



A Fact-Finding Mission Report

NO CONSENT TO PROCEED :

**Indigenous Peoples' Rights Violations At
The Proposed Baram Dam In Sarawak**

Written by:

Tanya Lee, Thomas Jalong & Wong Meng-Chuo

Endorsed by:

Jaringan Orang Asal SeMalaysia (JOAS), Suara Rakyat Malaysia (SUARAM), Asia Indigenous Peoples Pact (AIPP), Asian Forum for Human Rights and Development (FORUM-ASIA), Bruno Manser Fund & International Rivers



Sarawak, Malaysia
August 2014

NO CONSENT TO PROCEED:

INDIGENOUS PEOPLES' RIGHTS VIOLATIONS AT THE PROPOSED BARAM DAM IN SARAWAK

A Fact-Finding Mission Report

Written by Tanya Lee, Thomas Jalong & Wong Meng-Chuo

Copyright: Save Sarawak Rivers Network (SAVE Rivers)



Published in August 2014 by: Save Sarawak Rivers Network (SAVE Rivers)

Jaringan Selamatkan Sungai-Sungai Sarawak

Lot 1046, 2nd Floor, Shang Garden Shoplots,

Jalan Bulan Sabit, 98000 Miri, Sarawak, Malaysia

Tel: 085-423044

Fax: 085-438580

Email: saveriversnet@gmail.com

Endorsed by:

Jaringan Orang Asal SeMalaysia (JOAS), Suara Rakyat Malaysia (SUARAM), Asia Indigenous Peoples Pact (AIPP), Asian Forum for Human Rights and Development (FORUM-ASIA), Bruno Manser Fund & International Rivers

Front Cover Photo Credit:

Bruno Manser Fund

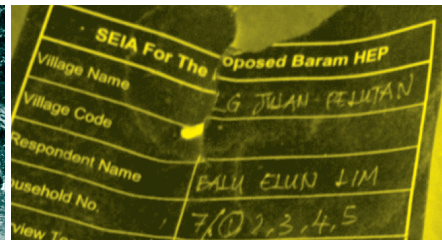


Table of Contents

• Dam-Building and Indigenous Peoples' Rights Violations in Sarawak, Malaysia	4
• Key Findings: Widespread Violation of Internationally Accepted Human Rights	7
• Violations of Indigenous Peoples' Rights Revealed by the Fact-Finding Mission	8
I. Denial of Right to Information and Lack of Transparency	8
II. Denial of the right to free, prior and informed consent	9
III. Violation of Right to Participate in Decision-Making through Representatives of Own Choosing	11
IV. Extinguishment of Customary Land Rights and Violation of the Right to Livelihood	12
V. Use of Coercion, Threats and Intimidation	13
VI. Lack of Access to Remedies	14
VII. Violation of Right to Self-Determination	15
• Recommendations	16
• Supporting Organizations	17

Dam-Building and Indigenous Peoples' Rights

Violations in Sarawak, Malaysia

In the Malaysian state of Sarawak, on the island of Borneo, the Sarawak government and the state-owned company, Sarawak Energy Berhad (SEB), are collaborating on plans to build a series of up to twelve large-scale hydroelectric dams as part of an industrial development initiative called the Sarawak Corridor of Renewable Energy (SCORE). The dams will inundate an area of more than 2,100 square kilometers, submerging forests, cultivated areas, and villages, and forcibly displace tens of thousands of indigenous people from their customary lands.

To date, three large hydroelectric projects, the Batang Ai, Bakun and Murum dams, have already been built in Sarawak. However, the recently completed Murum Dam is yet to begin operating due to technical design flaws, while the Bakun Dam is not operating at full capacity because of an insufficient demand for the electricity. The existence of excess unused power potential and the lack of evidence of demand-side needs for more power mean that there is no clear rationale for proceeding with the construction of more dams.

The poor management of environmental mitigation and dismal situation of the thousands of displaced indigenous people affected by the Batang Ai, Bakun and Murum dams has attracted local, national and international concern. Human rights violations at these sites have been scrutinized and denounced by the

national human rights organization, SUARAM, the Malaysian Human Rights Commission (SUHAKAM), and the Malaysian Bar Council. In particular, these investigations have shed light on substandard living conditions at the resettlement sites, unfulfilled promises of livelihood support for the displaced families, the denial of peoples' rights to access information and the use of coercion, threats and intimidation against those who raised questions or objections to the dam projects.

Since politically-connected businesses in Sarawak have interests in the dam construction, engineering and operating contracts, SEB is proceeding with preparatory surveys as well as attempts to acquire land at additional proposed SCORE dam sites. The 1200 Megawatt (MW) Baram Dam is proposed to be built on a section of the Baram River in north-eastern Sarawak between the villages of Na'ah and Long Keseh. Approximately 400 square kilometers of land would be inundated if the project moves ahead. Twenty-six villages of Kenyah, Kayan and Penan indigenous peoples would be directly affected, and as a result, between 6,000 and 20,000 people² would be forcibly dispossessed of their ancestral lands. The affected communities are determined to avoid a fate similar to that of people affected by the Bakun, Murum and Batang Ai dams. Like other indigenous communities in Sarawak, they have been confronted with attempts by the Sarawak

¹ In Malaysia, under the Federal Constitution, the term 'native' is used to refer to the heterogeneous indigenous people of Sarawak and Sabah (Article 161A). The term 'native' continues to be used in Sarawak without derogatory implications. The Federal Constitution provides special protections for the natives of Sarawak and Sabah. Although the Sarawak Land Code of 1958 severely limits the recognition of native customary rights to land, at the national level, there is an emerging body of law recognizing and reaffirming protections for native customary title rights, based on interpretations of the Federal Constitution, common law and international customary law.

