

# **FEATURE ARTICLE**

# Damn the Dam

## The Impacts of Hydropower Development on the Rights of the Adivasi Janajati of Nepal

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### Abstract

*Nepal is rich in hydropower resources, with 83,000 MW worth of hydropower energy potential waiting to be tapped. The country currently generates only 968 MW of hydropower energy. The Government of Nepal is quite keen on developing these resources for supposed economic growth and progress. There are, however, very few studies that use a rights-based approach to illustrate the possible effects of hydropower development on Indigenous Peoples. Fewer still are studies that use the rights-based approach to demonstrate the effects of hydropower development on the Adivasi Janajati, Nepal's Indigenous Peoples. This study is an attempt to bridge that gap. The research queries how hydropower development impacts the rights of the Adivasi Janajati in Nepal. The rights-based approach to hydropower development is used as a conceptual framework for studying and analyzing the said impacts. This study uses the case study approach to represent the said hydropower development impacts. Drawing on primary data from in-depth interviews and field research as well as secondary data gathered from various official documents, researches, reports, and news articles, this paper argues that, more often than not, hydropower development in Nepal violates the rights of the Adivasi Janajati. This study also asserts that the Adivasi Janajati have a deep connection to their ancestral lands, and loss of these ancestral lands will have devastating consequences for them. Finally, this research demonstrates that the rights-based approach to hydropower development is an effective tool in studying the impacts of hydropower development on Indigenous Peoples. This study can be utilized by government entities, advocacy groups, non-government organizations, and dam financiers and developers to more clearly understand what is at stake for and lost by the Indigenous Peoples in hydropower development. While Nepal is a party to the Indigenous and Tribal Peoples' Convention and is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples, it is clear that more needs to be done to secure the rights of the Adivasi Janajati in the country.*

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## I. Introduction

Nepal has, for quite some time now, been developing its rich hydropower resources through large dam development projects. While the country has about 83,000 megawatts (MW) of potential hydropower energy it can harness, its generators only produced 968 MW hydropower electricity as of 2017.<sup>1</sup> Policies related to exploiting the country's vast hydropower potential are currently designed to encourage private sector involvement following policy structure agreements the Government of Nepal agreed with the World Bank.<sup>2</sup>

Hydropower development in Nepal, though, has met with criticisms and protests, particularly from the *Adivasi Janajati*, the country's Indigenous Peoples. A large number of large dam projects in Nepal are located in the ancestral lands of the *Adivasi Janajati*. In many instances, indigenous rights, particularly those of self-determination and free, prior, and informed consent are overlooked, deliberately or otherwise, in the course of dam construction, whether in the pre-implementation, implementation, and post-implementation phases. Violations of the rights of the *Adivasi Janajati* concerning hydropower development have been documented by indigenous rights organizations.<sup>3</sup>

This paper questions how hydropower development impacts the rights of the *Adivasi Janajati* in Nepal. The results of this study can be utilized by indigenous rights organizations looking for further evidence of the impacts of hydropower development. It can also be a useful resource for entities involved in hydropower development to better understand what is at stake for the *Adivasi Janajati* when development projects such as large dams encroach on their ancestral lands.

This study uses the case study method to provide a more in-depth understanding of the problem at hand. Primary data was gathered from interviews with members of the *Adivasi Janajati* community affected by a large dam project in Nepal. Indigenous rights activists also served as respondents. In addition, this study analyzed documents from the hydropower project as well as from the International Finance Corporation (IFC). A

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<sup>1</sup> Asian Development Bank (ADB), *Nepal Energy Sector Assessment, Strategy, and Road Map*, ADB, Manila, 2017, p.5 available at <https://www.adb.org/sites/default/files/publication/356466/nepal-energy-assessment-road-map.pdf>, accessed 20 November 2018.

<sup>2</sup> Government of Nepal (GON), *Hydropower Development Policy*, 1992 available at [https://www.nea.org.np/admin/assets/uploads/supportive\\_docs/4561Hydropower%20Development%20Policy.pdf](https://www.nea.org.np/admin/assets/uploads/supportive_docs/4561Hydropower%20Development%20Policy.pdf) accessed on 4<sup>th</sup> November 2020; Government of Nepal, *Hydropower Development Policy*, 2001 available at <http://www.lawcommission.gov.np/en/wp-content/uploads/2018/09/hydropower-development-policy-2058-2001.pdf> accessed on 4<sup>th</sup> November 2020; World Bank, *Report and Recommendation of the President of the International Bank for Reconstruction and Development to the Executive Directors on a proposed first structural adjustment credit in an amount equivalent to \$50 Million to the Kingdom of Nepal*, 3 March 1987 available at <http://documents.worldbank.org/curated/en/511311468060281203/pdf/multi0page.pdf>, accessed on 14 June 2020.

