly those involving large groups, all feasible alternatives must be explored in consultation with the affected persons.

In addition, we wish to recall the United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement (A/HRC/4/18, Annex 1) that are as well applicable to business enterprises, which specify that evictions can only take place in 'exceptional circumstances'; that they must be authorized by law, and ensure full and fair compensation and rehabilitation. The Guidelines also state that any settlement agreement must satisfy the criteria of adequacy, accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education. Urban or rural planning and development processes should involve all those likely to be affected and should include the following elements: (a) appropriate notice to all potentially affected persons that eviction is being considered and that there will be public hearings on the proposed plans and alternatives; (b) effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups; (c) a reasonable time period for public review of, comment on, and/or objection to the proposed plan; (d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and (e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities. Comprehensive and holistic impact assessments should be carried out prior to the initiation of any project that could result in development-based eviction and displacement, with a view to securing fully the human rights of all potentially affected persons, groups and communities, including their protection against forced evictions. "Eviction-impact" assessment should also include exploration of alternatives and strategies for minimizing harm. The Guiding Principles underline that "transnational corporations and other business enterprises must respect the human right to adequate housing, including the prohibition on forced evictions, within their respective spheres of activity and influence." (para. 73)

We also would like to recall the United National Declaration on the on the Rights of Peasants and Other People Working in Rural Areas which recognizes in article 24 the right of these people to adequate housing and "to sustain a secure home and community in which to live in peace and dignity, and the right to non-discrimination in this context". The Declaration reiterates that "peasants and other people working in rural areas have the right to be protected against forced eviction from their home, harassment and other threats." Article 17 of the Declaration which recognizes that peasants and other people working in rural areas have the right to land, individually and/or collectively, including the right to have access to, sustainably use and manage land and the water bodies, coastal seas, fisheries, pastures and forests therein, to achieve an adequate standard of living, to have a place to live in security, peace and dignity and to develop their cultures. The same article states as well "that peasants and other people working in rural areas have the right to be protected against arbitrary and unlawful displacement from their land or place of habitual residence, or from other natural resources used in their activities and necessary for the enjoyment of adequate living conditions."

Finally, business enterprises must respect freedom of opinion and the right to peaceful assembly as set out in articles 19 and 21 of the International Covenant on Civil and Political Rights and must not interfere into persons exercising these rights.