² A high degree of variation is reflected in these numbers due to the lack of publicly accessible information about the proposed water levels and demarcation of the dam reservoir as well as location of associated facilities. In addition, many residents spend some months working and living in nearby urban centres, including Miri and Marudi. As a result, the numbers of people residing in the longhouses at any given time fluctuates. It is not clear if SEB's social and environmental impact assessment (SEIA) studies are inclusive of all residents from the affected villages, including those who migrate out for seasonal or temporary work.

government to limit and extinguish their customary land rights through changes to laws and regulations³ as well as through the provision of licenses for logging, plantations, oil pipelines, and now, the building of a hydropower dam. To unite local efforts in defense of their livelihoods and customary land rights, communities along the Baram River launched the Baram Protection Action Committee in 2008 and in 2011, took part in the formation of an indigenous peoples' coalition called SAVE Rivers⁴. Beginning in October 2013, Baram community members established two road blockades to prevent construction, surveying work and logging at the proposed location of the Baram Dam. As a result, preparatory construction works have remained stalled. Nevertheless, since November 2012, SEB claims to be engaging in a social and environmental impact assessment (SEIA) 'process' in communities to be affected by the proposed dam. In this context, alarming

human rights violations at the hands of SEB are being reported in the twenty-six affected communities.

SEB's website explains that the "SEIA process for dams in Sarawak draws upon key elements of internationally accepted consultation which are 'free, prior and informed' consultation leading to consent"⁵. SEB is consolidating separate and distinct processes involved in the project preparation phase. Standard processes for project preparation include informing all stakeholders about the proposed project, carrying out baseline studies and impact assessments, conducting inclusive and meaningful consultations with affected communities about the project's expected impacts and proposed mitigation plans, developing proposed resettlement action plans, and seeking the free, prior and informed consent (FPIC) of affected communities to proceed. Consent for the project should not be



If built, the proposed 1200MW Baram Dam would be located on the Baram River in northern Sarawak.
Credit: International Rivers

³ See for example documentation on the lack of recognition of land rights and encroachment onto Native Customary Land in Sarawak enumerated by the National Human Rights Commission of Malaysia in their "Report of the National Inquiry into the Land Rights of Indigenous Peoples" (2013), pp 23-29; 53-59; 112-128.

⁴ SAVE Rivers is a coalition of indigenous people in Sarawak that organizes awareness raising activities about the destructive impacts of large dams and mobilizes to stop the building of large hydropower projects in Sarawak.

⁵ Sarawak Energy Berhad. "Social and Environmental Impact Assessment Factsheet" (Accessed online 8 August 2014): www.sarawakenergy.com.my/index.php/hydroelectric-projects/fact-sheets/social-and-environment-impact-assesment-seia.

presumed following a one-time consultation⁶ as implied by SEB. Instead, communities have the right to freely give or withhold consent, based on the free-will of communities as expressed by the representatives of their own choosing. In their attempts to conduct an 'SEIA process' at Baram, SEB and their consultants are engaging in coercive tactics that have included closed-door meetings with selected individuals in each community, verbal threats imposed on elders, pressuring youth with monetary incentives and prematurely acquiring land without the consent of affected individuals.

Malaysia is one of the 143 member states of the UN General Assembly that voted to adopt the UNDRIP⁷ in September 2007. In Malaysia, the provisions of the Federal Constitution are consistent with international customary laws protecting the rights of indigenous peoples, including the right to liberty and life (Article 5), equality before the law (Article 8), prohibition of compulsory acquisition of property without adequate compensation (Article 13), and fiduciary obligations to safeguard the position of natives in Sarawak and Sabah (Article 153). The Sarawak government and SEB therefore have an obligation to comply with the 'fundamental law of the land' in Malaysia, as well as to ensure their actions do not violate the provisions outlined in UNDRIP and the international conventions to which Malaysia is signatory. Sarawak Energy's website and public materials also reference two voluntary corporate standards, the Equator Principles (based on the International Finance Corporation's Performance Standards)⁸ and the International Hydropower Association's Hydropower Sustainability Assessment Protocol (HSAP) guidance recommendations.⁹

In early 2014, SAVE Rivers initiated a call for an independent fact-finding mission to examine the situation of widespread rights violations at Baram and the climate of impunity surrounding these abuses. Members of the fact-finding mission were requested to act in their individual capacities to evaluate the

actions of SEB against the internationally accepted human rights outlined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

The following report is based on the information gathered during the fact finding mission, which took place between the 22nd and 28th of February 2014. Members of the fact-finding team included Thomas Jalong, Wong Meng-Chuo and Tanya Lee. Thomas Jalong has been actively involved in advocating for the promotion and protection of indigenous peoples' rights, human rights and socially just development for nearly thirty years. Locally in Baram, as well as nationally and internationally, he organizes and facilitates trainings on indigenous peoples' rights, human rights, land rights, legal strategies for defending these rights as well as on questions of development and the environment. Wong Meng-Chuo is a social and environmental consultant with the Sarawak-based non-governmental organization, Institute for Development of Alternative Living, and has been involved in indigenous rights advocacy and community empowerment initiatives since the 1980s. Tanya Lee has a background in international human rights law and has been actively involved in environmental justice, land rights and indigenous peoples' solidarity/right to self-determination movements. With International Rivers, she is focused on bringing greater attention to the negative social and environmental impacts of large-scale dam projects as well as the concerns and responses of dam-affected communities.

Interviews¹⁰ were carried out in thirteen villages selected as a sampling of locations from the downstream and reservoir zones of the proposed Baram dam and are representative of the three main populations of affected indigenous peoples (Kayan, Kenyah and Penan). The villages visited included Long Pila, Na'ah, Long Liam, Long Keluan, Long Daloh, Long Lutin, Long San, Tanjung Tepalit, Long Apu, Long Julian, Long Anap, Long Laput and Long Keseh¹¹.

