



អង្គការ សមធម៌កម្ពុជា  
equitable cambodia



inclusive development international

## Complaint to the Australian Human Rights Commission

### Submitted on behalf of people affected by the Cambodia Railway Rehabilitation Project

#### I. Introduction to the Complaint

1. Equitable Cambodia (EC) is a non-governmental human rights organisation registered in Cambodia. Equitable Cambodia works to promote equitable development to further the progressive realization of human rights in Cambodia through education, research, evidence-based advocacy and support for community-driven development efforts. (EC was formerly Bridges Across Borders Cambodia.)
2. Inclusive Development International (IDI) is an independent, non-profit association registered in the United States. IDI works to make the international development paradigm more just and inclusive by promoting a human rights approach to development and helping people affected by harmful development and business practices to seek accountability and claim their rights.
3. EC and IDI are jointly submitting this complaint to the Australian Human Rights Commission (AHRC) on behalf of Cambodian families resettled under a project to rehabilitate Cambodia's railway system, which was partly funded through a grant from AusAID (the Project). These families (the affected persons) have been resettled from sites along the railway tracks that are being repaired or constructed by the project in the Cambodian provinces of Phnom Penh, Preah Sihanouk, Banteay Meanchey, and Battambang.
4. The affected persons have authorised EC and IDI to submit this complaint after learning of their option to do so, the process of the AHRC and the possible outcomes of filing a complaint. The authorisation letter thumb printed by 30 affected persons on behalf of their families is attached in the Annex. EC and IDI offers to assist the AHCR in accessing and communicating with the affected persons at any stage during the process, should this be of assistance.
5. All affected persons have requested anonymity for security reasons and to safeguard against further breaches of their human rights. In particular they fear retaliation by agents of the Cambodian government if their identities are disclosed.
6. The affected persons have suffered serious violations of their human rights, including those recognised in instruments scheduled under the Australian Human Rights Commission Act 1986 (the Act), as a result of resettlement under the Project. As a significant financial contributor to the project, AusAID bears human rights obligations towards those affected by the Project. Notwithstanding the real and foreseeable risk of human rights violations occurring as a result of the Project, AusAID decided to provide significant funding to the Project without taking sufficient measures to safeguard against

breaches of human rights. Despite persistent warnings from NGOs of the high risk of human rights violations since early 2010, and thereafter irrefutable evidence that human rights violations had in fact occurred, AusAID has failed to take sufficient remedial and corrective action to avoid and mitigate harms suffered.

7. The complainants seek an outcome that effectively remedies harms that they have suffered as a result of these violations. Additionally, the complainants seek an outcome that prevents future breaches of human rights of affected persons and all other people affected by AusAID development projects in Cambodia and globally.
8. EC and IDI would like to acknowledge the Human Rights Law Centre for legal assistance with the drafting of this complaint.

## II. Background to the Railways Project

### Project Details

9. The Greater Mekong Sub-region Rehabilitation of the Railway in Cambodia Project was launched in 2006 to restore the country's approximately 650 kilometres of railway infrastructure. The Project is a part of ADB's Greater Mekong Sub-region Program, which brings together six states of the Mekong river basin with a common goal of growth through economic cooperation.
10. The Project aims to rehabilitate or construct Cambodian railway lines from the border town of Poipet in the northwest to the coastal province of Sihanouk in the south, through the Cambodian capital Phnom Penh. The Project also includes the development of a freight and cargo railway facility on the outskirts of Phnom Penh.
11. The original total cost of the Project was USD143.06 million. The Asian Development Bank (ADB) is providing the bulk of the funding for the Project through a concessional loan of USD84 million. The Government of Australia is the second largest financier, contributing approximately AUD26 million in total. This contribution amounts to between 15 and 20 percent of total Project costs (depending on exchange rate variations).
12. The ADB agreed to administer the initial AusAID grant not exceeding AUD24.4 million and made it available to the Royal Government of Cambodia (RGC) through an agreement dated 5 October 2010 on a number of terms and conditions. The grant was to be provided in instalments over several years.
13. The project is linked to a concession agreement under which an Australian company, Toll Holdings, is part of a joint venture to manage the railway system for 30 years. Toll Holdings entered into the joint venture, Toll Royal Railway (TRR), with Cambodian conglomerate Royal Group owned by well-known Cambodian-Australian businessman, Kith Meng.
14. Cambodia media has reported that the project has run over-budget and that the RGC requires a further USD60 million to USD90 million for its completion.<sup>1</sup>
15. Extensive information, media reports and other news items about the Project are available at: <http://www.inclusivedevelopment.net/railway> and <http://cambodiatrainspotter.wordpress.com>

### Resettlement under the Project

16. At least 4174 households whose residences, other structures and/or assets were or are situated within the Corridor of Impact (COI) of the railway line or on land required for the construction of stations, depots or other Project-related infrastructure stand to be affected by the Project (Project-affected households). The COI extends between 3.5 to 5 metres on either side of the centreline of the tracks depending on the section of the

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<sup>1</sup> Philip Heijmans, "Rail Operator Restarts Train Service to Kampot", The Cambodia Daily, 23 August 2012.

railway. Resettlement activities commenced in mid-2010 and as of July 2012 the COI has almost been completely cleared by the Project.

17. Project affected households have been or are required to either relocate to a Project-sponsored resettlement site, or, if the part of their residence outside of the COI is at least 30 square metres, they are required to dismantle the part of the house and/or other structures within the COI but can remain living in the residual Right of Way (ROW). Approximately 1,200 households are totally affected and must relocate.
18. With the exception of residents living in an area named Samrong Estate who have asserted their legitimate possession rights to that land, project-affected households live on land defined by the Cambodian Land Law (2001) as State public property and are regarded as “illegal settlers” by the RGC. Nonetheless, under the Project policy, their occupation of State public property does not preclude entitlements. Nor does it remove the protections and obligations of international human rights law.
19. Pursuant to Resettlement Plans (RPs) prepared under the Project, all Project-affected households are entitled to compensation for their lost or partly lost structures and/or assets based on a Detailed Measurement Survey at replacement cost. According to the RPs totally affected households required to relocate were to be provided with three options: (1) relocation to Project-sponsored sites with security of tenure and access to basic services, (2) re-organization onsite in the ROW with a guarantee of being able to remain there for at least the next 5 years, and (3) cash compensation for lost assets and self-arranged relocation. Vulnerable households are entitled to additional support. Totally affected households are also entitled to compensation for transition costs, lost income due to resettlement and income restoration support. The overriding objective of these entitlements is to ensure that project-affected households receive assistance so that they would be at least as well-off as they would have been in the absence of the project, in accordance with the ADB’s 1995 Policy on Involuntary Resettlement.
20. In practice, the range of options and full entitlements under the RPs were not made available to many Project-affected households. Furthermore, serious transgressions of due process rights, including threats and coercion, permeated the resettlement process. Moreover, the RPs and the ADB Involuntary Resettlement Policy themselves in some important respects fall below requirements of international human rights instruments, including instruments scheduled under the Act.
21. As a result of these factors, affected persons have suffered a regression in the enjoyment of their human rights, including rights recognized in instruments scheduled under the Act. The detail of these circumstances and the human rights violations to which they give rise is provided in the following sections.
22. A number of publications have been produced by NGOs in Cambodia that provide information about the flaws in the resettlement process and evidence of harm suffered by Project-affected households. We refer the AHRC to these publications, which contain pertinent supplementary information to this complaint. These publications are:
  - Bridges Across Borders Cambodia (BABC), *DERAILED: A Study on the Resettlement Process and Impacts of the Rehabilitation of the Cambodian Railway*, 2012 (<http://www.babcambodia.org/railways/>).

