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WATER, BUSINESS AND HUMAN RIGHTS: INSIGHTS FROM THE TRANSBOUNDARY RIVER BASINS OF GANGES-BRAHMAPUTRA-MEGHNA (GBM) AND SALWEEN BASINS



OXFAM

This Briefing Paper has been prepared by Oxfam's Transboundary Rivers of South Asia ([TROSA](#)) programme. TROSA is a regional water governance programme implemented by Oxfam and partners in Bangladesh, India, Myanmar and Nepal. Adopting a human rights-based approach to governance of shared waters in transboundary basins, the programme supports communities' participation and women leadership in water governance, and engage in dialogue, build evidence base and contribute to policy reform and formulation in order to secure their rights to water, and to a secure and resilient livelihood. TROSA works with civil society organisations (CSOs), governments and the private sector, including through multi-stakeholder partnerships and dialogues. One of the key programme objectives is to engage with businesses and private sectors to ensure business practices and investments respect peoples' rights, and embrace responsible and inclusive business practices.

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EXECUTIVE SUMMARY

The rivers of the Ganges-Brahmaputra-Meghna and Salween basins face numerous threats. Unregulated infrastructure developments, unplanned land use practices, climate change, agricultural run-off, poor household waste management practices and increased urbanisation are all serious threats. Conflict and a lack of cooperation amongst river stakeholders also works to leave poor and marginalised riverine communities vulnerable. Women are often disproportionately impacted when the health of rivers and river basins is undermined because of their significant contribution to agriculture and significant role managing household water consumption and food sources.

Business activity can also create additional threats. Private sector activity is essential and provides many of the goods and services we consume, and provides employment for millions of people. Yet private sector activity can also undermine peoples' human rights, including their right to water. Business activity – including the building of large infrastructure projects such as hydropower dams, sand mining, and industrial pollution – can degrade and deplete rivers, and restrict community access to rivers. This has an adverse impact on peoples' ability to produce food, ensure their health, secure a livelihood and enjoy cultural and customary practices.

The right to clean water is a fundamental human right and one that is clearly established in international human rights law. Water is essential for the full enjoyment of life, and is essential to the enjoyment of all human rights. Water is necessary to produce food, ensure environmental hygiene, secure a livelihood and, for many people, to enjoy cultural practices. The enjoyment of human rights is closely linked to the environment in which people live. For river dependent communities, the environmental health of those rivers and the forests, floodplains and other areas in their watersheds are critically important for the realisation of a range of rights.

Governments and businesses have the potential through their actions and inactions, and both positively and negatively, to impact on human rights and peoples' right to water. Yet they have different obligations with respect to human rights. The different obligations of governments and business are articulated in the UN Guiding Principles on Business and Human Rights. These are:

- The state (or government) duty to protect against human rights abuse by third parties, including business.
- The corporate responsibility to respect human rights and address adverse impacts with which they are involved.
- Access to remedy for victims of business-related human rights abuse.

A range of complementary approaches, which are described in this briefing paper, can address some of the threats from private sector activity on the transboundary rivers of the GBM and Salween river basins, and to peoples' right to water and other fundamental human rights. Some of these approaches might usefully bridge the gap between business and human rights, and water governance practice. This, and governments and businesses better meeting their human rights obligations, will have positive outcomes for the environment, people and their right to water. Critical to this is ensuring public access to environmental information, and participation in decision-making processes. Too often communities, including women, Indigenous Peoples and human rights defenders, are excluded from decision-making processes to the detriment of their communities and the environment.