⁶ If consent is granted, consultations should be ongoing throughout the life of the project (as noted, for example in Equator Principle 5 on "Stakeholder Engagement").

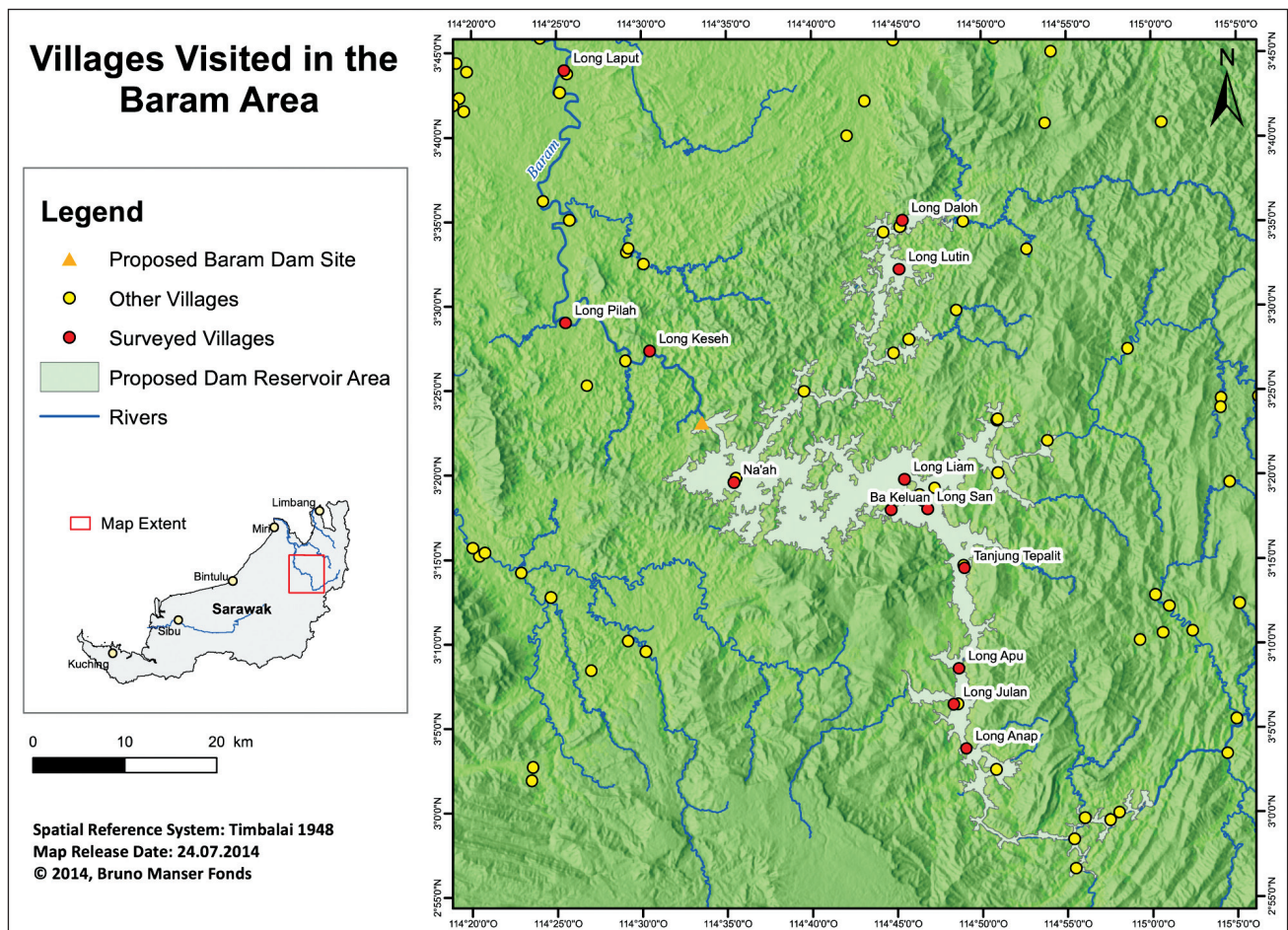
⁷ The collective and individual rights of indigenous peoples outlined within the UNDRIP articulate minimum standards for the "survival, dignity and well being of indigenous peoples" (Article 43) that member states should seek to uphold.

⁸ Since the social and environmental impact assessment studies for Baram Dam began in November 2012, compliance with the Equator Principles requires attention to the 2012 revisions of the International Finance Corporation's (IFC) Performance Standards. The Equator Principles refer to IFC Performance Standard 7 on Indigenous Peoples, which explicitly applies the principle of free, prior and informed consent to projects affecting indigenous people.

⁹ As outlined in each of the sections below, the fact finding mission interviews revealed widespread violations of the provisions in UNDRIP. Correspondingly, violations of Equator Principle 5 on Stakeholder Engagement, Equator Principle 6 on Grievance Mechanisms, as well as HSAP guidelines for "Communications and Consultation", "Project Affected Communities and Livelihoods", "Resettlement" and "Indigenous Peoples" were evident in each of the thirteen villages included in this investigation.

¹⁰ Data was gathered in each village during group interviews held in longhouses. The majority of interviews were conducted with groups of between four and eight people, though some discussions included as many as thirty people.

¹¹ Quotes are not attributed to specific individuals in order to protect the identities of the people interviewed.



Map of villages included in the fact-finding mission (located around the projected Baram Dam reservoir).