- Sahmakum Teang Tnaut (STT), Losing the Plot: Rapid Assessment of Household Debt in Trapeang Anhchanh, June 2012 (available at <http://teangtnaut.org/>).
  - STT, Rehabilitation of Cambodia's Railways: Comparison of field data, July 2011 (available at <http://teangtnaut.org/>).
  - STT and Housing Rights Task Force, Railways Relocation in Phnom Penh: Six women tell their stories, Fact and Figures Issue 20, March 2012 (available at <http://teangtnaut.org/>).
23. We also refer the AHRC to a video produced by BABC in which Project-affected people explain their concerns and the harms they are experiencing as a result of the Project. The video is available at <http://www.babcambodia.org/railways/>.

### **III. The Resettlement Process and Impacts: Grievances and Harms**

24. Project-affected families have not been afforded their due process rights during the resettlement process and have experienced severe hardships as a result of their involuntary resettlement to make way for the railway project.

#### **Denial of due process and use of coercion and threats**

25. Procedural and substantive protections were not put in place during the process of involuntary resettlement of people under the Project. Affected persons were kept largely uninformed about the resettlement process, its timeline and their options and entitlements. Community meetings were used as a main source of information for affected people, but many people who attended the meetings either did not have sufficient opportunity to raise questions and concerns, or were not satisfied with the response provided by officials. The other key source of information was a Public Information Booklet, which was unsuitable for a significant proportion of affected people, especially many women, who are illiterate or have low literacy levels.
26. Affected families were not meaningfully consulted about the resettlement process or provided with genuine options. Instead many families felt pressured to accept the compensation package offered, even if they were unsatisfied. Many affected people report that they felt intimidated or pressured by staff of the Inter-Ministerial Resettlement Committee (IRC), charged with implementing resettlement plans. Coercion techniques varied from overt threats of destruction of property without compensation to more subtle pressure to accept compensation and not complain. For example, a 58 year-old man stated: "IRC told me to thumbprint or I would get nothing when they finish their work inside the community and dismantle the house. I thumbprinted out of fear." A 51 year-old widow and mother said: "IRC told people that they would get nothing at all if they do not agree to the compensation." A 43 year-old man stated: "If we don't accept or agree, they will demolish our houses."
27. We refer the AHRC to the BABC study, *Derailed*, pages 14-20 for further details about lack of due process protections regarding access to information and genuine consultation, including additional testimony on the coercive nature of the process.

#### **Impoverishment resulting from inadequate compensation, loss of income and debt**

28. Compensation and resettlement packages provided were not sufficient to ensure that affected people had access to adequate housing and could meet other basic needs after they resettled. Since they have resettled, many families have suffered severe hardships including impoverishment. Inadequate compensation, widespread loss of income and new unmanageable indebtedness have meant that families are unable to meet subsistence needs. In particular, many parents are very concerned about their inability to take care of their children. Some parents have reported that they are no longer able to adequately feed their children or send their children to school. In some cases children have dropped out of school in order to work to supplement household income.
29. The study, *Derailed*, found that the average amount of compensation received by the

surveyed households required to resettle was US\$757.50, with a few households receiving US\$200 or less and the vast majority receiving less than US\$1000. These compensation amounts were supposed to cover loss of structures and assets, transition costs, loss of income and all other resettlement-related losses, costs and expenses. Unsurprisingly three quarters of interview respondents reported that they felt unsatisfied with the compensation package but agreed to it because they felt they had no choice. People gave various reasons for being dissatisfied including that the amount was not enough to rebuild decent shelter, to connect to essential services, to cover lost income and to cover transportation and reconstruction costs. Female-headed households in particular said that they could not afford to hire laborers to construct shelters for their families.

30. According to the NGO Habitat for Humanity, which builds houses for some of Cambodia's most impoverished communities, the cost of constructing a basic 4 x 4 meter stilt wooden house is at least US\$1,925.75. Constructing a 4 x 6 meter brick house costs a total of at least US\$1,040. The average total compensation provided to affected households (US\$757.50 according to BABC's survey) falls well short of these amounts and is supposed to cover *all* resettlement related losses, costs and expenses.
31. This situation is reflected in a survey conducted by the Project's External Monitoring Organization and reported in the 12<sup>th</sup> Quarterly Social Monitoring Report, which found that 60% of affected households reported that the compensation they received was inadequate to restore their lost property.
32. We refer the AHRC to pages 21-33 of Derailed for details about compensation rates.
33. Exacerbating the harm caused by inadequate compensation amounts, household incomes of many resettled families have dropped significantly since they have moved to the relocation site. This drop in income has occurred primarily because the location of the sites has displaced them from their sources of livelihoods and left them without access to sufficient alternatives. The extra distance to jobs or income earning opportunities means that the cost of transport may either outweigh or substantially cut into daily income. For example, in Phnom Penh, one peri-urban resettlement site has been established for all Phnom Penh affected communities, regardless of their pre-resettlement location. While the Phnom Penh resettlement site in Trapeang AnhChanh, is only a few kilometers away from some resettled communities, it is between 20 to 25 kilometers from other pre-resettlement communities. Trapeang AnhChanh is located well outside the busy urban center, in which residents from previously inner-city communities derive their incomes. Project-affected women who have moved to the site have especially reported facing difficulties in finding jobs and in some cases have stopped work altogether. NGOs, including Equitable Cambodia, and the United Nations Human Rights Office (UNOHCHR) forewarned both the ADB and AusAID about the likely risks of a drop in income and living standards following a move to Trapeang AnhChanh, based on the experiences of other resettled communities who had been impoverished over the previous decade. These entreaties to relocate people closer to their former residences were ignored.
34. In Battambang and Sihanoukville over 50 percent of the displaced families are not living at the resettlement site, either because they cannot afford to rebuild their houses or they are unable to make a living there. Some families in Sihanoukville have reportedly sold

their plots. The same pattern is emerging at the Phnom Penh resettlement site. We refer the AHRC to pages 37-38 of Derailed for further details on the location of each project-sponsored resettlement site.