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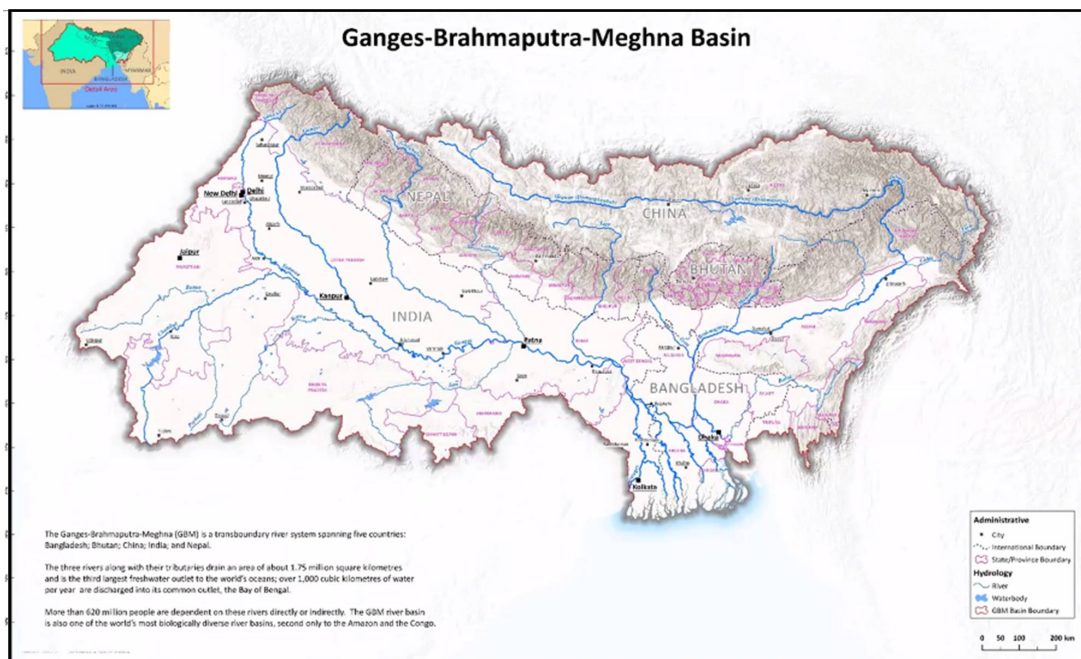
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Acronyms

ADB	Asian Development Bank
ASEAN	Association of Southeast Asian Nations
BIMSTEC	Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation
CBWG	Community based water governance
CSO	Civil society organisation
GBM	Ganges-Brahmaputra-Meghna
IFC	International Finance Corporation
NAP	National Action Plan on Business and Human Rights
NHRIs	National Human Rights Institutions
SAARC	South Asia Association for Regional Cooperation
SASEC	South Asia Subregional Economic Cooperation
SEA	Strategic Environmental Assessment
TROSA	Transboundary Rivers of South Asia
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

1. INTRODUCTION

In the Ganges-Brahmaputra-Meghna (GBM) river basin of Bangladesh, Bhutan, China, India and Nepal and the Salween river basin of China, Myanmar and Thailand millions of people depend on rivers to provide the water that is essential to produce food, ensure their health, secure a livelihood and enjoy cultural and customary practices. More than 10 million people depend on the Salween river basin for their livelihoods,¹ and at least 630 million people live in the GBM river basin – in Bangladesh for example approximately 75% of the population lives in the GBM river basin and in India approximately 40% of the population does.²



MAP: [Source: IUCN BRIDGE, 2017] <https://www.iucn.org/news/asia/201711/civil-society-organisations-launch-vision-cooperative-governance-ganges-brahmaputra-meghna-basins>

The rivers of the GBM and Salween basins face numerous threats, as do the people who depend on these rivers for their food, health, livelihoods and culture. Unregulated infrastructure developments, unplanned land use practices, and climate change are all serious threats. Conflict and a lack of cooperation amongst river stakeholders also works to leave poor and marginalised riverine communities vulnerable. Women are often disproportionately impacted when the health of rivers and river basins is undermined because of their significant contribution to agriculture and significant role managing household water consumption and food sources.

¹ Food and Agriculture Organization of the United Nations, Salween River Basin, AQUASTAT Survey – 2011, http://www.fao.org/nr/water/aquastat/basins/salween/salween-CP_eng.pdf

² Food and Agriculture Organization of the United Nations, Ganges-Brahmaputra-Meghna River Basin, AQUASTAT Survey – 2011, http://www.fao.org/nr/water/aquastat/basins/gbm/gbm-CP_eng.pdf

Business activity can also create additional threats. Private sector activity – undertaken by micro through to large multinational enterprises – is essential and provides many of the goods and services consumed in the region, and provides employment for millions of people. Yet private sector activity can also undermine peoples’ human rights, including their right to water and other fundamental human rights. Business activity can divert, degrade, deplete and pollute rivers and other water sources, and restrict community access to rivers, which then has adverse impacts on peoples’ lives. This can then lead to conflict between communities and business enterprises.