Key Findings:

WIDESPREAD VIOLATION OF INTERNATIONALLY ACCEPTED HUMAN RIGHTS

The Kayan, Kenyah and Penan families living along the Baram River first heard about SEB's proposal to build the Baram Dam over the course of 2012 and 2013. Ever since that time, they have raised questions and concerns about hydroelectric project. Residents have publicly expressed their objections to the Baram Dam and their grievances by gathering thousands of signatures on a petition presented to the Sarawak government, writing letters to authorities, posting information online, erecting signs outside their homes, filing complaints with the police, approaching legal advocates, consulting with indigenous peoples' alliances, and taking direct action to stop project-affiliated personnel from working.

The testimonials of the Kayan, Kenyah and Penan from the fact-finding mission to the thirteen affected villages revealed the following:

- Denial of right to information and lack of transparency about the impacts of the proposed project and the process of the Social and Environmental Impact Assessment (SEIA);
- Denial of the right to free, prior and informed consent;
- Violation of the right to participate in decision-making through representatives of own choosing;

- Extinguishment of customary land rights and violation of the right to livelihood;
- Use of coercion against villagers, including the issuing of punitive measures, threats and intimidation;
- No independent or legitimate process for project-affected villagers to seek redress for their grievances; and
- Violations of the right of indigenous peoples to participate in development planning and to self-determination.

In the following pages, the above findings will be further elaborated based on the quotes and concerns raised in discussions with directly affected people in Baram in February 2014.

Violations of Indigenous

PEOPLES' RIGHTS REVEALED BY THE FACT-FINDING MISSION

I. DENIAL OF RIGHT TO INFORMATION AND LACK OF TRANSPARENCY

The principle of seeking the free, prior and informed consent of indigenous peoples' communities has been articulated by diverse international organizations, including the UN (UN Declaration on the Rights of Indigenous Peoples), the International Labour Organization (Convention 169), and the International Finance Corporation (Performance Standard 7), and is generally understood as part of an emerging body of international customary law pertaining to indigenous peoples' rights. To exercise this right, people must have full and transparent access to information about the project being proposed, including short and long-term impacts, livelihood implications, and proposed mitigation as well as livelihood restoration measures.

However, members of Kayan, Kenyah and Penan longhouses along the Baram River testified that they have been provided with inadequate information about the risks and impacts of the Baram Dam and have no access to a channel by which to raise their questions. Some longhouse residents, particularly those living downstream of the proposed dam site, expressed the concern that there is no clarity on exactly which communities will have to move. According to them, there has also been no information provided about the risks related to living downstream of the dam or along tributary rivers.

In each of the thirteen villages, the information provided to people by SEB about the Baram Dam and the process for conducting a social and environmental



The school at Long Anap will be submerged if the proposed Baram Dam is built. Credit: Bruno Manser Fund.

impact assessment (SEIA) was reportedly in Bahasa Melayu. This language is not the mother tongue of the communities and not understood well by everyone. In addition, SEB's consultants were described as not providing transparent and understandable information about their mandate or the information they were gathering. At Long Anap, people noted that the consultants "did not describe what an SEIA is, ask people whether they want to participate in the SEIA, or give information about the SEIA reporting process. No one explained that the information in the survey would be for a report. They didn't offer to give any report to the village headman afterwards."

Senior representatives of each of the thirteen villages consistently said that their requests for an extra copy of the SEIA questionnaire for the purposes of keeping one on file were refused. In separate instances, villagers recounted offering to photocopy the survey themselves if the consultants could not provide a copy to them, but being told by the consultants that copying the survey was not permitted.

With no clear, transparent information about the scope of project impacts and the process being undertaken for the SEIA report, longhouse residents alluded to feelings of distrust, confusion, anger, fear and frustration. Residents of Long Anap also noted that:

"We have never been shown an accurate map of the project, only a drawing that said which villages might be flooded by the Baram Dam reservoir. During the presentation from the SEB Community Relations Officer, we weren't told about the impacts of the project. Instead we were shown pictures of dams in Australia and how there is development in the cities there...In response to every question we had, SEB representatives said they were not in a position to answer. But they also couldn't tell us who was in a position to answer."

At Long Apu, residents brought forward the following fundamental questions about the process of community engagement:

"We have never been given full information about the project, including true information about the impacts and the changes it will bring. What about the loss of fish, the loss of land, the loss of forest resources? If the Baram Dam is really a good project, why is SEB hiding the whole story by not telling us both the good and the negative sides of the project?"

Similarly, people at Long Laput attested that:

"SEB has never organized an open public discussion on the project...They have never said anything about negative impacts and risks that could affect us."

They also explained some of the barriers to participating meaningfully in decision-making processes about the dam:

"From the very beginning, this entire process for the Baram Dam has not been transparent. SEB should explain first why they want to build a project: why they are building the roads, why they are acquiring land, why they are building a dam, and why they will survey us. We have never been shown a detailed map of how the project will impact the land, the river and our villages. We would prefer SEB to come to hear our perspectives first, but they haven't done this... We shouldn't be just forced to accept a project."

II. DENIAL OF THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT

According to Article 10 of the UN Declaration on the Rights of Indigenous Peoples, "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned..."

Viewpoints expressed by people in all thirteen villages on the implications of the Baram Dam for their land, identity and future livelihoods are in significant contrast with the positive language found in SEB's promotional materials. Kenyah, Kayan and Penan people interviewed commonly spoke of the threats of dispossession, their potential loss of identity as a people, and the toll of forced evictions from their ancestral lands. Based on a wide range of concerns, affected communities of Baram continue to withhold consent for SEB and the Sarawak government to proceed with building the dam, to conduct surveys on their customary lands, acquire village lands, or to initiate resettlement-related measures.