35. The combined factors of reduced income, increased expenses and insufficient compensation have led to widespread household indebtedness. Many affected families claim that they have had no choice but to borrow from moneylenders at exorbitant interest rates of between 5 to 7 percent per month, using their plot of land at resettlement sites as collateral. Some people have expressed fear that they will lose their plots to creditors because they are unable to manage their monthly repayments. According to the resettlement plans, resettled households are eligible to receive title to their plots five years after resettlement; however the unmanageable debt burdens on households pose a severe threat to their security of tenure. As indebtedness increases and remains unaddressed, the risk that families will become landless and homeless escalates.
36. People have said that despite being aware of the risk of indebtedness they felt they had no choice but to borrow to meet the basic needs of their families including food. Anecdotal evidence suggests that principle loan amounts range from between US\$1,000-\$2000.
37. We refer the AHRC to the rapid assessment of household debt at the Phnom Penh resettlement site, Trapeang AnhChan, published in June 2012. In its report, 'Losing the Plot,' STT found:

*The combined effects of inadequate compensation, a dearth of practical advice, reduced incomes resulting from lack in income-generating opportunities and unsustainable and spiraling levels of debt means that just eight months after resettlement, households in Trapeang Anhchanh are severely overdue with their interest repayments, and are facing regular intimidation from informal lenders. There is a distinct risk that some households will default on their loans and lose their homes and their land in the near future. Furthermore, some households appear to be struggling to afford even their most pressing expenditures such as food. Indeed, in January and May 2012 local human rights organization LICADHO provided emergency food assistance to [44] households... at the site. Others may also be in need, given that many of the households now appear to live below the national poverty line, which according to the ADB in 2007 was \$0.62 per day or approximately \$19 per month per person, rising to over \$23 per month per person in Phnom Penh. Described as a "very low" poverty line by the ADB, following relocation to Trapeang Anhchanh, it is beyond reach of many of the households featured in this report.<sup>2</sup>*

### **Impacts on children: food insecurity, drop in school attendance and reduced access to health services**

38. In July 2012 Equitable Cambodia (EC) conducted interviews with 13 parents and 15 children who had moved to the Phnom Penh resettlement site to find out what the impacts of resettlement have been on their children.

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<sup>2</sup> STT, Losing the Plot, June 2012, pages 3-4.



39. Almost all parents interviewed stated that because of the drop in their income they are no longer able to feed their children three nutritional meals per day. Some have relied on limited food aid from an NGO. Most parents also said that one or more of the children have stopped going to school. Both younger and older children are affected, but while there is a primary school nearby, there is no secondary school so teenage children are more likely to have dropped out. Parents reported noticing a regression in children's grades or skills, including reading. In some cases children are working to supplement household income instead of attending school. Resettled people interviewed also said that although there is a health post on the site, it is often closed and travel costs to the hospital in Phnom Penh coupled with treatment could be prohibitive if their children fall ill. A description of some of the families' situations and parents' testimonies follows. Full survey results of both parents and children are available upon request.
40. A 59 year-old *tuk-tuk* driver and father said that while prior to resettlement he generally (although not always) fed his children three meals of vegetables and meat per day, at the resettlement site his children do not have enough food to eat. He told EC that his two youngest children, aged 14 and 18, who still live with him, had to stop studying after the move because of a drop in household income. Both children now work at a factory. At the new site they have a larger house and plot of land to live on "with more fresh air," and his children are sick less often than before; however he said he has never seen a doctor at the health post, and that if he had to take his children to a hospital he would need to travel to Phnom Penh at considerable cost. He said that his youngest child is more "stressed" now than before.
41. A 47 year-old mother told EC that before her family resettled her children still in her care (aged 12, 15 and 18) ate three meals per day of "whatever they wanted from the market" and she was also able to give her children money for a daily snack. Since they have resettled she can only feed her children one or two meals per day and they are eating snails. There is not always enough money to buy rice. She no longer has enough money to send all her children to school (to pay for the food and snacks necessary), so two out of three have dropped out. One daughter now works at a factory and the other stays home and helps her cook and clean. She says that her children were not often sick before resettlement and are now "always sick" with headaches because they are hungry. Her children "are more stressed because they are angry with their mother since they don't have enough to eat." The health post is always closed or there is no doctor or nurse there, and "they don't have enough instruments."
42. A 38 year-old mother of three, whose family received a total of US\$400 in compensation, said that since her family resettled there is less food to eat. She still feeds her children (aged 12, 9 and 1) three meals per day but the meal sizes are much smaller than before. There are not enough doctors and nurses at the health post on the site, which she described as "not good" so they would need to travel to Phnom Penh hospital if they got sick. She is concerned that she would be unable to cover the costs of treatment because she lost her job. Both school age children still attend school but she thinks that the quality of education is worse than at their old school because the teacher does not always turn up and they have "mixed some of the grades, so its boring." Her children's marks have

dropped since they changed schools. She is also concerned about what will happen when her children are older since there is no secondary school near the site.

43. A 35 year-old divorced man with HIV has one of his three children, an eleven year old daughter, living with him at the resettlement site. Before they moved his daughter did not have enough food to eat, although she ate three meals a day – often fast food from the market. Now at the resettlement site “its worse than before”. She eats only two meals per day and misses breakfast. In the afternoon she eats at the Christian English school. She has stopped going to school because he can’t afford to send her, but has been attending the Christian school “that teaches English for three months.” The father said that he wants “her to have a good education and have a better life and he has nothing to give her.”
44. A 39 year-old mother of three said that before her family moved she provided her children (aged 13, 9 and 7) three full meals, snacks and fruit every day. Since living at the resettlement site she can only feed her children two insufficient meals per day. Sometimes they eat snails and frogs, or whatever else they can find near their house. She told EC that sometimes there is no nurse or doctor at the local health post. She tries to take care of her children’s health because she won’t be able to afford the treatment if they fall seriously ill and would need to borrow money to do so. She sends all her children to school, but her eldest son’s marks have dropped. She says “this is because he is upset with me that sometimes I am unable to give him money to go to school or send him to study English as before.” She is concerned about the lack of access to secondary school at the site and fears she will be unable to afford to send them far away to study.
45. A 47 year-old mother of two teenagers told EC that before “I provided food to my children three times [a day]...because I had enough income to spend on food...” Now, she feeds her children two meals per day because she has “no income, no job.” She said: “Since my family has moved from my old place to here, it is very different related to my children’s living. In my old place, my children lived so happily. They had enough food to eat. But in the new place my children aren’t happy. Both sleeping and eating. In the new place sometimes my son becomes a construction worker, when he is not studying. My son is just 13 years old.” Her 15 year-old daughter has stopped going to school completely: “From day to day, she always asks my neighbors about a job because she doesn’t want to study, she wants to find a job in order to earn income to help mother. When I was in my old place my children were so happy. In the morning I gave them money for school, [and to] buy snacks for eating. They didn’t think about anything besides studying.” Since there is sometimes no free medicine at the health post she says: “I tell my children to endure, because I have no money to buy medicine.”