Oxfam’s Transboundary Rivers of South Asia (TROSA) program is working to address some of these threats, and to help communities secure their rights to water and to a secure and resilient livelihood. TROSA is a five-year (2017-2021) regional water governance program implemented by Oxfam and partners in Bangladesh, India, Myanmar and Nepal. The program supports communities to participate in water governance, and engage in dialogue, build an evidence base and contribute to policy reform and formulation. TROSA also works with civil society organisations (CSO), governments and the private sector, often through multi-stakeholder partnerships and dialogue. Oxfam’s engagement with the private sector is aimed at ensuring business practices and investments recognise and respect peoples’ rights, and embrace responsible and inclusive business practices.

Water governance is a business and human rights issue yet too often water governance, and environmental issues more broadly, are missing from the business and human rights debate. This briefing paper fills a gap in stakeholders’ understanding of these linkages. The briefing paper outlines the right to water, explains the different obligations of governments and business with regards to human rights including the right to water, describes some of the business-related activities that threatens the rivers of the GBM and Salween basins, and proposes some possible solutions.

2. HUMAN RIGHTS AND THE ENVIRONMENT, AND THE RIGHT TO WATER

2.1 International human rights standards

The right to clean water is a fundamental human right³ and one that is clearly established in international human rights law. Water is essential for the full enjoyment of life, and is essential to the enjoyment of all human rights⁴ including the right to development, food, health and housing.⁵ Water is necessary to produce food, ensure environmental hygiene (an aspect of the right to health), secure a livelihood and, for many people, to enjoy cultural practices.⁶ The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.⁷ An adequate amount of safe water is necessary to prevent death from dehydration, reduce the risk of water-related disease and provide for consumption, cooking, and personal and domestic hygienic requirements. The COVID-19 pandemic has highlighted the critical importance of the human right to water in preventing people from contracting and spreading disease. People with limited access to water and safe sanitation services are at a much higher risk of COVID-19 infection.⁸ Frequent hand washing with soap and water, necessary to prevent the spread of COVID-19, is not possible without access to sufficient, safe, acceptable, physically accessible and affordable water.

The right to safe drinking water for all people is derived from the right to an adequate standard of living and the right to the highest attainable standard of physical and mental health (both of which are recognised in the International Covenant on Economic, Social and Cultural Rights).⁹ The Convention on the Rights of the Child recognises the importance of clean drinking water to combat disease in children, and highlights the dangers and risks to children of environmental pollution.¹⁰

³ UN General Assembly Resolution 54/175, The right to development, A/RES/54/175, 15 February 2000, <https://undocs.org/pdf?symbol=en/A/Res/54/175>

⁴ UN General Assembly Resolution 64/292, The human right to water and sanitation, A/RES/64/292, 3 August 2010, <https://undocs.org/A/RES/64/292>

⁵ UN General Assembly Resolution 54/175, The right to development, A/RES/54/175, 15 February 2000, <https://undocs.org/pdf?symbol=en/A/Res/54/175> and Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water, E/C.12/2002/11, 20 January 2003, https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water, E/C.12/2002/11, 20 January 2003, https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water, E/C.12/2002/11, 20 January 2003, https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

⁸ Dina Lupin Townsend, COVID-19 Symposium: COVID-19 and the Human Right to Water and Sanitation, 31 May 2020, <https://opiniojuris.org/2020/03/31/covid-19-symposium-covid-19-and-the-human-right-to-water-and-sanitation/>

⁹ UN Human Rights Council Resolution 15/9, Human rights and access to safe drinking water and sanitation, A/HRC/RES/15/9, 6 October 2010

¹⁰ Convention on the Rights of the Child, Article 24, <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

The right to water should be enjoyed without discrimination, and enjoyed equally between women and men.¹¹ The right of women to water (along with other things important to enjoy adequate living conditions) is specifically recognised in the Convention on the Elimination of All Forms of Discrimination against Women.¹²