In a group discussion at Long Laput, it was asserted that:

"The Baram Dam is going to destroy us, as a people. It will bring no benefits. For this, there can be no compensation. How do you put value on the land and the river? This is our land, and there is no other place here that is available for us."¹²

At Long Lutin, questions were raised about being dispossessed of their collectively conceived ancestral domain in the name of 'development':

¹² Although people from Baram have been promised replacement land if they move to a resettlement site, much of the surrounding land has already been auctioned off to logging and plantation companies as concessions. SEB and the Sarawak government have yet to take this constraint on land availability into account in the context of discussions on displacing and resettling thousands of people.

"SEB says the dam will develop the people, but how? In fact, it is going to leave us without land, without the forests, without our homes, and without the river."

Evidently, SEB personnel have been personally informed on several occasions by people in affected villages that they have not granted consent for the proposal to build the Baram Dam. For example, a Penan headman testified that:

"People from here have gone to Miri three times to tell the SEB officials that we don't consent to them building the dam. Each of the three times, we have said we will not move [from our ancestral lands]."

Surveyors contracted by SEB to record locations of traditional burial grounds and fruit orchards have also been ordered to withdraw from the area by villagers living along the Baram River based on the fact that consent had never been sought or granted. During some of the interviews, people described posting signs at longhouse entrances to inform consultants hired to by SEB that they did not have permission to enter the community and would be considered trespassers.

At Long Anap, it was noted:

"Although the process for dealing with such large development projects is not clearly outlined in our traditional adat, if a company wants to propose a project they should meet with the village leader, and then consult with all villagers. The villagers themselves should also be able to have the time to get together, discuss and form the opinions that they will bring forward to the village leader and to the company proposing the project. There must be a consensus with terms and conditions made by the people, who can make the decision for the project to stop if the project is not being carried out the way it was proposed or if they reject the project proposal. Consent does not come from a village leader only."

The Kayan, Kenyah and Penan residents in all thirteen villages expressed the opinion that SEB, the consultancy firm hired by SEB (Chemsain Konsultants Berhad) and the Sarawak government have an obligation to respect the communities' decision to withhold consent for the project, and on this basis, should not proceed with the social and environmental impact assessment (SEIA) for the site. By moving forward with an SEIA on native customary land without the affected peoples' consent

to the Baram Dam, SEB's and Chemsain's actions violate the rights of indigenous people as outlined in UNDRIP Articles 10, 18, 23 and 27.

According to residents of Long San:

"Before any project - big or small - is carried out, proper consultation should be done. This means the entire community should be well informed about the positive and negative sides of a project. The voice of the community should be respected and taken seriously, with people making decisions free of harassment....The whole of Baram should have the opportunity to come together, discuss, and come up with a consensus about whether we accept or reject the dam project. If this is done, then they [the government and SEB] would see that the majority of people here do not accept the project."

Each village explained that discussions hosted by SEB in the community focused on *informing* people about what will happen during and after the dam building process, including resettlement site development, compensation, and lifestyle changes. The implicit assumption made by SEB that regardless of affected peoples' concerns or opposition, the project will move ahead, has led to a high degree of frustration amongst the people of Baram. For example, at Long Anap, people observed that:

"Nothing about this process is negotiated. There was discussion about our suggestions for compensation rates and resettlement places, but this is not a negotiation! "

During a group discussion involving several households from Tanjung Tepalit, people explained the following:

"SEB and the Chemsain consultants have never come to ask for our consent to build the dam. They do not come to negotiate; they do not come here to meet with the people who live here and listen to us. No, that is not what is being done. There is no discussion. Instead, they come to tell us about the benefits of the Baram Dam, and that we should not oppose it because the Sarawak government wants the project."

Similarly, during a group meeting at Long Laput, villagers said that "SEB doesn't want to listen or negotiate. They refuse to have a dialogue."

In the context of the current situation of widespread community opposition to the project, it would be



Since October 2013, communities affected by the proposed Baram Dam have collectively decided to establish road blockades to demonstrate the widespread opposition to the project. Credit: International Rivers

impossible for there to be relocation of affected communities in a manner which is consistent with the human rights obligations under UNDRIP. According to the above standards, the terms of resettlement and compensation should be subject to a transparent and inclusive process of good faith negotiation. However, in this instance, SEB has already announced that compensation rates “will be guided by existing policies of the Government,”¹³ and that investments will be made in building a new central township called “Bandar Baru Telang Usun”¹⁴. To date, these existing policies have proved inadequate, as evident at the Batang Ai, Bakun and Murum dams resettlement sites, where communities have been displaced and dispossessed of their native customary land with few – if any – prospects of livelihood improvement.

III. VIOLATION OF RIGHT TO PARTICIPATE IN DECISION-MAKING THROUGH REPRESENTATIVES OF OWN CHOOSING

The UN Declaration on Indigenous Peoples specifies that:

“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures.” (Article 18)

However, Kayan, Kenyah and Penan residents interviewed during the fact-finding mission explained how the government has appointed leaders and spokespeople to speak on behalf of Baram residents, even though these people were not chosen through processes in accordance with procedures deemed legitimate by the Baram people. For example, district level politicians and government-appointed representatives were described as expressing support for the Baram Dam. Such statements by people wielding political power are denounced by longhouse residents as misleading, because they are not seen to reflect the genuine sentiments of people living along the Baram River. Given that this project is proposed by a company that is fully owned by the Sarawak government¹⁵, political appointees also face the reality

¹³ Sarawak Energy Berhad. Factsheet on Baram Hydroelectric Project (Accessed online 7 April 2014): www.sarawakenergy.com.my/index.php/hydroelectric-projects/fact-sheets/baram

¹⁴ Sarawak Energy Berhad. Factsheet on Baram Hydroelectric Project (Accessed online 18 May 2014): www.sarawakenergy.com.my/index.php/hydroelectric-projects/fact-sheets/baram

¹⁵ Since SEB is fully owned by the Sarawak government, their priorities are identical. In addition, Sarawak Energy does not differentiate between its own position and that of the government. Implicit in this linkage is the fact that both the Sarawak government and SEB share responsibility for respecting the human rights of people affected by the proposed Baram Dam.

that a demotion or a terminated salary and position¹⁶ could result if they express opposition or skepticism about the dam.