### **Loss of access to basic services and unsafe conditions at resettlement sites leading to death of three children**

46. Families resettled under the Project have in some cases experienced a reduction in their access to basic services, including water, as compared to their pre-resettlement situation. None of the five Project-sponsored resettlement sites were properly prepared with services prior to relocation of households. Many of the services have since been installed but some remain absent or inadequate. A chart of services available at resettlement sites

as the time of relocation and as of December 2011 is available on the last page of Derailed.

47. For example, although families began moving to the Battambang resettlement site in May 2010, more than two years on access to water remains limited. Initially, resettled families accessed water from adjacent rice fields and an eight-meter deep pond 300 metres away, both of which they believed was polluted with chemicals used for rice cultivation. Following an outcry by residents and NGOs about the water situation at Battambang, water trucks began delivering subsidized water to affected people in December 2010. Soon afterwards, however, this service stopped. A new pond and water filter has since been installed behind the resettlement site. Affected families report, however, that the pond does not supply enough water to meet their needs. Some families have been forced to return to fetching water from the rice fields, while those who can afford to purchase unsubsidized water trucked in by private companies at a higher rate than at their previous location.
48. The lack of access to safe water at the site has had fatal consequences. In May 2010, four days after their family had relocated to the Battambang resettlement site, two children, a brother (9) and sister (13), drowned in the eight-metre deep pond in the adjoining rice field. While there are conflicting reports as to why the two children went to the pond that day, it is clear that it was used as a main water source by resettled families at that time.
49. Other safety issues at resettlement sites have presented severe risks to children and another death. In November 2011, two children were hit by a truck at the Poipet resettlement site, while they were walking back home at the site from school. One child died and the other sustained serious injuries. The children's parents told EC that they were not used to crossing the busy road on the journey to and from school, which was close to their old home. Affected people were promised that there would be a school at the site prior to resettlement, but when they arrived they found nothing, and children have been forced to walk 4 kilometers to get to their old school. After the accident, community representatives reported that some families have stopped sending their children to school.
50. No due diligence measures were undertaken by AusAID or any other actor to safeguard against these known hazards to children at resettlement sites that resulted in these tragic and avoidable deaths. In this regard we note that, the Committee on the Rights of the Child expressed deep concern in its Concluding Observations on Cambodia that "drowning is the leading cause of death among children followed by road accidents which also represent the leading cause of permanent disability of children."<sup>3</sup> Involuntary resettlement under the Project placed children at heightened risk of falling victim to these dangers.

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<sup>3</sup> Committee on the Rights of the Child, Concluding Observations: Cambodia, 20 June 2011, UN Doc. CRC/C/KHM/CO/2 at para 32

## IV. Human Rights Violations

51. The section above details the far-reaching harmful consequences flowing from evictions and involuntary resettlement without comprehensive safeguards under the Railways Project. The harm suffered by Project-affected both during the process of resettlement and since they have resettled amount to violations of human rights recognised in instruments scheduled under the Act and ratified by both Australia and Cambodia, in particular the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).

### Forced evictions

52. Forced evictions constitute a gross violation of a range of human rights.<sup>4</sup> While most commonly cited as a transgression of the right to adequate housing as a component of the right to an adequate standard of living recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR), forced evictions of children and their families are also a violation of the similarly constituted right enshrined in article 27 of the CRC.<sup>5</sup>

53. Owing to the interdependency of human rights, forced evictions will also often result in violations of other human rights. As noted by the former Special Rapporteur on adequate housing:

*[f]orced evictions constitute gross violations of a range of internationally recognized human rights, including the human rights to adequate housing, food, water, health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement.<sup>6</sup>*

54. The Committee on Economic, Social and Cultural Rights has similarly recognized that:

*...while manifestly breaching the rights enshrined in the [ICESCR], the practice of forced evictions may also result in violations of civil and political 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.<sup>7</sup>*

55. General Comment No. 7 of the Committee on Economic, Social and Cultural Rights contains the most authoritative international law definition of forced evictions. For an eviction to be consistent with international human rights law, it must occur in strict compliance with a number of due process protections. These protections include access to information, genuine consultation and access to legal remedies. Furthermore, evictions cannot render people homeless or vulnerable to the violation of other human rights and as

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<sup>5</sup> Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living. UN Doc No, A/HRC/4/18 at para 1.

<sup>6</sup> Special Rapporteur on adequate housing, “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living”, at para 6 of Annexure I, A/HRC/4/18 (05/02/2007).

<sup>7</sup> Committee on Economic, Social and Cultural Rights, “General Comment No. 7: The right to adequate housing (art. 11.1 of the Covenant): forced evictions”, at para 5 (20/05/1997).

such, anyone evicted from their home must have access to alternative adequate housing, including tenure security and access to basic services. Resettlement housing must be in a suitable location that provides access to livelihood opportunities and facilities such as health centres and schools.<sup>8</sup>

56. Although a violation of the ICESCR right to adequate housing cannot found a complaint to the Commission, related violations of provisions in the ICCPR and the CRC can. The consequences of the Railways Project detailed above evidence such violations in respect to both the absence of legal protections and the retrogression in the enjoyment of a range of human rights post-resettlement.

### **Interference with privacy and the home**

57. Article 17 of the ICCPR protects against “arbitrary or unlawful interference with [a person’s] privacy, family, home or correspondence”. Similarly, Article 16 of the CRC protects all children from “arbitrary or unlawful interference with his or her privacy, family, or correspondence”.

58. Eviction from one’s place of abode is unequivocally a direct interference with their home. Further, in the context of the equivalent protection in article 8(1) of the *European Convention on Human Rights*, it has been held that the eviction of a person also engages their right to family<sup>9</sup> and their right to privacy.<sup>10</sup>

59. The eviction and relocation of families under the Railways Project clearly constitutes an interference with their home, family and privacy. The question to be determined is whether such interference is arbitrary.

60. In his commentary on Article 17 of the ICCPR, Manfred Novak has observed that “arbitrary interference contains elements of injustice, unpredictability and unreasonableness.”<sup>11</sup>

61. Similarly, the Human Rights Committee has recognized the centrality of notions of reasonableness and necessity to assessing whether a particular interference is arbitrary, noting:

*...the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims*

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<sup>8</sup> Committee on Economic Social Cultural Rights, “General Comment 7: Forced evictions, and the right to adequate housing,” UN Doc. E/1998/22 (1997). See also, Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living. UN Doc No, A/HRC/4/18.

<sup>9</sup> See *Donoghue v Poplar Housing & Regeneration Community Association Ltd & Anor* [2001] EWCA Civ 595 (27 April 2001) at 67.

<sup>10</sup> See *London Borough of Harrow v. Qazi* [2003] UKHL 43 (31 July 2003) at 70.

<sup>11</sup> Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (2nd ed, 2004), p.383.