The enjoyment of human rights is closely linked to the environment in which people live. For river dependent communities, the environmental health of those rivers and the forests, floodplains and other areas in their watersheds are critically important for the realisation of a range of rights. Human rights and environmental protection are interrelated. In this regard the UN Special Rapporteur on Human Rights and the Environment has made clear that a safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights.¹³ The Special Rapporteur has also made clear that it is governments who have key obligations here.¹⁴ Governments through a variety of policy and regulatory tools, and their own practices, should prevent pollution, ensure sustainable and equitable natural resource use, and protect and conserve ecosystems and biological diversity to allow the enjoyment of human rights. Governments should also ensure the effective enforcement of their environmental standards against public and private actors. The Special Rapporteur has also urged that governments do not use the current COVID-19 crisis to as an excuse to weaken environmental protections – a number of governments have said they would lower environmental standards, suspend environmental monitoring requirements, reduce environmental enforcement, and restrict public participation.¹⁵

The Special Rapporteur has also made clear that the exercise of human rights, such as freedom of expression and association and rights to education and information, helps to protect the environment. Further, governments must provide a safe and enabling environment for human rights defenders to operate free from threats, harassment, intimidation and violence.¹⁶

¹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water, E/C.12/2002/11, 20 January 2003, https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf


¹² Convention on the Elimination of All Forms of Discrimination against Women, Article 14, <https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

¹³ UN Special Rapporteur on Human Rights and the Environment, Framework Principles on Human Rights and the Environment (2018), <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>

¹⁴ UN Special Rapporteur on Human Rights and the Environment, Framework Principles on Human Rights and the Environment (2018), <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>

¹⁵ UN Special Rapporteur on Human Rights and the Environment, COVID-19: “Not an excuse” to roll back environmental protection and enforcement, UN rights expert says, 15 April 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25794&LangID=E>

¹⁶ UN Special Rapporteur on Human Rights and the Environment, Framework Principles on Human Rights and the Environment (2018), <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>



Human rights defenders: protecting the right to water, land and natural resources

Human rights defenders, community leaders and activists, women's leaders, indigenous leaders, journalists and lawyers do essential work to protect rivers and watersheds, and to protect community rights to water. Defending human rights can be dangerous work though, including when defending human rights against private sector activity.¹⁷

Across the countries of the GBM and Salween river basins CSOs find themselves under increasing pressure if they raise issues linked to the rights to water are being silenced through physical violence, illegal arrest, arbitrary detention and judicial harassment, and restrictions on freedom of expression and association.

In Myanmar for example, anti-dam activists risk fines or imprisonment for organising public protests against dam development.¹⁸ Environmental activists also face police and judicial harassment. In one recent example, an arrest warrant was issued for prominent environmental activist ostensibly for participating in a ceremony where prayers were offered to protect water source from pollution by a coal-fired cement factory.¹⁹ In India, to take another example, journalists investigating illegal sand mining have been threatened with violence and killed.²⁰ Community members in both India and Nepal who confront sand miners have also been killed.²¹

Gravel and boulder mining in the Mahakali river, Nepal

Photo: Jyotiraj Patra/Oxfam

The right of Indigenous Peoples to the conservation and protection of the environment, and the productive capacity of their lands and resources, is specifically promoted in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).²² The UNDRIP also promotes the rights of Indigenous Peoples to participate in decision-making in matters which affects their rights; to determine and develop priorities and strategies for the development or use of their lands and other resources; and to give their free, prior and informed consent for the development of projects that affect their lands and resources, including their water resources. These rights are fundamental to the exercise of self-determination, which is a right also promoted in the UNDRIP. These rights exist in addition to the right to water that all people enjoy.