<sup>3</sup> Lawyers Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP), *Study on the impact of the Upper Trishuli-1, 216 MW hydropower project on the indigenous communities of Rasuwa*, LAHURNIP, Kathmandu, 2017 available at [http://www.lahurnip.org/uploads/articles/UT%201%20Report\\_FINAL\\_ENG.pdf](http://www.lahurnip.org/uploads/articles/UT%201%20Report_FINAL_ENG.pdf) accessed on 20 October 2018; Sunuwar Welfare Society, *Hydropower development and right to Free, Prior, and Informed Consent (FPIC) of Indigenous Peoples: Study conducted in coordination with Lawyers Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) and the Asia Indigenous Peoples Pact Foundation*, Asia Indigenous Peoples' Pact (AIPP), Chiang Mai, 2010 available at [https://data.opendevelopmentmekong.net/en/dataset/hydropower-development-and-right-to-free-prior-and-informed-consent--fpic-of-indigenous-peoples/resource/c430b948-416f-434e-917c-9783d2722ef3?view\\_id=90f6eb70-f176-425b-8276-296141da3cc7](https://data.opendevelopmentmekong.net/en/dataset/hydropower-development-and-right-to-free-prior-and-informed-consent--fpic-of-indigenous-peoples/resource/c430b948-416f-434e-917c-9783d2722ef3?view_id=90f6eb70-f176-425b-8276-296141da3cc7), accessed on 19 November 2018.

critical review of literature related to hydropower development and reports and other documents from indigenous rights organizations and news agencies in Nepal was also conducted. This study focuses on the events surrounding the pre-implementation phase of a large dam project and its effects on the residents of *Hakubensi*, a small village in Nepal's *Rasuva* district. Majority of the residents of the said village are from the indigenous *Tamang* people.

This paper argues that hydropower development is violating the rights of the *Adivasi Janajati* in Nepal. It also asserts that the *Adivasi Janajati* are deeply connected to their ancestral lands and that to lose these lands would severely affect their ways of life. This study further argues that a rights-based approach to hydropower development is necessary in order to better understand what is at stake when implementing development projects in *Adivasi Janajati* ancestral lands.

The next part discusses various issues connected with Indigenous Peoples and hydropower development. The succeeding section then describes the findings of this study, along with a short description of the *Tamang* people, *Hakubensi* village and the dam project being studied.

## II. Indigenous peoples and hydropower development

The United Nations identifies Indigenous Peoples through several 'characteristics'. These are self-identification at the individual level, and acceptance of the said individual by the community; the group's historical linkage and continuity with pre-colonial or pre-settler societies; possessing a strong link to lands and territories and its natural resources; a distinct social, economic, or political system; a distinct language, culture, and beliefs; politically and/or economically marginalized in society; and the resolve to maintain their ancestral environments and systems as groups and communities distinct from the dominant ones.<sup>4</sup>

Nepal's Indigenous Peoples, the *Adivasi Janajati*, comprise about 36% of the country's 26.5 million people, divided into 59 officially recognized groups.<sup>5</sup> Most of them can trace their roots to the north of Nepal.<sup>6</sup> Recent studies in genetic structures of several *Adivasi Janajati* seem to support this assertion.<sup>7</sup>

Nepal is considered a low-income country, with an estimated gross domestic product

<sup>4</sup> Office of the High Commissioner on Human Rights (OHCHR), *Indigenous Peoples and the United Nations human rights system*, UN, Geneva, 2013 available at <https://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf> accessed on 1<sup>st</sup> December 2018.

<sup>5</sup> K.B. Bhattachan, *Country technical note on indigenous peoples issues: Federal Democratic Republic of Nepal*. IFAD, 2012, p. 12 available at [https://www.ifad.org/documents/38714170/40224860/nepal\\_ctn.pdf/63df5831-28f8-4d0c-8338-ac2062c7fa24](https://www.ifad.org/documents/38714170/40224860/nepal_ctn.pdf/63df5831-28f8-4d0c-8338-ac2062c7fa24), accessed 29 December 2018.

<sup>6</sup> V.B.S. Kansakar, 'History of population migration in Nepal,' vol. 5-6, *Himalayan Review*, 1973.