*and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.*<sup>12</sup>

62. Accordingly, whether a particular instance of interference with the home, family or privacy is arbitrary will turn on the circumstances and context in which it occurs.
63. The interference with the home, privacy and family experienced by the thousands of parents and children evicted and relocated pursuant to the Railways Project is arbitrary because it is unnecessarily and avoidably oppressive - there has been a failure to take reasonable steps to avoid significant, foreseeable suffering.
64. The complaint highlights the following injustices resulting from resettlement under the project:
  - a. families have been impoverished due to the payment of grossly inadequate compensation and removal from livelihood opportunities;
  - b. children are withdrawing from school in order to earn income for the survival of their families;
  - c. people's health and access to healthcare is being compromised by their impoverishment and the location of some resettlement sites far from appropriate and adequate health services; and
  - d. children's safety and wellbeing is being compromised by their relocation to sites where they face foreseeable hazards.
65. Adding to the arbitrariness of the interference occasioned by the Railways Project is the lack of procedural protections and due process involved. As outlined in the complaint, evictions and relocations under the project have occurred in the context of:
  - a. undue coercion and pressure;
  - b. inadequate consultation and communication with affected persons;
  - c. the absence of effective mechanisms for resolving disputes as to entitlements; and
  - d. the absence of access to effective legal remedies for human rights violations.
66. In sum, evictions and relocations under the Railways Project interfere with the home, family and privacy of affected persons. That interference:
  - a. has produced suffering that was foreseeable;
  - b. has produced suffering that was preventable; and
  - c. has produced suffering that was unnecessary, unreasonable and unjust.
67. Consequently, that interference is arbitrary and in violation of article 17 of the ICCPR and article 16 of the CRC.

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<sup>12</sup> Human Rights Committee, "General Comment No 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation" at para 4 (08/04/1988).

## Children's rights issues

### Article 24 of the CRC – health concerns

68. Article 24 relevantly provides that:

*States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*

69. Article 24 requires State Parties to pursue the full realization of this right. However, as the complaint reveals, relocated families have raised concerns that their children now face heightened health risks.

70. By precipitating these consequences, the evictions and relocations under the Railways Project constitute a regression, rather than progression, in the realization of the Article 24 right of children to the highest attainable standard of health.

### Articles 28 and 32 of the CRC – educational concerns

71. Article 28 enshrines the right of the child to education. States are required to take steps to progressively realize this right.

72. Article 32 requires, among other things, the protection of children:

*...from performing any work that is likely to ... interfere with the child's education or to be harmful to the child's physical, mental, spiritual, moral or social development.*

73. Many children are being relocated to areas where there are no secondary schools nearby. Others are being forced to withdraw from school to help provide for their impoverished families.

74. Better selection of resettlement sites, ensuring access to educational facilities, the payment of adequate compensation, and timely and effective income restoration support programs could have avoided such regressions. Instead, the circumstances of resettlement are forcing children out of schools and into work, contrary to their right to education (Article 28) and in violation of the Article 32 obligation to protect children from performing work likely to interfere with their education.

### Article 27 of the CRC – impoverishment

75. Article 27 protects the right of every child “to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.”

76. Children and their families are being forcibly relocated into poverty. They are being evicted from their homes but given inadequate compensation to purchase or construct new ones. They are being removed from their regular means of earning a living. They are

being relocated to sites often lacking access to secondary schools, health services, basic amenities and even drinking water. Parents are becoming increasingly concerned about their ability to provide three meals a day to their children. Children are leaving school to work.

77. These impacts of the Railways Project on children compromise their standard of living and thus run counter to their Article 27 right.

Article 6 of the CRC and Article 6 of the ICCPR – concerns about safety and wellbeing

78. Article 6 of the CRC (along with Article 6 of the ICCPR) recognizes every child's inherent right to life. Further, States are required to "ensure to the maximum extent possible the survival and development of the child."
79. The Committee on the ICCPR has urged that unduly narrow constructions of the right to life be eschewed, commenting:
- The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.<sup>13</sup>*
80. The complaint highlights concerns about the heightened poverty caused by forced relocations and the impact such poverty, when coupled with limited access to health services, will have on the wellbeing of children. The complaint also highlights concerns about the risks of harm facing children at resettlement sites when there is an omission to conduct due diligence to ensure basic hazards are addressed.
81. The right to life and the obligation to ensure the survival of children ought to carry with them the mandate to take reasonable steps to avoid foreseeable risks of death or serious harm – preventing death or serious harm is a corollary of the obligation to protect life.
82. As a result of the Railways Project, children are being relocated into circumstances involving risks of serious harm. The risks are foreseeable. They are also preventable – reducing impoverishment through adequate compensation, ensuring the availability of health services at resettlement sites and taking reasonable safety precautions in relation to obvious hazards would all reduce the current risks to the wellbeing of relocated children. The failure to adopt these measures violates the right to life and the Article 6 CRC obligation to "ensure to the maximum extent possible the survival and development of the child".

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<sup>13</sup> Committee on Economic, Social and Cultural Rights, "General Comment No. 06: The right to life", at para 5, (30/04/1982).



### Article 3(1) of the CRC – lack of consideration of the interests of affected children

83. Article 3(1) requires that “in all actions concerning children... the best interests of the child shall be a primary consideration.”
84. As outlined above, the Railways Project has precipitated significant adverse consequences on affected children, which were entirely avoidable. The best interests of children were thus either not a primary consideration in the development and implementation of the Railways Project or they were considered but not sufficiently incorporated. Either way, the failure to adopt reasonable measures to mitigate foreseeable harm to children amounts to a violation of article 3(1).

### **Lack of access to effective remedies**

85. Article 2(3) of the ICCPR requires States to ensure that there are effective remedies available to persons suffering rights violations and that any claim for such remedies are determined by a competent authority.
86. Many affected people have not had access to legal remedies during the resettlement process and thus continue to seek remedies for harms suffered. The grievance process established under the Project was nonoperational for more than a year after the process commenced. The ADB made some efforts to improve the functioning of the grievance process in mid-2011 through capacity building workshops; however the grievances of many affected people remain unresolved. As poor people seeking to claim their rights against the State, affected persons do not regard the Cambodian courts as a feasible avenue for obtaining legal remedies or equal protection of the law.
87. We refer the AHRC to Derailed, pages 56-65 for further details about lack of access to legal remedies.

