

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
Promoting human rights by protecting those who defend them

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Lawyers Rights Watch Canada Response to Questionnaire on large-scale development projects and a safe and enabling environment for human rights defenders

Context

The capacities of States to protect human rights have not kept pace with the expansion of global economic activity. As businesses have gained greater economic rights, access to markets and mobility, governments have increasingly failed to find a balance between the power of business and the duty of the State to protect human rights.¹

In the context of large-scale development projects, a range of people's civil and economic, social and cultural human rights can be negatively affected. For HRDs and representatives of affected communities in particular, their human rights can be placed at risk as a result of their human rights advocacy. They can face repression and criminalisation where rights to protest are denied. Other civil rights that can be violated include rights to physical integrity; liberty and security of the person and rights against arbitrary arrest and detention; peaceful assembly and association; freedom of expression, and rights to due process. Lawyers Rights Watch takes the position that both host states (where the development project is being implemented) and home states (where the project sponsors are registered) have obligations under international law to ensure that both states and project sponsors respect and protect human rights.

1. Challenges and opportunities of a human-rights based approach to development re. large-scale development projects and the role, protection and effective participation of human rights defenders.

A number of challenges exist to pursuing a human-rights based approach to development especially in relation to large-scale development projects including,

- The state's processes for permitting, planning and monitoring of large-scale development projects are rarely, if ever, described in human rights terms i.e. as processes that require

¹ Olivier deSchutter, Anita Ramastry, Mark B. Taylor, Robert Thompson, "Human Rights Due Diligence: The Role of States" (ECCJ, ICAR, CNCA: December 2012) at 1. Available at <http://www.corporatejustice.org/New-article.1344.html?lang=en>.

the state to demonstrate its respect for, and protection and fulfillment of, international law obligations to ensure the enjoyment of rights by all and to ensure remedies for violations. States' permitting, planning and monitoring processes should be reconceptualised and described in these terms in order to clarify the nature of states' international human rights obligations. These include rights to consultation and participation in decision-making; free, prior, informed consent; free speech; self-determination; water; land; environmental protections; an adequate standard of living; food; water etc.

- The entities responsible for funding, developing and operating large scale development projects (project sponsors) can be complex partnerships of national and international, public and private entities making lines of authority difficult to identify and lines of accountability difficult to establish. The planning and permitting processes should require full accurate disclosure of the identity of project sponsors as a condition of permitting.
- Domestic statutory bodies with regulatory responsibilities can be fragmented, weak and lack an integrated approach to the regulation of the large scale development project through the stages of permitting, monitoring, closure and clean-up. Strong independent oversight is necessary to ensure that the state fulfils its own duties to respect, protect and fulfill its international and domestic human rights obligations throughout this process.
- The planning and permitting processes through which large-scale development projects are initiated, planned, approved and executed can prove difficult for affected communities and HRDs to navigate and engage with. This impedes efforts to ensure that the collective and individual interests vulnerable to loss as a result of the development are adequately represented and protected throughout the project life-cycle and losses are properly remediated. Planning and permitting process must be transparent and accessible.

Opportunities -

- Though a number of non-binding sets of principles and guidelines exist for project sponsors and corporations on human rights assessment and management of their activities², these vary in their definition and approach to human rights³ and corporate responsibility. Though perhaps helpful as industry guidelines, as voluntary codes, they have no legal or regulatory weight and there is no obligation on project sponsors to adopt them. Mechanisms to monitor their implementation and their impact are acknowledged to be piecemeal and inadequate and may not include a public reporting provision. The

² See for example the Global Reporting Initiatives at <https://www.globalreporting.org/Pages/default.aspx> as well as the International Finance Corporation's 'Guide to Human Rights Impact Assessment and Management' available at http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/About+the+Guide+to+HRIAM/. The latter has been endorsed by the United Nations Global Compact. See also industry association produced guidelines e.g. International Council on Mining and Metals' 'Human Rights in the Mining and Metals Industry. Overview, Management Approach and Issues' (May 2009). Available at <http://www.icmm.com/page/14809/human-rights-in-the-mining-and-metals-industry-overview-management-approach-and-issues>.

³ For example, in the latter publication human rights are described as 'universal values', not legal norms (p.3).

“Ruggie Principles”,⁴ while enunciating general state responsibilities, lack specificity. They are inadequate as a guide to the creation of mechanisms necessary to ensure compliance of large scale development projects with states’ international human rights obligations.

- There is a great need for an elaboration of what would constitute a human rights compatible ‘regime’ vis-à-vis the initiation, planning, implementation and monitoring of large-scale development projects that identifies international and domestic human rights law obligations and imposes enforceable duties on project sponsors to comply with those standards and submit to civil and criminal remedies for violations.

2. How large-scale development projects can best be elaborated in order to ensure the effective participation of human rights defenders?

One approach could be to plot the life-cycle of large-scale development projects in relation to the permitting processes, practices and standards necessary to ensure compliance with local and international human rights laws and standards. These would be matched to existing, or new mechanisms that would ensure the effective participation of HRDs and provide severe penalties for non-compliance.

Project life cycle stage	Treaty provisions, laws and regulations imposing penalties for failure to comply	What are the relevant and necessary regulatory oversight mechanisms (local, national, international)?	What policies and practices would ensure effective HRD participation?
Location decision →			
Feasibility investigation →			
Concept/project design →			
Construction →			
Commencement of operations →			

⁴ The ‘Guiding Principles on Business and Human Rights’ Implementing the United Nations “Protect, Respect and Remedy” Framework’ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Human Rights Council. 21st March 2011. A/HRC/17/31. Available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

Closure/decommissioning, reclamation, post-closure →			→
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3. How do you think human rights defenders can effectively monitor the impact of large-scale development projects?

LRWC suggests that, in addition to the above, supports for HRDs include dedicated access to domestic national human rights institutions (NHRI). LRWC believes that NHRIs, properly constituted⁵ and resourced, can play a valuable role in creating an enabling environment for HRDs in general, as well as in supporting their work.

NHRIs can play an important role in monitoring human rights compliance of large scale development projects and in the investigation of complaints and reporting of instances of non-compliance to authorities. NHRIs could also investigate and report on the adequacy and effectiveness of the domestic regulatory, justice and security frameworks that affect the extent to which HRDs can monitor the impact of large-scale development projects. NHRIs could contribute resources and training to HRDs, as well as to statutory regulators and service providers to ensure that policies and procedures are human rights compliant. In addition, NHRIs could play an important public information role, releasing information from their monitoring of the human rights compliance of large-scale development projects.

4. How can business and corporations involved in large-scale development and investment projects best be monitored re. corporate social responsibility (CSR) principles and their engagement with HRDs? What is the role of defenders in this process and how could their capacity to engage be strengthened?

In order to ensure the effective monitoring of businesses and corporations involved in large-scale development and investment projects, states should adopt legally binding corporate accountability standards that are based on international human rights norms. These standards should include

- Inclusion of the recognised right of free, prior, informed consent for affected communities and Indigenous Peoples.
- Mandatory reporting by companies of their performance and compliance with these standards.
- The creation of an independent Ombudsperson to receive and investigate complaints and to monitor compliance.
- Mechanisms to suspend state services and supports to businesses and corporations that are not in compliance with these standards.
- Legal remedies in the home state for host state nationals affected by large-scale development projects.

⁵ See the Paris Principles. Available at <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>.

Each state should establish and promote its National CSR Framework, which should be compliant with the purpose and substance of existing international human rights law established by treaty and customary international law. These frameworks can draw from approaches already established e.g. the International Finance Corporation, United Nations Global Compact Guidelines and the Ruggie Principles referred to earlier, but can and should expand on those, particularly in relation to gaps in the national regulatory framework. The National CSR Framework can include details on principles, guidelines, standards, best practices, performance criteria and public information requirements.⁶

LRWC also recommends that the national CSR frameworks should explicitly include recognition of the importance of the work of HRDs including participation in peaceful protests and detail how their work can be supported.

In relation to enforcement, LRWC recommends that states ensure that

- Existing criminal laws extend to project sponsors for crimes directly relevant to the protection of human rights, such as violent crimes. Criminal liability should arise for the acts of the project sponsor as well as its failure to act to prevent such crimes, either by its own conduct, the conduct of its employees or agents, or of companies belonging to the corporate group throughout its global operations.
- Civil liability against a project sponsor is provided for, where a harm or prejudice to human rights is caused by its own conduct (including the conduct of its employees or agents, or of companies belonging to corporate group throughout its global operations) or by its failure to act.
- State administrative regulations (in areas such as labour regulation, environmental and consumer protection) can hold project sponsors to account for their failure to respect human rights. In addition, states should require human rights due diligence as the basis of approval for licenses and permits for large-scale development projects. For example,

⁶ A study undertaken for the World Bank in 2002 described four main public sector roles in the area of states' CSR engagement, including that of 'mandating', where governments define minimum standards for business performance that are embedded in the legal framework; 'facilitating', where the public sector enables or incentivises companies to engage in CSR activities, or to drive local social and environmental improvements; 'partnering', where the public sector builds partnerships between the public sector, the private sector and civil society to tackle social and environmental problems, and 'endorsing', where the public sector recognises and promotes best practice through the production of policy documents, award and recognition schemes etc. LRWC suggests that national frameworks outline public sector roles in these four areas. See Tom Fox, Halina Ward & Bruce Howard, "Public Sector Roles in Strengthening Corporate Social Responsibility; A Baseline Study" IIED for the World Bank Corporate Social Responsibility Practice (The World Bank, 2002), 2-6. Available at <http://pubs.iied.org/pdfs/16017IIED.pdf>.

existing environmental impact assessment and permitting should include human rights due diligence.⁷

In addition, LRWC recommends that home states should ensure that corporations, whose parent companies are under their jurisdiction, respect human rights in their overseas operations. This requires the creation of statutory provision within the home state to regulate corporations' compliance with international human rights, irrespective of the site of violations or the nationality of victims.

5. In your view, should development co-operation programmes integrate the role of human rights defenders and the notion of a safe and enabling environment in recipient countries? How do you think the expertise of human rights defenders on the ground can be best used to design, implement, monitor and evaluate development cooperation programmes? How should security/protection concerns be addressed when necessary?

Yes, development co-operation programmes should integrate the role of HRDs and must promote a safe enabling environment in recipient countries.

HRDs should be consulted in the design, implementation, monitoring and evaluation of development co-operation programmes.

Adequate protection of the safety of HRDs is of paramount importance and must include timely investigation, identification and punishment of perpetrators of violations against HRDs. Currently, HRDs have no protection from attacks and little hope of obtaining civil or criminal remedies. State authorities are often complicit or directly responsible for attacks on HRDs. Protection from the host state is unavailable either because of complicity of state authorities or state co-operation with project sponsors. Recommendations for protections from international bodies are not timely enough to be effective and in any event, are often ignored. Home states do not have statutory provisions to enable actions to be brought on behalf of nationals of the host state. Effective protections for HRDs under attack are virtually non-existent and impunity for the perpetrators of violations against HRDs is virtually seamless.

⁷ Olivier deSchutter, Anita Ramastry, Mark B. Taylor, Robert Thompson, "Human Rights Due Diligence: The Role of States" (ECCJ, ICAR, CNCA: December 2012). Available at <http://www.corporatejustice.org/New-article.1344.html?lang=en>.