<sup>7</sup> A. Cole et al., 'Genetic structure in the Sherpa and neighboring Nepalese populations,' vol. 18, no. 102, *BMC Genomics*, 2017, pp.1-10; G.A. Gneccchi-Ruscione et. al., 'The genomic landscape of Nepalese Tibeto-Burmans reveals new insights into the recent peopling of Southern Himalayas,' vol. 7, no. 1, *Scientific Reports*, 2017, pp.1-12.

per capita income of USD 1004 in 2018.<sup>8</sup> It is, however, rich in hydropower resources, with an estimated 83,000 MW of hydropower available for development.<sup>9</sup> There are those who view Nepal's future progress as depending on optimal exploitation of its hydropower resources.<sup>10</sup> The Government of Nepal is determined to maximize its hydropower potential and has called on private sector involvement for this purpose.<sup>11</sup> Investment in hydropower in Nepal is still inconsiderable,<sup>12</sup> due mainly to weak infrastructure, political instability, and industrial conflict.<sup>13</sup>

Despite this, there were at least 20 large dams being planned or constructed in Nepal in 2017.<sup>14</sup> A large dam is defined by the International Commission on Large Dams,<sup>15</sup> an international non-government organization that compiles data on design, construction, and impacts of large dams worldwide, as any dam that rises to at least 15 meters high from its base or a dam between five and 15 meters that stores at least three million cubic meters of water.

Although dams are being touted as a clean, cheap, and 'green' alternative source of energy compared to fossil fuels,<sup>16</sup> the negative consequences of large dam development are enormous. Studies show that large dams account for a large portion of greenhouse gases released in the atmosphere that worsen climate change.<sup>17</sup> Other effects include fragmentation of river systems, massive deforestation, and loss of marine and land biodiversity.<sup>18</sup>

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<sup>8</sup> Government of Nepal (GON), *Economic Survey 2017/18 (Unofficial translation)*, Ministry of Finance, Kathmandu, 2018 available at [https://mof.gov.np/uploads/document/file/for%20web\\_Economic%20Survey%202075%20Full%20Final%20for%20WEB%20\\_20180914091500.pdf](https://mof.gov.np/uploads/document/file/for%20web_Economic%20Survey%202075%20Full%20Final%20for%20WEB%20_20180914091500.pdf), accessed on 1 June 2019.

<sup>9</sup> ADB (n 1), p. 5.

<sup>10</sup> F. Alam, et al., 'A review of hydropower projects in Nepal', vol. 110, *Energy Procedia*, 2017, pp. 581-585 available at <https://www.sciencedirect.com/science/article/pii/S1876610217302187?via%3Dihub>, accessed on 21 November 2018.

<sup>11</sup> GON (n 2).

<sup>12</sup> R.B. Bista, 'Economic liberalization in Nepal: Determinants, structure and trends of FDI', vol. 18, no. 1, *The Winners*, 2017, pp. 33-41.

<sup>13</sup> P.K. Shrestha, 'Economic liberalization in Nepal: Evaluating the changes in economic structure, employment, and productivity', vol. 1, no. 1, *Journal of Development Innovations*, 2017, pp. 60-83.

<sup>14</sup> Alam (n 10).

<sup>15</sup> International Commission on Large Dams (ICOLD), *Constitution*. ICOLD, Paris, 2011, p. 3 available at [https://www.icold-cigb.org/userfiles/files/CIGB/INSTITUTIONAL\\_FILES/Constitution2011.pdf](https://www.icold-cigb.org/userfiles/files/CIGB/INSTITUTIONAL_FILES/Constitution2011.pdf), accessed 26 December 2018.

<sup>16</sup> International Finance Corporation (IFC), *Hydroelectric power: A guide for developers and investors*, IFC, Stuttgart, 2015 available at <https://openknowledge.worldbank.org/handle/10986/22788>, accessed on 26 December 2018.

<sup>17</sup> B.R. Deemer et al., 'Greenhouse gas emissions from reservoir water surfaces: A new global synthesis', vol. 11, no. 1, *Bio Science*, 2016, pp. 949-964; P.M. Fearnside & S. Pueyo, 'Greenhouse-gas emissions from tropical dams', vol. 2, *Nature Climate Change*, 2012, pp. 382-384 available at <https://doi.org/10.1038/nclimate1540>, accessed 19 December 2018; I.B.T. Lima et al., 'Methane emissions from large dams as renewable energy resources: A developing nation perspective', vol. 13, *Mitigation and Adaptation Strategies for Global Change*, 2008, pp.193-206; C. Zarfl et al., 'A global boom in hydropower dam construction', vol. 77, *Aquatic Sciences*, 2015, pp. 161-170.