## V. Breaches of human rights by acts and omissions of AusAID: Australia's Extra-territorial Human Rights Obligations under the Project

88. Australia is the second largest financial contributor to the Railways Project. The Project has resulted in severe harms and human rights violations suffered by people forced to resettle to make the Project possible. Australian aid has thus had the unintended but gravely adverse consequence of contributing to the impoverishment of some of Cambodia's poorest families. These human rights violations were highly foreseeable and could have been avoided. Upon deciding to act extraterritorially by providing significant financing to the Project, and thereby making Project implementation possible, AusAID became obliged to take measures to ensure, to the best of its ability, that the human rights of those to be affected by the Project would be respected. While the Government of Cambodia bears the primary obligations under international law to ensure respect for the human rights of Project-affected people, Australia, through AusAID, also bears a degree of legal responsibility and is partly liable for the human rights violations suffered.
89. Australia has recognised its extraterritorial human rights obligations in relation to aid in committing to the Accra Agenda for Action, which states that donors will “ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability.”<sup>14</sup>
90. With respect to the CRC, the Committee on the Rights of the Child has stated that, “[w]hen States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation.”<sup>15</sup> We also note the Committee's 2012 Concluding Observations on Australia, in which it “urges the State party to adopt a consistent human rights approach for all its development aid policy and programmes, focusing where possible on child rights, to ensure sustainable development and to guarantee that all recipient countries are able to fulfil their human rights obligations.”<sup>16</sup> This recommendation indicates that the Committee considers that the CRC gives rise to obligations in relation to acts occurring outside Australian territory in the context of Australia's aid and development program. The Committee on Economic, Social and Cultural Rights has made a similar indication in its Concluding Observation on Germany, in which it expresses concern that “the State party's development cooperation programme has supported projects that have reportedly resulted in the violation of economic, social and cultural rights...in Cambodia.”<sup>17</sup> The Committee recommends that “the development cooperation policies to be adopted by the State party contribute to the implementation of the economic, social and cultural rights of the Covenant and do not result in their violation.”<sup>18</sup>

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<sup>14</sup> Accra Agenda for Action, 2008, at para 13(c).

<sup>15</sup> Committee on the Rights of the Child, “*General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child*,” (Thirty-fourth session, 2003), UN Doc. CRC/GC/2003/5, at para. 5.

<sup>16</sup> Committee on the Rights of the Child, Concluding Observations: Australia, 19 June 2012, UN Doc CRC/C/AUS/CO/4, at para 26.

<sup>17</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations: Germany, 12 July 2011, UN Doc E/C.12/DEU/CO/5, at para 11.

<sup>18</sup> *Ibid.*

91. With respect to the ICCPR, the Human Rights Committee (HRC) has stated that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if not situated within the territory of the State Party.”<sup>19</sup> In its individual complaints jurisprudence, the Committee elaborated upon the meaning of “power or effective control” stating in *Munaf v Romania* that “a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction.”<sup>20</sup> The Committee has also stated in *Lopez Burgos v Uruguay* that “it would be unconscionable to permit a State to perpetrate violations on foreign territory which violations it could not perpetrate on its own territory.”<sup>21</sup> Since the facts of these individual complaints to the Committee, however, diverge significantly from those at hand, which involve the question of State responsibility with respect to its international development assistance and cooperation, we refer to a more instructive and recent interpretive instrument in the following paragraphs.
92. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights provide important guidance in determining the jurisdictional scope and nature of Australia’s human rights obligations, particularly with respect to its international development cooperation and assistance.<sup>22</sup> Given the desirability of an interdependent and mutually reinforcing construction of international human rights treaties,<sup>23</sup> these principles should inform the interpretation of the jurisdictional clauses of, not only the economic, social and cultural rights recognised in the CRC, but also civil and political rights recognised in both the ICCPR and the CRC.<sup>24</sup>
93. According to the Maastricht Principles, extraterritorial human rights obligations arise, inter alia, in situations over which a State’s acts or omissions bring about foreseeable effects on the enjoyment of human rights outside its territory, and in situations in which it is in a position, through separate or joint acts, to exercise decisive influence or to take measures to realize human rights extraterritorially.<sup>25</sup> The Principles clarify that:

*States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a*

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<sup>19</sup> Human Rights Committee, “General Comment 31: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, CCPR/C/21/Rev.1/Add. 13, 26 May 2004 [10].

<sup>20</sup> Human Rights Committee, *Munaf v Romania*, CCPR/C/96/D/1539/2006, 21 August 2009 at para 14.2.

<sup>21</sup> Human Rights Committee, *Lopez Burgos v Uruguay*, Communication No. R 12/52 (6 June 1979) at para 10.3.

<sup>22</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 2011.

<sup>23</sup> As has been recently acknowledged by the Chairperson of the Committee on the Elimination of Racial Discrimination, it is important to ensure the “consistency of the case law [of] different treaty bodies and enhance the indivisibility of civil, political, economic and social rights by guaranteeing an inclusive approach to all human rights”. See the Chairperson’s letter at:

[http://www2.ohchr.org/english/bodies/HRTD/docs/LetterfromChairperson\\_treatybodysubmission.pdf](http://www2.ohchr.org/english/bodies/HRTD/docs/LetterfromChairperson_treatybodysubmission.pdf).

<sup>24</sup> As has been recently acknowledged by the Chairperson of the Committee on the Elimination of Racial Discrimination, it is important to ensure the “consistency of the case law [of] different treaty bodies and enhance the indivisibility of civil, political, economic and social rights by guaranteeing an inclusive approach to all human rights”. See the Chairperson’s letter at:

[http://www2.ohchr.org/english/bodies/HRTD/docs/LetterfromChairperson\\_treatybodysubmission.pdf](http://www2.ohchr.org/english/bodies/HRTD/docs/LetterfromChairperson_treatybodysubmission.pdf).

<sup>25</sup> Maastricht Principles, at para 9.

*foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.*<sup>26</sup>

94. The act of jointly financing the Project brought with it a real and foreseeable risk of human rights violations. Cambodia's poor track record on forced evictions and resettlement resulting in violations of human rights has been the subject of multitudinous media accounts, NGO reports, and reports of the Cambodian Office of the United Nations High Commissioner for Human Rights over the past decade. Concerns regarding forced evictions have been highlighted by the Committee on Economic, Social and Cultural Rights in its Concluding Observations on Cambodia (2009), and in successive reports by UN Special Rapporteurs on the Situation of Human Rights in Cambodia. Since the Project commenced, but before many families were resettled, the Committee on the Rights of the Child expressed in its Concluding Observations on Cambodia its deep concern with respect to the forced evictions of families and children including for development activities.<sup>27</sup> Moreover, the risk of forced evictions, including of children, in the particular context of infrastructure projects financed by the ADB was highly foreseeable given the NGO and ADB reports surrounding indebtedness and impoverishment of families resettled for the National Highway One project.
95. If AusAID was unaware of the real and foreseeable risk of human rights violations, including breaches of the CRC, it was willfully blind to the copious amounts of relevant publically available information and evidence. Furthermore, from early 2010 concerned NGOs regularly warned representatives of AusAID in Phnom Penh and later in Canberra of the risk of harms amounting to human rights violations befalling affected families. Written communications to this effect commenced in late 2010 and can be made available to the Commission upon request.
96. Given the highly foreseeable risk of human rights violations the onus on AusAID to take steps to prevent and mitigate harm was heightened. As a component of its extraterritorial human rights obligations, AusAID should have taken measures such as conducting a comprehensive human rights risk assessment and ensuring that safeguards were put in place to prevent these risks being realised. In omitting to take these measures, AusAID failed to satisfy its extraterritorial human rights obligations. In this regard, the Maastricht Principles state:

*States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies.*<sup>28</sup>

97. In relation to the CRC, before committing funds to the Project AusAID was obliged to assess the likely impacts on children from its decision and "apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions [...]"<sup>29</sup> In failing to do so, AusAID breached article 3(1) of the Covenant. In this respect we refer to the Committee's 2012 Concluding Observations on Australia, in which it urges the State party to "strengthen its efforts to

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<sup>26</sup> Maastricht Principles, at para 13.