¹⁷ Global Witness, *Enemies of the State? How governments and business silence land and environmental defenders*, 2019, <https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state/>

¹⁸ see for example <https://www.irrawaddy.com/news/police-open-case-anti-myitsone-dam-protest-leader.html>

¹⁹ <https://www.irrawaddy.com/news/burma/environmental-activist-faces-arrest-myanmars-karen-state-rights-groups-object.html>

²⁰ see for example <https://www.theguardian.com/environment/2019/jun/17/writing-truth-weighing-heavily-on-my-life-murder-jagendra-singh>

²¹ see for example <https://www.recordnepal.com/wire/features/sand-mafia-murder-dhanusha-youth-who-fought-back/>

²² United Nations Declaration on the Rights of Indigenous Peoples, Article 29, https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Bangladesh, India, Myanmar and Nepal (the four countries in Oxfam's TROSA program) are all signatories to the International Covenant on Economic, Social and Cultural Rights (the key international human rights treaty on which the right to water is established). All four countries are also signatories to the Convention on the Rights of the Child; and Convention on the Elimination of All Forms of Discrimination against Women. India, Myanmar and Nepal, but not Bangladesh, support the UNDRIP. Bangladesh, India and Nepal, but not Myanmar, are also signatories to the International Covenant in Civil and Political Rights – where the right to information, peaceful assembly and freedom of association (among others), and which are relevant to the protection of water, land and natural resources – are established.

2.2 National frameworks

Courts in both Bangladesh and India have interpreted each country's constitution to encompass or imply the protection and preservation of a healthy environment or the right to a healthy environment.²³ The Nepalese constitution explicitly promotes the rights of citizens to live in a clean and healthy environment, and to obtain compensation for inquiry caused by environmental pollution or degradation. No such rights-based provisions (or court interpretations) exist in Myanmar's constitution (although the constitution includes a more general duty of the state to protect and conserve the natural environment).²⁴ However, the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration, which Myanmar and neighboring Thailand have affirmed, promotes the right to safe drinking water and sanitation, and to a safe, clean and sustainable environment.²⁵

Bangladesh's National Water Policy recognises water as a basic human right and promotes the role of all stakeholders, including women and civil society in water projects.²⁶ India's National Water Policy²⁷ (which is being updated in 2020) also promotes community participation and, like the Bangladesh policy, a framework for various areas of water policy including water planning and management, conservation, water supply and sanitation. Similarly, Nepal is guided by its Water Resource Strategy (2002) and National Water Plan (2005), and Myanmar by its National Water Policy (2014). Not surprisingly, gaps exist between these policies and their implementation.²⁸

²³ Special Rapporteur on human rights and the environment, Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties: Asia-Pacific Region, A/HRC/43/53/Annex V, 14 February 2020, available at

<https://www.ohchr.org/en/issues/environment/srenvironment/pages/annualreports.aspx>

²⁴ Special Rapporteur on human rights and the environment, Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties: Asia-Pacific Region, A/HRC/43/53/Annex V, 14 February 2020, available at

<https://www.ohchr.org/en/issues/environment/srenvironment/pages/annualreports.aspx>

²⁵ ASEAN Human Rights Declaration, 18 December 2012, <https://asean.org/asean-human-rights-declaration/>

²⁶ Ministry of Water Resources, Government of Bangladesh, National Water Policy, 1999.

http://old.warpo.gov.bd/policy/nw_policy.pdf

²⁷ Ministry of Water Resources, Government of India, National Water Policy (2012),

http://mowr.gov.in/sites/default/files/NWP2012Eng6495132651_1.pdf

²⁸ See for example <https://www.indiawaterportal.org/articles/policy-practice-can-national-water-policy-2020-bridge-gap>

The South Asia Association for Regional Cooperation (SAARC) does not have its own equivalent to ASEAN's Human Rights Declaration. Nor does it have an equivalent to the ASEAN Intergovernmental Commission on Human Rights, whose work occasionally considers issues of business and human rights,²⁹ and human rights and the environment.³⁰ Sub-regional initiatives such as the South Asia Subregional Economic Cooperation (SASEC) and Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), whose work includes a focus on issues such as inland water transport and fisheries, do not have mechanisms on human rights either. This is something that should be rectified.

Finally, it is worth noting that in 2019 the Bangladesh High Court granted its rivers the status and rights of a living entity, a move the National River Conservation Commission of Bangladesh said was an "unprecedented order that would help the vast ecology and biodiversity of Bangladesh's river system".³¹ In 2017 the Uttarakhand High Court in India declared the Yamuna and Ganges rivers living entities, although the court's decision was later overruled. Elsewhere, Colombia and New Zealand have also given some of their rivers living entity status.