<sup>18</sup> R. Janson, 'The effects of dams on biodiversity,' cited in B. Johansson & B. Sellberg (eds), *Dams under debate*, Forskningsrådet Formas, Stockholm, 2006, pp.77-84 available at: [http://www.formas.se/PageFiles/5245/Dams\\_under\\_debate.pdf](http://www.formas.se/PageFiles/5245/Dams_under_debate.pdf), accessed 28 December 2018.; Y. Kano et al., 'Impacts of dams and global warming on fish biodiversity in the Indo-Burma hotspot', vol. 11, no. 8, *PLoS ONE*, 2016, pp.1-21; S. Schmutz & O. Moog, 'Ecological impacts and management', cited in S. Schmutz & J. Sendzimir (eds), *Riverine Ecosystem Management*, Aquatic Ecology Series, Springer, 2018; M.K. Pandit & M.E. Grumbine,

Around 40 to 80 million people have been displaced by large dam construction.<sup>19</sup> There are no estimates of those displaced from the year 2000 up to present, but with the resurgence of large dam construction in recent years, the number promises to be significant.<sup>20</sup>

Indigenous Peoples are disproportionately affected by large hydropower projects.<sup>21</sup> They are forced out of their ancestral lands, impoverished, and sometimes meet threats to their lives.<sup>22</sup> In Nepal, large dams, other development projects, and forest conservation have claimed 65 percent of ancestral lands.<sup>23</sup> This development has resulted in the *Adivasi Janajati* being some of the poorest people in Nepal.<sup>24</sup>

Several studies show how large dam construction has contributed to further impoverishment of the *Adivasi Janajati* during dam pre-implementation phase<sup>25</sup> and how the state and the companies behind large dam development have failed to respect the rights of the *Adivasi Janajati* to self-determination and free, prior, and informed consent.<sup>26</sup> Even the World Bank found itself in the midst of a controversy when a bank inspection panel found that the World Bank itself did not follow its own protocols on indigenous rights with regards to the *Arun III* hydropower project.<sup>27</sup> The 900 MW dam is one of the largest projects in Nepal in terms of foreign investment and, as the power from the dam will be exported to other countries, would have significantly added to the government's income. The project was revived recently and is currently under construction.

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<sup>19</sup> Potential effects of ongoing and proposed hydropower development on terrestrial biological diversity in the Indian Himalaya', vol. 26, no. 6, *Conservation Biology*, 2012, pp.1061-1071.

<sup>19</sup> World Commission on Dams, *Dams and development: A new framework for decision making*, Earthscan, London, 2000 available at [https://www.internationalrivers.org/sites/default/files/attached-files/world\\_commission\\_on\\_dams\\_final\\_report.pdf](https://www.internationalrivers.org/sites/default/files/attached-files/world_commission_on_dams_final_report.pdf), accessed on 5 November 2018.

<sup>20</sup> S. Pearce-Smith, 'The return of large dams to the development agenda: A post-development critique', vol. 11, *Consilience*, 2014, pp.123-131 available at <http://www.jstor.org/stable/26188733>, accessed 19 November 2018.

<sup>21</sup> A. Neef & J. Singer, 'Development-induced displacement in Asia: conflicts, risks, and resilience', vol. 25, no. 5, *Development in Practice*, 2015, pp.601-611 available at <http://dx.doi.org/10.1080/09614524.2015.1052374>, accessed 24 November 2018.

<sup>22</sup> M. Finley-Brook & C. Thomas, 'Treatment of displaced indigenous populations in two large hydro projects in Panama', *Water Alternatives*, 2010, pp.269-290 available at <http://www.water-alternatives.org/index.php/volume3/v3issue2/93-a3-2-16/file> accessed on 19 November 2018; *Annual report of human rights defenders at risk in 2017*, Frontline Defenders, Dublin, 2017 available at [https://www.frontlinedefenders.org/sites/default/files/annual\\_report\\_digital.pdf](https://www.frontlinedefenders.org/sites/default/files/annual_report_digital.pdf), accessed on 17 December 2018; Global Witness, *Annual report 2017 Spotlight on corruption*, Park Communications, London, 2017 available at <https://www.globalwitness.org/en/about-us/annual-reviews/>, accessed on 17 December 2018; A. Van Cleef, 'Hydropower development and involuntary displacement: Toward a global solution', *Indiana Journal of Global Legal Studies*, 2016, pp.349-376 available at <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1615&context=ijgls>, accessed 6 June 2019.