<sup>27</sup> Committee on the Rights of the Child, Concluding Observations: Cambodia, 20 June 2011, UN Doc. CRC/C/KHM/CO/2 at para 61 and 62.

<sup>28</sup> Maastricht Principles, at para 14.

<sup>29</sup> Committee on the Rights of the Child, General Comment No. 5 (2003), at para 12.

ensure that the principle of the best interests of the child is widely known and appropriately integrated and consistently applied in all [...] policies, programmes and projects relevant to and with an impact on children.”<sup>30</sup> With regard to its international development cooperation, the Committee urged Australia to “include a child rights-based approach to its assistance programs [...]”<sup>31</sup>

98. If, following an assessment of human rights risks and possible risk mitigation measures, it was determined that AusAID in cooperation with other actors could not prevent human rights violations, AusAID should have refrained from financing the Project. In this regard the Maastricht Principles state:

*States must refrain from any conduct which [...] aids, assists, directs, controls or coerces another State or international organization to breach that State’s or that international organization’s obligations as regards economic, social and cultural rights, where the former States do so with knowledge of the circumstances of the act.*<sup>32</sup>

99. AusAID cannot discharge its international obligations by claiming that it relied on the ADB to ensure safeguards were in place to prevent human rights violations. AusAID is aware that the ADB does not commit to upholding the human rights of people affected by projects that it funds and instead commits only to a lesser obligation to comply with its own set of safeguard policies. Furthermore, despite ADB’s policy on involuntary resettlement, the institution has a notoriously bad record on resettlement in the region generally and Cambodia specifically. At a minimum AusAID should have undertaken its own human rights risk assessment and also assessed the viability of the safeguards arrangements with respect to resettlement between the ADB and the RGC. Following the identification of any gaps and shortcomings, AusAID should have worked to strengthen the contractual obligations of the RGC, the Project policies and the processes concerning resettlement to ensure consistency with human rights standards. AusAID should have then worked to build the capacities of resettlement implementers under the Project to comply with policies. Thereafter it should have monitored resettlement design and implementation with an eye to identifying emerging problems and working with the ADB and the RGC to rectify these before they became serious violations of human rights.

100. Australia’s human rights obligations also extend to its membership of the ADB, in which it exerts considerable influence over decision-making as the fifth largest shareholder. In this regard the Maastricht Principles affirm:

*As a member of an international organization, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competencies to, or participates in, an international organization must take all reasonable steps to ensure that the relevant organization acts consistently with the international human rights obligations of that State.*<sup>33</sup>

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<sup>30</sup> Committee on the Rights of the Child, Concluding Observations: Australia, 19 June 2012, UN Doc CRC/C/AUS/CO/4 at para 31.

<sup>31</sup> Ibid, at para 26.

<sup>32</sup> Maastricht Principles, at para 21(b). See also, Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission (ILC) on the Work of its 53rd session (23 April to 1 June and 2 July to 10 August 2001), UN Doc. A/56/10, article 16.

<sup>33</sup> Maastricht Principles, at para 15.

101. Australia's international obligations in the international aid context have also been considered by the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living:

*States should ensure that binding human rights standards are integrated in their international relations, including through trade and investment, development assistance and participation in multilateral forums and organizations. States should implement their human rights obligations with regard to international cooperation, whether as donors or as beneficiaries. States should ensure that international organizations in which they are represented refrain from sponsoring or implementing any project, programme or policy that may involve forced evictions, that is, evictions not in full conformity with international law, and as specified in the present guidelines.*<sup>34</sup>

102. The fact that AusAID has provided only part of the financing for the Project does not nullify its human rights obligations. Such an interpretation of extraterritorial human rights obligations would encourage AusAID to finance only a minority of the cost of any given project in order to wash its hands of liability. In this respect, the Maastricht Principles state:

*All States must take action, separately, and jointly through international cooperation, to respect the economic, social and cultural rights of persons within their territories and extraterritorially[...]*<sup>35</sup>

103. The ILC Commentary on the Articles on Responsibility of States for Internationally Wrongful Acts notes:

*There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.*<sup>36</sup>

104. In any case, Australia's assistance to the Project meets a higher threshold, because without its significant financial contribution, the Project would not have been feasible, and thus its aid and assistance was indeed essential.

105. The proportion of the Project's financing that AusAID contributed, however, does provide an indication of the proportion of its legal responsibility for the human rights violations and its obligation to rectify and remedy harms done. The ILC Commentary to Articles on Responsibility of States for Intentionally Wrongful Acts is instructive on the issue of allocation of responsibility. It states:

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<sup>34</sup> Report of Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari HUMAN RIGHTS COUNCIL A/HRC/4/18 5 February 2007 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/28/PDF/G0710628.pdf?OpenElement> p. 18-19

<sup>35</sup> Maastricht Principles, at para 19 [italics added].

<sup>36</sup> ILC Commentary on the Articles on Responsibility of States for Internationally Wrongful Acts, commentary on article 16.

*[...] a State providing aid or assistance with a view to the commission of an intentionally wrongful act incurs international responsibility only to the extent of the aid or assistance given.*<sup>37</sup>

106. It is therefore submitted that the Australian Government, along with the Government of Cambodia and the ADB, bears joint responsibility for the human rights violations outlined in this complaint.

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<sup>37</sup> ILC Commentary on the Articles on Responsibility of States for Internationally Wrongful Acts, commentary on article 17.