As explained in a discussion group at Long Laput:

“Some community leaders [appointed by the Sarawak government as ‘spokesmen’] are pro-dam, but they are not representative of the sentiments of people on the ground, of those who live in the villages along the Baram River.”

During a group discussion at Long Julan, people declared:

“If SEB claims everyone here supports the dam project, this is absolutely not true. We have not agreed to the project, SEB has not consulted us - the people who live here. It is a complete misrepresentation to claim peoples’ support for the Baram Dam.”

In each village, residents also described instances of company-sponsored festivities, gift-giving and cash handouts distributed by SEB. Those who were interviewed consistently denounced these actions as pressure tactics by SEB to buy-off leaders and members of the community. To underline their opposition to SEB and any tactics of coercion or bribery, people typically reported rejecting the gifts and cash handouts. They also expressed the feeling that SEB ‘assumes acquiescence.’

IV. EXTINGUISHMENT OF CUSTOMARY LAND RIGHTS AND VIOLATION OF THE RIGHT TO LIVELIHOOD

The provisions of UNDRIP call upon states to respect Indigenous Peoples’ rights to their ancestral lands, in recognition of the significance to community identity, social cohesion, health, well-being, economic security, and basis of self-determination, and to duly compensate for losses, as reflected for example in Articles 26 and 28:



If built, the proposed Baram Dam would dispossess thousands of people living along the river, forcing them to move to resettlement sites designated by SEB and the Sarawak government. Credit: International Rivers

¹⁶ In one village visited by the research team, the headman reported receiving a termination notice from the state government. He is vocal about his opposition to the Baram Dam and is under the impression that his term has been cut because of his willingness to speak out against the project.

"Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired [...] States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." (Article 26)

"Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent." (Article 28)

At Long Keseh and Long Pila, villagers reported that land acquisitions for purposes associated with the Baram Dam are underway, without their consent or involvement in any form of negotiation for compensation. The extinguishment of customary rights to land in these cases was announced in notifications that were issued by the Sarawak Minister of Resource Planning and the Environment and were posted in the community as well as in the news. This form of uncompensated land acquisition is in direct violation of Malaysia's international obligations under UNDRIP as per Articles 8, 26 and 28, but is also symptomatic of the broader systematic lack of recognition of indigenous peoples' customary land rights in Sarawak. As noted by the National Human Rights Commission of Malaysia in their "Report of the National Inquiry into the Land Rights of Indigenous Peoples":

"The Sarawak Land Code has created several challenges for native communities seeking to secure their native customary rights over lands. In general, these challenges relate to (a) the statute's failure to recognise traditional forms of occupation according to native customary laws, and (b) the State's broad authority to extinguish NCR [Native Customary Rights]."¹⁷

The cases of land acquisition at Long Keseh and Long Pila also violate the Malaysian Federal Constitution's provisions in Articles 5 and 13 on the rights to life and to property, respectively. In response, a constitutional challenge has been filed on behalf of the affected communities. At the time of writing, the case has yet to be adjudicated in Court.

V. USE OF COERCION, THREATS AND INTIMIDATION

One of the fundamental requirements of free, prior and informed consent is that the government's and project developer's interactions with the community must be free of coercion, manipulation, threats, and intimidation. In addition, affected people must have the opportunity to make decisions through culturally appropriate methods. According to the UN Declaration on the Rights of Indigenous Peoples:

"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." (Article 32(2))

In addition, under international law, indigenous peoples have the right to participate in decisions made by the government (and state-owned bodies or enterprises) affecting their rights and access to their customary lands.

In contrast, interviews revealed that SEB and their consultants have pursued heavy-handed approaches, using pressure tactics that have been interpreted by villagers as intimidating, threatening, misleading and as attempts at bribery.

In every village visited, people reported that they were told by SEB's consultants that if they did not comply with the request to fill in the surveys for the social and environmental impact assessment of the Baram Dam,

¹⁷ SUHAKAM (2013): Chapter 3 (3.43; 3.47).

they would not receive compensation and would regret their actions later. Some described being individually pressured by consultants who claimed that if people in their longhouse did not agree to take the survey, they would be the only families in Baram who rejected the process. Consultants reportedly called on the eldest people in each household to answer the survey, and offered cash hand-outs to youth if they assisted in distributing the surveys. Villagers reported that they were concerned that elders and young people were being specifically targeted and isolated by SEB in an effort to pressure them into collaborating with the SEIA reporting process.

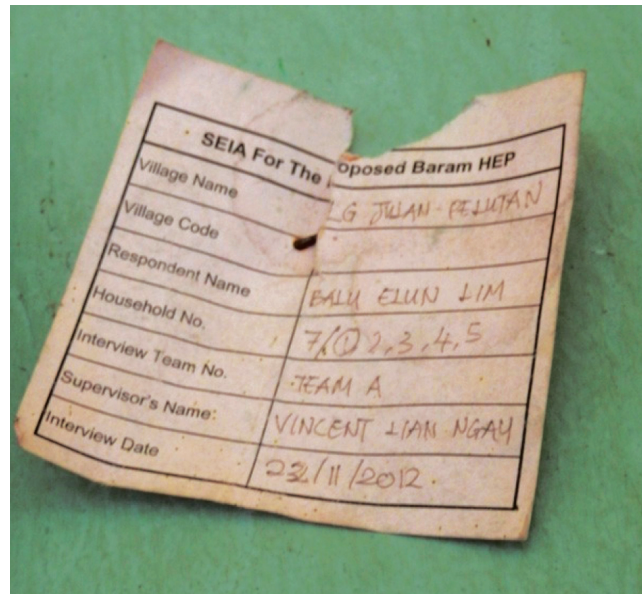
During a group discussion at Long Lutin, the consultants were said to have:

“tried to convince us that if we didn’t agree to fill out the questionnaire, we wouldn’t get compensation. They told us that if we don’t agree with a dam here, there will be no development. They tried to influence us; to tell us it is a government-backed project (and shouldn’t be opposed); that the dam is good for you and your children.”