<sup>23</sup> Cultural Survival & National Coalition Against Racial Discrimination, *Observations on the human rights situation of indigenous peoples in Nepal in light of the UN Declaration on the Rights of Indigenous Peoples*, Second Cycle of UPR of Nepal, 2015 available at <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=2124&file=EnglishTranslation>, accessed on 23 December 2018.

<sup>24</sup> Bhattachan (n 5).

<sup>25</sup> S.Koirala, D. Hill & R. Morgan, 'Impacts of the delay in construction of a large scale hydropower project on potential displaces', *Impact Assessment and Project Appraisal*, 2017, pp.106-116.

<sup>26</sup> LAHURNIP (n 3).

<sup>27</sup> World Bank Inspection Panel, *Inspection panel report on request for inspection Nepal: Proposed Arun III hydroelectric project and restructuring of the Arun III access road project*, 1994 available at <http://documents.worldbank.org/curated/en/606771468779695098/Nepal-Arun-III-Hydroelectric-Project-Inspection-Panel-Report-on-the-Request-for-Inspection>, accessed 3 June 2019.

### III. The rights-based approach to hydropower development

The rights-based approach to hydropower development (RBAHD) is the use of human rights standards and norms in planning, implementation, operation and evaluation of hydropower development projects. This concept builds on the work done by hydropower development watchdog, International Rivers on using the rights-based approach to dam standards.<sup>28</sup>

The importance of using RBA in hydropower development is that it allows us to have a common standard, internationally recognized as such, with which to measure the impacts of hydropower development on project-affected people. The RBAHD assumes, first and foremost, that human beings have a set of inherent rights by virtue of being human. In addition, the RBAHD identifies both right holders and duty bearers in hydropower development, thus opening up avenues with which rights holders can seek redress and justice, should duty bearers fail to uphold and protect the rights of the project affected people.

In this study, the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* is used as a reference to enumerate the rights related to Indigenous Peoples in the context of hydropower development.<sup>29</sup> While the UNDRIP is not legally binding to countries, it is still an update on the International Labour Organization's *Indigenous and Tribal Peoples' Convention (C169)* of 1989. It also deals more strongly with such issues as self-determination, displacement, and militarization. It also enjoys much broader support than the C169, as the UNDRIP has been endorsed by at least 150 countries. In contrast, only 23 countries are party to C169.

### IV. Hydropower development and the *Adivasi Janajati* in Nepal: A case study

The small village of *Hakubensi* is located in *Rasuma* District, Bagmati, about 80 kilometers away from Kathmandu, Nepal's capital city. The village is home to 42 households, with an estimated population of 200 people.<sup>30</sup> The *Tamang* people are the predominant *Adivasi Janajati* living in *Hakubensi*. For the *Tamang* people, the land is life.<sup>31</sup> Most of the *Hakubensi* villagers are farmers, planting rice, corn, millet, and vegetables. They practice a type of Tibetan Buddhism intertwined with centuries-old *Tamang* beliefs. For seven days in April, they celebrate the *Sansaripuja*, where *Tamang* spiritual leaders would

<sup>28</sup> International Rivers, *Dam standards: A rights-based approach*, International Rivers, Berkeley, 2014 available at <https://www.internationalrivers.org/resources/dam-standards-a-rights-based-approach-8232>, accessed 13 December 2018.

<sup>29</sup> UN, *United Nations Declaration on the Rights of Indigenous Peoples*, 2007 available at [https://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](https://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf), accessed 30 November 2018.

<sup>30</sup> Nepal Water and Energy Development Company (NWEDC), *Indigenous Peoples' Plan NEP: Upper Trishuli 1 hydropower project*, NWEDC, Nepal, 2018c, para. 32 available at <https://www.adb.org/sites/default/files/project-documents/49086/49086-001-ipp-en.pdf>, accessed 31 May 2019.

<sup>31</sup> Interview with Tahal (not real name), Mark Anthony V. Ambay III, Researcher, Kathmandu, 22 May 2019, 13:30hrs.

invoke the blessings of Mother Nature.<sup>32</sup> Such practices show how deeply connected the *Tamang* people are to their ancestral lands.

*Hakubensi* lies less than 10 kilometers from the site of the Upper Trishuli 1 hydropower project (UT1). It is the pet project of the Nepal Water and Energy Development Company (NWEDC). Ownership of NWEDC, in turn, is divided between South Korean companies; Korea South-East Power (50%), Daelim Industrial Company (15%), Kyeryong Construction (10%), Nepali businessman Bkesh Pradhanang (10%), and the IFC (15%) through its project development venture fund.<sup>33</sup>

The project comprises of a run-of-river type of dam, where a river's water is diverted from its course to pass through tunnels and engines to generate electricity before being returned some distance away from the dam site.<sup>34</sup> The dam will operate under a build-own-operate-transfer scheme, and NWEDC will essentially own the UT1 for 35 years before turning it over to the Government of Nepal.

The dam will be 29.5 meters high, and 1090 workers will be employed for the project. In early 2019, NWEDC announced that it would start construction of the dam itself,<sup>35</sup> although construction of dam-related infrastructure and other activities commenced a few years before.

NWEDC acquired a total of 107.79 hectares for the UT1 project.<sup>36</sup> Of these, more than 84 hectares are national and community forests while the rest are private and *Guthi*-controlled lands. *Guthi* is a form of the social organization of the *Adivasi Janajati*. *Guthi*-controlled lands are lands owned by the *Guthi*, but wherein community members are allowed to till the land for their needs. Thirty-nine households composed of 154 families were considered tenants of the *Guthi* lands or owners of the private ones. Meanwhile, 422 families utilized the community forests for their livelihood, food, and other uses.<sup>37</sup>

In 2007, NWEDC was granted a survey permit by the Government of Nepal. Land surveys for the project site started in 2009.<sup>38</sup> Meanwhile, consultations with the project affected people started in 2012.<sup>39</sup> Construction of an access road and a bridge were initiated prior to 2015, although the said facilities were severely damaged by a major earthquake that hit Nepal in 2015.<sup>40</sup> Meetings to obtain the Free, Prior, and Informed Consent (FPIC) of the project-affected people were conducted in late 2018, resulting

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<sup>32</sup> *Ibid.*

<sup>33</sup> International Finance Corporation (IFC), 'Upper Trishuli', *IFC Disclosures Website* available at <https://disclosures.ifc.org/#/projectDetail/SII/35701>, accessed 5 June 2019.

<sup>34</sup> International Rivers, *Swindling rivers: Run-of-river hydro primer*, International Rivers, 2016 available at [https://www.internationalrivers.org/sites/default/files/attached-files/run\\_of\\_river\\_fact\\_sheet.pdf](https://www.internationalrivers.org/sites/default/files/attached-files/run_of_river_fact_sheet.pdf), accessed 1 June 2019.

<sup>35</sup> Tahal (n 31).

<sup>36</sup> NWEDC (n 30).

<sup>37</sup> *Ibid.*, para. 7.5-1.

<sup>38</sup> *Ibid.*, para. 8-1.

<sup>39</sup> *Ibid.*, para. 35.

<sup>40</sup> *Ibid.*, para. 2-8.



in the project affected people signing a consent agreement with the company as well as an Indigenous Peoples Plan, supposedly to assist the project affected people cope with the effects with the project construction. Following this, NWEDC announced in early 2019 that dam construction would commence sometime late in the year.

Article 2 of the UNDRIP provides that Indigenous Peoples “have the right to self-determination... (to freely) determine their political status and freely pursue their economic, social, and cultural development” and Article 10 stipulate that their FPIC should be obtained prior to commencement of any development projects or policies that may affect them as a community. Shradha Ghale, an indigenous journalist and novelist, opines that, in Nepal, it is usually government officials and big businesses who agree on large projects while *Adivasi Janajati* is mostly absent from any proceedings.<sup>41</sup> United Nations Special Rapporteur Victoria Tauli-Corpuz, in a message to the UN Human Rights Council, expressed her concern about the proliferation of large scale development projects that are “undertaken without consulting the Indigenous Peoples concerned, nor is their free, prior, and informed consent sought”.<sup>42</sup>

This appears to be the case for the UT1 project, as it is the government and NWEDC who agreed on the UT1 project. Tahal and Durga, both residents of *Hakubensi* village, do not remember ever being consulted by either government or NWEDC representatives prior to the approval of NWEDC’s survey permit.<sup>43</sup> They were not allowed to decide on whether they want the said project or not.

In addition, surveys and construction of project facilities started even without the consent of the project-affected people, thus violating their right to Free, Prior, Informed Consent (FPIC). NWEDC itself acknowledges that it deliberately did not seek the consent of the project affected people prior to land acquisition and facilities construction as there was no specific law in Nepal mandating such.<sup>44</sup> Furthermore, the company considers that FPIC can be obtained even if “individuals or groups within the community explicitly disagree”.<sup>45</sup> When they attended meetings held about the project, respondents to this study say they were only told about the project; their consent was not asked for.<sup>46</sup> This fact puts into question the sincerity of NWEDC and the Government of Nepal in respecting the rights to self-determination and FPIC of the *Adivasi Janajati* in the project affected area.