²⁹ See for example <https://aichr.org/news/aichr-interregional-dialogue-sharing-good-practices-on-business-and-human-rights-4-6-june-2018-bangkok-thailand/>

³⁰ See for example <https://aichr.org/news/asean-explores-framework-for-an-effective-environment-impact-assessment-to-ensure-sustainable-development-2/>

³¹ Quoted in https://www.business-standard.com/article/pti-stories/bangladesh-declares-its-rivers-legal-persons-119070201486_1.html

3. DUTIES AND RESPONSIBILITIES OF GOVERNMENTS AND BUSINESSES

Governments and businesses have the potential through their actions and inactions, and both positively and negatively, to impact on human rights and peoples' right to water. Yet they have different obligations with respect to human rights. The different obligations of governments and business are best articulated in the UN Guiding Principles on Business and Human Rights (UNGPs).³² The Guiding Principles are based on international human rights law obligations (some of which have been described elsewhere in this briefing paper).

The UNGPs are based on three complementary pillars.³³ These are:

01 The state (or government) duty to protect against human rights abuse by third parties, including business

02 The corporate responsibility to respect human rights and address adverse impacts with which they are involved

03 Access to remedy for victims of business-related human rights abuse.

3.1 State duty to protect

The state duty to protect as described in the UNGPs sits alongside obligations to not undermine or interfere with the enjoyment of the right to water (and other fundamental human rights), and to fulfill the right to water, both of which are described in the text box below. The duty to protect requires governments to take action to prevent, investigate, punish and redress any human rights abuse by third parties, including business, through policy, legislation and regulation and adjudication.³⁴ Specially as it relates to the right to water, this may require that

³²United Nations Guiding principles on business and human rights, 2011, HR/PUB/11/04, https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

³³United Nations Guiding principles on business and human rights, 2011, HR/PUB/11/04, https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

³⁴United Nations Guiding principles on business and human rights, 2011, HR/PUB/11/04, https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

governments adopt legislation and other measures to stop businesses from denying equal access to water, and from polluting and inequitably extracting water resources, including from natural sources.³⁵

Importantly, given that many businesses operate transnationally, the state duty to protect has extraterritorial obligations. This requires governments to take steps necessary to prevent human rights violations abroad by corporations domiciled in their territory or jurisdiction, such as by requiring corporations to act with due diligence to identify, prevent and address abuses by subsidiaries and business partners, wherever they may be located.³⁶ These obligations are particularly important in cases where the remedies available to victims before domestic courts where the harm occurs are unavailable or ineffective. The European Union recently announced that it would legislate mandatory human rights and environmental due diligence in European Union companies' global supply chains.

Governments' obligations to respect and fulfil the right to water

Governments must not undermine or interfere with the enjoyment of the right to water. This means that governments should not deny or limit access to water, arbitrarily obstruct customary water allocation arrangements, unlawfully pollute water, or destroy water services and infrastructure as a punitive measure.³⁷

Governments also have an obligation to fulfil the right to water.³⁸ This means governments should (among other things) ensure that water is affordable for everyone; facilitate improved and sustainable access to water; and adopt strategies and programs to ensure that there is sufficient and safe water for present and future generations. Governments should also provide water to individuals or groups who are unable, for reasons beyond their control, to access sufficient and safe water themselves.³⁹



Photo by Patrick Beznoska on Unsplash

³⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water, E/C.12/2002/11, 20 January 2003, https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

³⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, <https://digitallibrary.un.org/record/1304491?ln=en>

³⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water, E/C.12/2002/11, 20 January 2003, https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