Although the SEIA surveys required respondents to provide personal identity data and information about consumption habits, there was no corresponding offer from the consultants to ensure the confidentiality of results. Villagers interviewed interpreted this requirement of the survey as implicitly threatening. In addition, they were typically asked by SEB’s consultants to write the answers to the survey in pencil, and sign their signatures in pen, making many suspicious of possible manipulation of answers.

At Long Anap, residents noted that: “Many people thought that if they are going to write down that they are opposed to the dam, why should they agree to sign the forms, give their phone number, or provide their MYKad¹⁸ number? It could make them a potential target by the government or SEB.”

As a result, some people reported refusing to fill in personal details, and instead only writing, “I don’t want the Baram Dam!” on the top of every page of the survey. In each case, the consultants reportedly told them that if they didn’t fill in the form ‘properly’, they would not receive any compensation.



SEIA For The Proposed Baram HEP	
Village Name	LG JUAN-REUTAN
Village Code	
Respondent Name	BALU ELUN LIM
Household No.	7/12, 3, 4, 5
Interview Team No.	TEAM A
Supervisor's Name	VINCENT LIAN NGAY
Interview Date	22/11/2012

A lack of transparency has surrounded SEB’s process of conducting a social and environmental impact assessment (SEIA) at Baram. Affected families report being pressured into participating in SEIA surveys without being told why the information was needed or how it would be used.
Credit: International Rivers

VI. LACK OF ACCESS TO REMEDIES

In accordance with international human rights law, communities affected by a large-scale development project, such as the Baram Dam, are entitled to access a mechanism through which they can raise grievances and seek remedies for violated rights. UNDRIP requires the establishment of a “fair, independent, impartial, open and transparent process...to recognize and adjudicate the rights of indigenous people pertaining to their lands, territories and resources.” (Article 27)

However, there are no accessible, independent, or legitimate mechanisms by which communities affected by the proposed Baram Dam can submit grievances, concerns or requests for mediation without fear of retribution. In each of the thirteen villages visited, residents typically pointed out that there is no known safe or effective process by which to seek resolutions for their project-related grievances, especially given the context of the powerful interests involved in SEB, as an enterprise of the Sarawak government. As a result, people from Baram are limited to seeking justice through the lengthy and expensive process of filing cases in the court of law, while asserting their rights to defend themselves with the immediate action of establishing blockades and protest sites.

¹⁸ Identity card issued by the National Registration Department of Malaysia.

VII. VIOLATION OF RIGHT TO SELF-DETERMINATION

The UN Declaration on the Rights of Indigenous Peoples explicitly recognizes that indigenous peoples have the right to determine their own development, affirming that:

"Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes"(Article 23); and

"Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources." (Article 32(1))

SEB and the Sarawak government have proceeded to make a plan for developing Baram without informing or meaningfully consulting with affected people. In this situation, the people of Baram are denied the right to collectively determine and map out their own way forward for the future. Interviews revealed that during SEB's presentations in the affected communities, promises to economically develop the area, create a new centralized town, and offer everyone jobs were made, reflecting SEB's and the Sarawak government's plans and assumptions of what the Kenyah, Kayan and Penan of Baram need. People reported being told what would be best for them, as though the future of Baram had already been decided and imposed upon them. In this context, SEB's approach can be considered neither culturally appropriate nor part of a negotiation carried out in 'good faith'.

At Long Anap, residents spoke of the underlying cultural assumptions about indigenous people held by Sarawak authorities, their lack of consideration for customary *adat*¹⁹, and lack of respect for their rights to determine their own development priorities:

"Whenever we have raised questions about the impacts of the dam, Chemsain and SEB representatives have told us that it is our culture to move, and so we shouldn't be worried because we will now be able to move to a place where there will be better homes, where we will all have jobs. They always try to give an impression that this is the best project ever and life will be better once the dam is completed."

Interviewed villagers held clear views on the type of "development" that would most benefit their communities, and how this development could be achieved without building the Baram Dam. For example, representatives of Long Lutin explained:

"What we need here in Baram is basic development: a clinic, a school, roads, electricity...This is the kind of development we want. We are very firm: we will not give up our land. We rely on the land; we want the land for the generations to come."

At Na'ah, residents noted:

"The company and the government will spend billions to build the dam. But if they were serious about development, that money could instead develop infrastructure for our village."

Villagers interviewed directly challenged SEB and the Sarawak government's plan for developing Baram. They also suggested that there are different types of energy generation and infrastructure that should be considered in order to meet the needs of local people. As was articulated by people at Long Apu:

"There is no need for big dams, as there is no need for so much electricity... Why not build some micro-dams, as those smaller projects could generate all the power we need in Baram?"

¹⁹ The meaning of *adat* in this context has been articulated most recently in the National Human Rights Commission of Malaysia's (SUHAKAM) National Inquiry into the Land Rights of Indigenous Peoples (April 2013): "Indigenous communities have their own age old customs or *adat* related to the use and protection of lands, territories and resources.... *Adat* encompasses customary laws, concepts, principles and practices, and the customary institution that implements and regulates such laws, concepts, principles and practices. In short, it can be called a holistic set of indigenous system of governance." (Section 2.8)

Recommendations

SEB and the Sarawak government are accountable for the human rights violations committed to date in relation to the proposed Baram Dam, and most urgently, have a responsibility to take corrective action.