Karsang Tamang, an indigenous rights activist residing in the area, laments that the project affected people had no participation whatsoever in the design and planning

<sup>41</sup> Interview with S. Ghale, Mark Anthony V. Ambay III, Researcher, Kathmandu, 24 April 2019, 1500 hr.

<sup>42</sup> V. Tauli-Corpuz, ‘Statement of Ms. Victoria Tauli-Corpuz Special Rapporteur on the rights of indigenous peoples to the Human Rights Council 39th Session’, 2018, *Website of United Nations Special Rapporteurs* available at <http://unsr.vtaulicorpuz.org/site/index.php/en/statements/252-hrc-2018>, accessed 18 June 2019.

<sup>43</sup> Tahal (n 31); Interview with Durga (not real name), Mark Anthony V. Ambay III, Researcher, Kathmandu, 23 May 2019, 08:30hrs.

<sup>44</sup> NWEDC (n 30), para. 7.6-3.

<sup>45</sup> Ibid.

<sup>46</sup> Tahal (n 31); Durga (n 43).

of the UT1 project.<sup>47</sup> This situation goes against the right to participation, Indigenous Peoples possess. The project was presented to them ready-made. Lakpa Tamang, another indigenous rights leader living in the area, notes that company and government representatives initially talked only to district and municipal level officials and political party representatives; it was only much later that they would start conducting talks with the villagers themselves.<sup>48</sup>

Also, the meetings were held mostly in Nepali, in which majority of the *Tamang* people living in *Hakubensi* were not fluent. With the low level of education most of the residents of the village had, they were mostly unable to comprehend the technicalities of the discussion, and many of them left the meetings with no clearer understanding of the project or its consequences.<sup>49</sup> In addition, project documents are available on the company website only in the English language, and *Hakubensi* villagers possessed no copies of these project documents in the *Tamang* language,<sup>50</sup> thus limiting the ability of project-affected people not conversant in English to scrutinize information regarding the project further.

Just compensation for development induced displacement is stipulated in Article 28.2 of the UNDRIP. The article further clarifies that, whenever possible, compensation should be in the form of land, territory or resources at least equal to those lost due to the project. NWEDC admits that, from the onset, it did not even consider land-for-land compensation as viable; it instead opted for cash-for-land compensation for their land acquisition program.<sup>51</sup> Just compensation for the project affected people was clearly insufficient and unequal to what the project affected people lost to the project.

Previous research in the area indicates that the project and government representatives presented the sale of the ancestral lands as something non-negotiable.<sup>52</sup> Respondents to this study verify this claim, stating that the approach taken by the representatives was that the villagers had no choice but to agree to the cash-for-land compensation scheme.<sup>53</sup> In fact, the villagers were not even made aware that there was a land-for-land compensation option available, nor were they made aware of what their rights over their lands were as *Adivasi Janajati*.

Moreover, although the private landowners and *Guthi* land tenants affected were paid 500,000 rupees per 0.05 hectares of land, they were given no compensation for the residences, trees, and other structures that stood on their lands. The 422 families affected by the loss of the community forests were also not compensated for the loss of access to these forests, as it was the District Forest Office who claimed ownership

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<sup>47</sup> Interview with Karsang Tamang, Mark Anthony V. Ambay III, Researcher, Kathmandu, 24 May 2019, 13:00hrs.

<sup>48</sup> Interview with Lakpa Tamang, Mark Anthony V. Ambay III, Researcher, Kathmandu, 24 May 2019, 14:35hrs.

<sup>49</sup> Interview with Manoj (not real name), Mark Anthony V. Ambay III, Researcher, 23 May 2019, 15:30hrs

<sup>50</sup> Tahal (n 31).

<sup>51</sup> NWEDC (n 30), para. 7-5.3.

<sup>52</sup> LAHURNIP (n 3).

<sup>53</sup> Tahal (n 31); Durga (n 43).

of these forests as stipulated in Nepal's Forest Act.<sup>54</sup> Compensation was thus paid to the forest office instead of the project affected people. Since the farms and forests act as sources of food and livelihood, loss of these lands means less food on the table and hunger in the horizon for the *Adivasi Janajati* of *Hakubensi*.

The project will also reduce to 10 percent the water flow of the *Trishuli* River, which lies at the foot of the hill in which *Hakubensi* is located and which acts as a source of water for drinking, bathing, washing, irrigation, recreation, and religious purposes.<sup>55</sup> The lessened water flow will also immensely impact riverine biodiversity. This reduction, in turn, may lead to less fish catch for the *Hakubensi* villagers.