## VI. Attempts to resolve the complaint with AusAID and measures taken by AusAID to rectify the situation

108. Project-affected people and concerned NGOs, including EC, have repeatedly raised their concerns about resettlement with AusAID. Two high level meetings were held in Canberra in November 2010 and February 2012 in which EC (then BABC) urged AusAID to take immediate measures to remedy human rights violations and prevent further violations from occurring using all means at its disposal. Numerous meetings were held in Phnom Penh during 2010 and 2011. Several NGOs have also provided extensive written evidence of harm suffered or likely to be suffered by Project-affected households, including a letter sent from NGOs to AusAID concerning the drowning of the children in Battambang and a plethora of other problems and concerns in October 2010. An advance copy of the report published by BABC, *Derailed: A Study of the Resettlement Process and Impacts of the Rehabilitation of the Cambodian Railway* was provided to AusAID. BABC presented the findings of the study to AusAID in Canberra in February 2012 and offered suggestions of practical measures AusAID could take to begin remedying harms suffered, including the provision of free public transport for people at the resettlement sites to urban centres and places of employment, hospitals and schools. One month prior to the submission of this complaint, IDI provided AusAID with EC's children and parents survey results (Annex B).
109. In response to sustained advocacy of EC and partner organisations and in acknowledgement of the severe challenges faced by resettled families, in November 2011 AusAID committed a further AUD1 million for an Enhanced Income Restoration Program (EIRP). This measure was urgently needed since the original Income Restoration Programs (IRPs) had either not been implemented or were extremely ineffective at all of the five resettlement sites. The failure of the original IRP was partly due to a vast underestimation of the costs and technical inputs required to restore resettled people's livelihoods. We refer the Commissioner to pages 51-53 of *Derailed* for details about the original IRPs.
110. Unfortunately there was little if any consultation by AusAID with affected families and no consultation with concerned NGOs about the design of the EIRP. According to correspondence received by EC from the ADB on 10 April 2012, under the EIRP the Cambodian Government is establishing "self-help groups and will include social safety nets provision and access to revolving community credit schemes to assist affected households during the transition period." In its letter, the ADB claims that the EIRP "will improve relocated household's ability to earn a living through livelihood opportunities near the new community." In an "NGO Round Table on the Enhanced Income Restoration Program," held at the ADB office in Phnom Penh on 27 August 2012, a presentation was made to NGOs on the broad aims and structure of the EIRP; however no documentation was provided with detailed information about how the program will work or how the budget is allocated.
111. Funds from the EIPR began being transferred to self-help groups for use by affected families in August 2012, more than two years after many Project-affected families were forced to resettle away from their livelihood sources. To date few benefits have reached affected families. Some families still remain unaware of the EIRP and most families surveyed are not confident that the EIPR will be effective in preventing or reversing their impoverishment. Affected people have reported feeling frustrated at the EIRP because it will not directly assist them with their crippling debt burdens, a point confirmed by AusAID in the NGO roundtable on 27 August. There is also no provision under the EIRP to compensate people for the months and years of lost income that they have incurred after they were required to resettle and were not provided with promised livelihood



support due to the ineptitude of project implementers and supervisors. We believe that these factors combined mean that the EIRP as currently structured will not be successful in reversing the impoverishment of many affected persons.

112. In a meeting on 1 October 2012, AusAID informed NGOs that it would contribute a further AUD 1 million to the EIRP in recognition that the Project was “under-performing” relative to their quality standards.

## VII. Remedies: Outcomes sought by the Complainants

113. Victims of human rights violation are entitled under international law to reparations for the harm they have suffered.<sup>38</sup> If these human rights violations ensue wholly or partly as a result of extraterritorial acts or omissions of a State, that State bears a measure of responsibility for remedying harms done. The Maastricht Principles state: “

*[...] Where the harm resulting from an alleged violation has occurred on the territory of a State other than a State in which the harmful conduct took place, any State concerned must provide remedies to the victim.*<sup>39</sup>

114. AusAID is thus obligated to ensure that remedial action is taken with respect to the resettled families who have suffered human rights violations as a result of the Project.

115. The proportion of aid and assistance provided to the Project goes to the degree of responsibility for ensuring an effective remedy to affected persons. At a minimum AusAID should take all possible measures to obtain cooperation from the ADB and the RGC to ensure an effective remedy for the human rights violations suffered, with each actor contributing to the remedy commensurate to the proportion to its legal responsibility taking into account its maximum ability to do so. In the case that ADB and/or the RGC are unwilling to cooperate in the provision of effective remedies, AusAID should unilaterally provide direct reparations to affected families. AusAID should not use recalcitrance on the part of the RGC and/or the ADB as an excuse for not remedying harms done by the Project. Such a stance would amount to an ongoing serious violation of its international human rights law obligations.

116. In particular, affected people seek the following remedies from AusAID in conjunction with the ADB and the RGC:

- A comprehensive, independent and transparent review and revision of the compensation amounts received, so that each household receives full replacement cost for lost assets and full reimbursements for resettlement expenses, and at a minimum enough to ensure that households are able to secure adequate housing and meet other basic needs.
- Delivery of cash payments for actual loss of income, including past losses, at a minimum to cover household daily subsistence needs, until income levels are restored to their pre-Project levels through the EIRP.
- Repayment of debt principle and interest incurred as result of inadequate compensation and late implementation of the Income Restoration Program.
- Access to affordable basic services at relocation sites.
- Support to enable parents to reenroll in school children who dropped out following resettlement. Support should also include free school buses or other transport to ensure primary and secondary age school children at all resettlement sites can safely travel to and from school.
- Appropriate reparations to the families of the children who are deceased as a result of

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<sup>38</sup> CRC, article 39; and ICCPR article 2(2) and (3).

<sup>39</sup> Maastricht Principles, at para 37.

the Project.

117. In addition to the direct reparations for breaches of human rights of affected persons, in order to fulfill its extraterritorial obligations under human rights instruments to which Australia is a State party, AusAID should adopt human rights safeguard policies and practices including requirements to conduct human rights impacts assessments for all projects to which it is considering providing support. It should take all possible steps to ensure that human rights violations are avoided and possible harms mitigated in all AusAID-financed projects and other development activities. It should devote adequate human and financial resources to these processes and activities, including, assessments, due diligence, supervision, evaluations and where necessary, to building the capacity of project implementers in aid recipient countries. Financial and other resources should also be made available for any necessary remedial action for human rights violations that occur or will foreseeably occur as a result of an AusAID-financed project or activity.

118. These recommendations are consistent those of the UN Independent Expert on Foreign Debt and Human Rights, Cephias Lumina, who, following his 2011 country mission to Australia, commented on the lack of a human rights focus in Australia's aid program.<sup>40</sup> The Independent Expert recommended that:<sup>41</sup>

*In order to adequately and fairly respond to the development challenges in recipient countries while promoting the fundamental rights of the citizens of these countries, human rights should inform the design and delivery of Australian aid.*

119. The Independent Expert also recommended that:<sup>42</sup>

*To ensure that development strategies do not negatively affect the realization of economic, social and cultural rights and progress towards the Millennium Development Goals in recipient countries, AusAID should undertake human rights impact assessments to inform the design, implementation, monitoring and evaluation of its development programmes.*

120. Finally, we note that the Maastricht Principles state:

*States must ensure the availability of effective mechanisms to provide for accountability in the discharge of their extraterritorial obligations. In order to ensure the effectiveness of such mechanisms, States must establish systems and procedures for the full and thorough monitoring of compliance with their human rights obligations, including through national human rights institutions acting in conformity with the United Nations Principles relating to the Status of National Institutions (Paris Principles).<sup>43</sup>*

121. Despite the limitations of AHRC's mandated powers under the Act with respect to ensuring effective remedies, strong recommendations from the Commission to AusAID to remedy the breaches of human rights to which its acts and omissions contributed would represent an important step towards providing for accountability in the discharge of Australia's extraterritorial obligations. It would also provide a measure of justice for

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<sup>40</sup> Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina, A/HRC/17/37/Add.1, 25 May 2011.

<sup>41</sup> Ibid [93]

<sup>42</sup> Ibid [95].

<sup>43</sup> Maastricht Principles, at para 36. (See also, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly resolution 60/147 of 2005, at para 12.)

Cambodian families and children who continue to suffer violations of their human rights as a result of the AusAID-funded Project.