In addition, all actors involved in the development of dams in Sarawak and associated facilities have a responsibility to uphold and respect the rights of the indigenous communities in accordance with the Malaysian Federal Constitution along with provisions in UNDRIP, the international human rights instruments to which Malaysia is signatory and international customary law.

Due to the SEIA survey procedures involving tactics which are coercive, disrespectful of affected communities' *adat*, inappropriate for the specific language needs of communities, lacking in transparency and in violation of peoples' rights to information, SEB's forthcoming Baram SEIA report will neither be a legitimate nor valid reflection of the realities in Baram or the will of the communities. Affected villagers have explained they have not consented to dam construction on their land, agreed to give up their land or agreed to move to a resettlement site. In accordance with international obligations under the provisions of UNDRIP, numerous villagers said that SEB should – as a matter of urgency – completely withdraw from the area.

The following specific recommendations are based on the expressed concerns of villagers living along the Baram River and the key findings of this report.

Sarawak Energy and the Sarawak government should:

- *Respect affected residents' of Baram expression of broad community opposition to the Baram Dam and their decision to withhold consent for the project* by immediately withdrawing from the area. All surveys, bidding processes, land acquisition and preparatory site work – including logging – for the Baram Dam should be immediately halted.
- *Address the lack of transparency* surrounding the Baram Dam by publicly releasing all studies, surveys and plans completed to date about the proposed dam and its impacts, making them available online and in hard copy in Bahasa Melayu, English and local indigenous languages.

- *Return all lands acquired for the Baram Dam* to the native customary rights land holders. Any further action towards extinguishing the rights of rightful landholders and usurping the properties without free, prior and informed consent of all affected residents and their leaders (selected and agreed by the community concerned) is unconstitutional and should not proceed.
- *Respect and abide by the Malaysian Federal Court rulings to uphold native customary land rights* in Sarawak based on the provisions of the Federal Constitution.

The Malaysian Government and Malaysian Anti-Corruption Commission should:

- *Take immediate measures to launch an independent and detailed investigation into allegations of SEB's acts of corruption and coercion of villagers at Baram.* They should require that SEB produce an action plan to avoid corrupt practices and comply with federal laws.

Institutions that are considering or offering loans, financing, or advisory, engineering or construction services to SEB for hydro-generation and transmission projects should:

- *Withdraw all financial and technical support to SEB* in order to avoid complicity in violations of internationally recognized indigenous peoples' rights, allegations of corruption and illegitimate SEIA reporting processes that do not meet accepted industry benchmarks.
- *Investigate SEB's project compliance with the Equator Principles and IFC Performance Standards.* Attention should be focused on questions related to land acquisition, involuntary resettlement and respect for indigenous peoples' rights.
- *Follow-up with the Malaysian Anti-Corruption Commission in relation to allegations of SEB's acts of corruption* at Baram and launch further investigations as needed.



THE FINDINGS AND RECOMMENDATIONS OF THIS REPORT ARE ALSO SUPPORTED BY THE FOLLOWING ORGANIZATIONS:

- Aliansi Masyarakat Adat Nusantara- Indigenous Peoples' Alliance of the Archipelago (Indonesia)
- Article 19: Defending Freedom of Expression and Information (International)
- Asia Indigenous Peoples' Network on Extractive Industries and Energy (AIPNEE)
- Asia Pacific Indigenous Youth Network (Asia Pacific)
- Association of Nepal Kirat Kulung Language and Cultural Development (Nepal)
- Borok Peoples' Human Rights Organisation (India)
- Borok Indigenous Tribal Development Centre (India)
- Borneo Resources Institute (Malaysia)
- Building Community Voices (Cambodia)
- Center for Orang Asli Concern (Malaysia)
- Centre for Organisation Research & Education (India)
- Centre for Research and Advocacy-Manipur (India)
- Committee on the Protection of Natural Resources-Manipur (India)
- Cordillera Peoples' Alliance (Philippines)
- Cordillera Youth Center (Philippines)
- Forest Peoples' Programme (UK)
- Hawai'i Center for Human Rights Research & Action (Hawai'i)
- Hawai'i Institute for Human Rights (Hawai'i)
- INDIGENOUS (Hawai'i)
- Indigenous Peoples' Links (UK)
- International Council for the Indigenous Peoples of Chittagong Hill Tracts (Bangladesh)
- Justice and Peace Network (Myanmar)
- Kirat Chamling Language Culture Development Association (Nepal)
- Kirat Youth Society (Nepal)
- Koalisyon ng mga Katutubo at Samahan ng Pilipinas/National Coalition of Indigenous Peoples in the Philippines (Philippines)
- Nepal Federation of Indigenous Nationalities (Nepal)
- Netherlands Centre for Indigenous Peoples (Netherlands)
- NGO Coalition for Environment (Nigeria)
- NGO Federation of Nepalese Indigenous Nationalities (Nepal)
- Organization for the Promotion of Kui Culture (Cambodia)
- PACOS Trust (Malaysia)
- PADI Indonesia (Indonesia)
- Peoples' Unity Young Society (Nepal)
- Radyo Sagada (Philippines)
- Sarawak Dayak Iban Association (Malaysia)
- Society for New Initiatives and Activities (Italy)
- TARA-Ping Pu (Taiwan)
- Tribal Environmental Policy Center (USA)



Credit: International Rivers

REPORT ENDORSED BY:



PUBLISHED BY:

