

Applying a Human Rights-Based Approach to Transboundary Infrastructure Projects

Are large infrastructure development projects possible while maintaining respect for human rights? The benefits of building a large dam, for example, include the production of clean and renewable energy, indispensable to meet the increasing demand for electricity, while limiting the impact of climate change. There are, however, inevitable trade-offs between any benefits such a project aims to bring and the negative socio-ecological impacts likely to be caused to local communities and other concerned parties.



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Almost three billion people across 145 countries live in one of our planet's 310 transboundary river basins shared by two or more countries. The necessity to cooperate over shared water resources can lead to unity and interdependence between riparian states. However, the planning and construction of large hydropower installations can often trigger alarm bells. History demonstrates that poor planning and governance may lead to human rights abuses on a large scale, most commonly in the form of population displacement and the loss of livelihoods and cultural heritage. This is not least the case in transboundary settings. There is, however, a different route to take. Respect for human rights does not necessarily rule out large infrastructure development projects, but imposes conditions and procedural limits on them, for the benefit of all parties.

The World Commission on Dams proposed two decades ago that a human rights-based approach (or approaches) (HRBA) be adopted to balance positive and negative impacts of large infrastructure developments.

The HRBA Process

The HRBA is a value-based, people-centred tool and process for planning, programming, and monitoring development projects, useful also to foresee and prevent conflict by ensuring due participation and transparency in decision-making processes. This approach can be helpful when assessing and implementing large infrastructure projects, as it provides a step-by-step method to identify rightful claims, freedoms, and entitlements.

The Human Rights-Based Approach

The HRBA owes much of its origin to a report by the World Commission on Dams (2000), saying “we have to bring new voices, perspectives and criteria into decision-making [... to] build consensus”. This brought a paradigm shift for development aid

Image above by Philippe Cecchi. Weir at Nabazana, Burkina Faso.

programming based on rights, risks, and core values by stressing that justiciable rights trump charity commitments. The Approach promotes systematic mapping of entitlements and claims, the corresponding duties that States hold, and the identification of ‘rights-holders’ among those with a stake in a matter, and ‘duty-bearers’ in government bodies.

The HRBA also requires that human rights standards guide all the programming, planning and implementation phases of a project. Participation; accountability; non-discrimination; and transparency are also principles of good governance.

The HRBA places emphasis on capacity building as the means to progressively realize the human rights established under international law. Understanding the Approach is a constant development towards an objective.

The human rights in focus here are laid down in the binding UN International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as other treaties and conventions. These contain procedural and substantive rights, but also principles that are cross-cutting on non-discrimination and gender equality dimensions. Priority groups – women, children, older persons, indigenous people, subsistence farmers, ethnic and other minorities – are potentially vulnerable with respect to adequate housing and other rights.

Dam-based developments tend to have gendered impacts. For instance, registration of property is often in the name of the male head of the household, and in some indigenous communities, women may hold user rights but not formal ownership. In such cases, all human rights must be recognized for all, *universally*, particularly in relation to public consultation and compensation. There are also intergenerational impacts: the needs and opinions of youth are less likely to be voiced in public hearings for example, and large infrastructure projects may threaten the life and dignity of future generations.

Customary international law of interest to transboundary watercourses and aquifers covers the duty of cooperation, the duty not to cause any significant harm, reasonable and equitable utilization of shared resources, and free, prior informed consent.

However, the HRBA has its limitations. The formal framing of the specific human rights at stake is decisive. HRBA presupposes a sufficiently well-functioning State in which it is possible to invoke the rights in question. If the State lacks capacities to effectively implement human rights standards and take steps progressively towards full realization, it becomes a priority of the world community and the UN system to provide cooperative and technical assistance.

The HRBA also cannot give assurances to those waiting to learn whether the threats of displacement will eventually become reality. It cannot remedy how interlinked dimensions of poverty - inequality, dignity, deprivation, and structural forces - influence access to the institutions and advocacy groups that can assist in building capacity and enforcing the rights of the affected.

Human rights in a transboundary context

The substantive entitlements that may be at stake in the case of large infrastructure projects include the rights to adequate housing; not to be forcibly evicted; protection against the arbitrary destruction and demolition of one's home; and the freedom to choose one's residence and to determine where to live. Further, the rights to food, drinking water, adequate health and standard of living are all guarded. Additionally, the State must not deprive indigenous peoples or subsistence farmers of the water resources needed for their requirements and a healthy and sustainable environment is emerging as a human right.

Key procedural human rights include sharing information; genuine participation; public consultation with those affected; adequate and reasonable prior notice for all affected persons; free, prior informed consent from Indigenous Peoples; and environmental and social impact assessments. A transboundary Environmental/Social Impact Assessment is a requirement of customary or general international law and treaties which require one, including the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, and also under the policies of many international lending agencies. However, there is little guidance as to the required scope and content of any transboundary assessment.

The corresponding obligation involves *respecting* the right to housing. This requires that States refrain from carrying out forced evictions and demolishing homes. States are further obliged to *refrain from* any action which lowers or has a negative effect on the standard of living of right-holders as well as to take all steps to improve their standard of living.



The Wat Nong Bua Yai May temple in the Lopburi province of Thailand. Submerged for 20 years in the waters of the Pa Sak Cholasit Dam, its remains revealed themselves again during an extreme, decade-long drought in the area. Image by Ball Lun La.

In infrastructure projects, much of the activity — from design to operation and maintenance — is conducted by private companies. These are not legally bound by the international human rights regime, but they are expected to respect the established human rights and carry out human rights due diligence as appropriate. This is laid down in the UN Guiding Principles on Business and Human Rights, a soft law instrument that also stipulates how States are obliged to regulate private companies to protect rights-holders from abuse. States must also ensure access to judicial redress.

Recommendations

Trade-offs are inevitable in transboundary development schemes such as hydropower projects but putting the HRBA principles into action across the conception, development, and implementation of large transboundary infrastructure works is key to elevating and sharing the benefits, and distributing the risks and costs with respect for social and environmental justice.

To respect human rights obligations, it is critical to:

- Recognize that individuals and communities in the affected areas are rights-holders with legal entitlements under international human rights law;
- Arrange for adequate sharing of information, genuine consultations, and reasonable notice to those risking eviction;
- Involve women, indigenous peoples, and other priority groups, and empower the young to engage;
- Ensure mutual trust between the riparian and other concerned countries, and that planning is coordinated;
- Warrant that the ‘zero alternative’/options to what is being proposed are also assessed. For instance, it should be investigated whether a series of smaller dams would lead to fewer human rights impacts;
- Safeguard that companies, including financiers, respect human rights, and apply due diligence as required under the UN Guiding Principles, the Equator Principles, and other standards, to prevent significant transboundary harm.



Construction of the Xayaburi dam and hydropower plant on the Mekong River, Laos. Image by Onutto.

The Pancheshwar Multipurpose Project Case

The Mahakali–Sharda River forms part of the international border between India and Nepal. The Pancheshwar Multipurpose Project (PMP) is a transboundary hydropower scheme, planned for a century, and actualized in a Treaty of 1996 — though continuously delayed. As a joint venture between India and Nepal, it features a 315 m tall dam and a 80 km reservoir, which is estimated to submerge around 116 km² and displace some 60,000 people, should the project eventually be realized.

The PMP aims to bring benefits from clean, renewable energy; irrigation opportunities and food security; and reduced risk for devastating floods, all of which are foundations for prosperous development and investments for present and future generations.

It is unclear in this case how the concerned have been given notice of public hearings or what information was made available; if the information was effectively communicated; available in local languages or only in English; and if the processes allowed for meaningful participation. There is, however, still time to remedy and address the human rights that are at stake in this case to avoid future violations and abuse. An ICWC report (Grönwall, 2020) analyses the case and provides recommendations on appropriate steps and mitigation measures by applying the HRBA.



Changtu village area on the Mahakali river, west Nepal. Image by Elena Vasta.

References

Grönwall, J., 2020. Large dams and human rights obligations: The case of the Pancheshwar Multipurpose Project on the border between India and Nepal. Stockholm: International Centre for Water Cooperation, Stockholm International Water Institute. Available: https://www.siwi.org/wp-content/uploads/2020/07/Report_ICWC_HRBA_2020_WEB.pdf.

Rieu-Clarke, A., 2020. The duty to take appropriate measures to prevent significant transboundary harm and private companies: insights from transboundary hydropower projects. *Int Environ Agreements* 20: 667–682. <https://doi.org/10.1007/s10784-020-09504-5>.

Sida (nd). Human Rights Based Approach. Available: <https://www.sida.se/en/partners/methods-materials/human-rights-based-approach>.

McCracken, M. and Wolf, A.T., 2019. Updating the register of international river basins of the world. *Int. J. Water Resources Development* 35(5):732-782.

World Commission on Dams, 2000. Dams and development: A framework for decision making. London and Sterling, VA: Earthscan. Available: http://awsassets.panda.org/downloads/wcd_dams_final_report.pdf.

About this publication

This policy brief has been authored by Dr Jenny Grönwall, Advisor, Policy & Rights, with input from Elizabeth A. Yaari, Operations Team Lead Senior Programme Manager, on behalf of the International Centre for Water Cooperation (ICWC) hosted by SIWI under the auspices of UNESCO. The brief is based on the full report 'Large dams and human rights obligations: The case of the Pancheshwar Multipurpose Project on the border between India and Nepal' authored by Dr Jenny Grönwall, published by ICWC SIWI in 2020.

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