Along with the land, 27 residences were acquired by NWEDC and will soon be demolished to give way to the construction of project facilities.<sup>56</sup> The company relocated only two houses, and it is not clear why only these two houses were relocated and not the others. The other families had to buy new houses in other areas such as *Dhunche* or Kathmandu, where the price of land and the cost of living were higher. This additional expense significantly reduced the resources the families received from the cash-for-land compensation provided by NWEDC.

In return for the loss of livelihood, NWEDC verbally promised to provide one job for every family in the villages in the project affected area.<sup>57</sup> Yet during the construction of the access road and other facilities, workers from other parts of Nepal were hired instead of locals.<sup>58</sup> Also, NWEDC expressed its preference for hiring workers from outside the locality because of the lower wage rates.<sup>59</sup> And, if ever the company does hire the villagers, the tenure of employment will most likely be up to the project completion date five years from the start of dam construction.

It is clear from the incidences mentioned above that hydropower development in Nepal violates the rights of the *Adivasi Janajati*, the country's Indigenous Peoples. The *Tamang* people of *Hakubensi* village were not allowed to determine whether they wanted to have a dam or not in their ancestral lands, and their free, prior, and informed consent was not obtained until over one decade after the issuance of a survey permit for the company's activities and the commencement of these activities. Their participation in the design and planning of the project was not sought for either by NWEDC nor by the government.

Relevant information regarding the project was denied to the *Adivasi Janajati*, whether it be the use of Nepali in community meetings, or the use of English in project documents, both languages in which the majority of *Hakubensi* village are not fluent. The land loss was presented by NWEDC and government representatives as inevitable,

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<sup>54</sup> *Forest Act*, Nepal, 1993.

<sup>55</sup> NWEDC (n 30), para. ES 7-8.

<sup>56</sup> NWEDC (n 30), para. 7.5-1.

<sup>57</sup> *Durga* (n 43).

<sup>58</sup> NWEDC (n 30), para. 7-8.1.

<sup>59</sup> *Ibid.*

with cash-for-land compensation as the only compensation scheme available.

Loss of land and forests means loss of livelihood and less food for the villagers; it also means food insecurity and possible hunger in the horizon. Dam activities will also lead to a great reduction in water supply in the *Trishuli* River, threatening the villagers' right to water. Houses will be demolished for the project with no relocation provided for the vast majority of the families to be displaced.

Because the *Adivasi Janajati* are deeply connected to their lands, the great changes brought about and will continue to be brought about by the UT1 project spells disaster for the ways of life of the *Hakubensi* villagers. Through the use of the rights-based approach in viewing the effects of hydropower development, it is now much clearer to us what Nepal's Indigenous Peoples have to lose in the hydropower development projects like UT1.

## V. Conclusion: Development and Human Rights

There is no debate when we say that energy is important for the progress of any country. The Government of Nepal is currently trying to produce this energy through the exploitation of its vast hydropower resources. A large number of large dam projects, however, are in the lands of the *Adivasi Janajati*.

The *Adivasi Janajati* are deeply connected to their ancestral lands. The livelihood and ways of life of the *Tamang* of *Hakubensi* village reflect this connection. However, this connection, as well as their rights, is threatened by the arrival of the Upper *Trishuli* 1 hydropower project.

Through the data presented above and by the use of a rights-based lens, this paper shows how NWEDC and the government violated the rights of the *Tamang* people of *Hakubensi*. The rights of the *Adivasi Janajati* to self-determination and free, prior, and informed consent were not respected. Their rights to their ancestral lands, food, water, housing, and work are also endangered by the project, and the displacement of the project affected families promises more violations of indigenous rights to come.

The implications of this situation are staggering. Indigenous Peoples have time and again been pitted against the interests of profit-oriented entities, damning Indigenous Peoples to lose their lands, livelihoods, ways of life, and even their very lives in the name of so-called 'development'. While numerous political, anthropological, sociological, and historical studies abound regarding Indigenous Peoples, what is often forgotten is that the history, culture, and ways of life of Indigenous Peoples are likely to disappear in the face of the onslaught of development projects. What is worrying is that, given the current situation, it seems that it is quite easy right now to disregard the rights of Indigenous Peoples, indeed, the rights of everyone, in the name of 'development'.

Although this paper shows how hydropower development has violated Indigenous Peoples' rights, this does not mean that development projects such as large dams should be scrapped in their entirety. Further studies should be made, though, to develop new

ways of ensuring that, in the mad rush for development, the rights of project-affected people are upheld and respected. Development should never come at the expense of human rights.