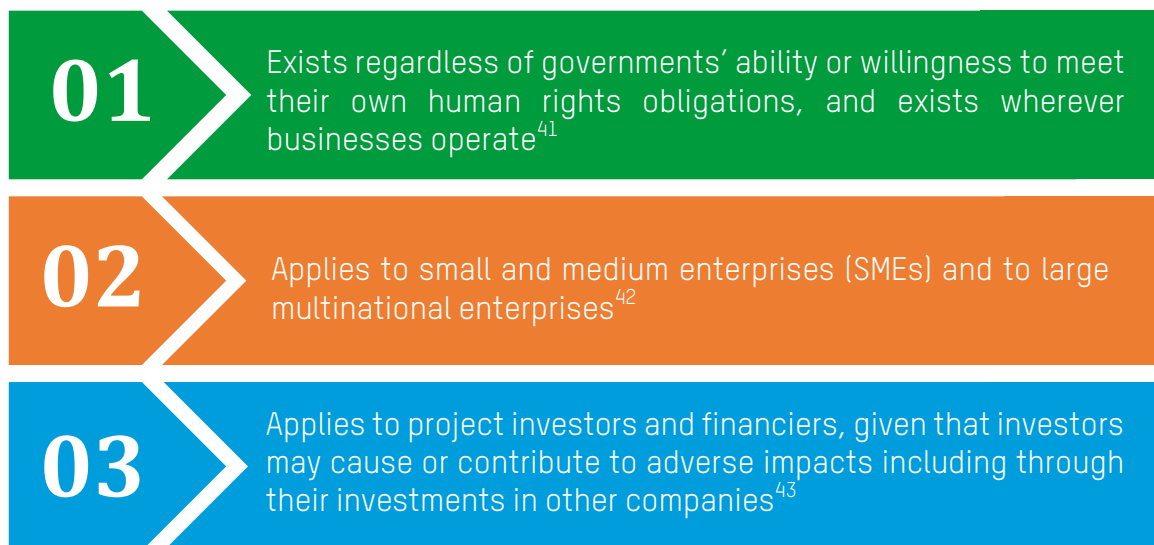
³⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water, E/C.12/2002/11, 20 January 2003, https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

³⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water, E/C.12/2002/11, 20 January 2003, https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

3.2 Business responsibility to respect

Unlike governments, businesses are not obligated to ensure that people have access to water. Instead the corporate responsibility to respect human rights requires that business do not cause or contribute to human rights abuse⁴⁰ or, in other words, not infringe on peoples' rights (such as negatively affecting peoples' access to water). This might require that businesses do not divert, degrade, deplete or pollute water sources if local communities rely on those water sources for food, health and a livelihood.

The corporate responsibility to respect human rights:



The corporate responsibility to respect human rights is exercised, in part, through corporate due diligence processes. This means businesses should assess the potential and actual negative human rights impacts of their own activities, or which may be linked to them through their business relationships.⁴⁴ Once identified negative human rights impacts should be prevented, mitigated or otherwise addressed.

⁴⁰ United Nations Guiding principles on business and human rights, 2011, HR/PUB/11/04, https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

⁴¹ United Nations Guiding principles on business and human rights, 2011, HR/PUB/11/04, https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

⁴² Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/35/32, 24 April 2017, https://www.ohchr.org/Documents/Issues/Business/ExSummary-WGBHR-SOE_report-HRC35.pdf

⁴³ UN General Assembly, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/73/163, 16 July 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/87/PDF/N1822487.pdf?OpenElement>

⁴⁴ United Nations Guiding principles on business and human rights, 2011, HR/PUB/11/04, https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

3.3 Remedy

Finally, the UNGPs emphasises the critical importance of victims of business-related human rights abuse to be able to access some form of remedy.⁴⁵ Remedy may take the form of an apology, compensation, punitive sanctions (such as fines) or guarantees to prevent any future harm. Both governments and business have obligations to provide mechanisms through which grievances can be raised and remedies sought. Examples include the courts and national human rights institutions (NHRIs) (both of which are state-based) or mechanisms developed by individual companies or industry sectors. Company or industry mechanisms potentially make it possible for grievances to be addressed early and remediated directly, provided they are designed to be fair, accessible and human-rights compatible.⁴⁶

3.4 Other issues and considerations

International finance institutions, such as the World Bank and its private sector lending arm the International Finance Corporation (IFC), also have human rights obligations, including a due diligence responsibility not to facilitate the violations of states' human rights obligations, or to otherwise become complicit in such violations.⁴⁷ These obligations stem in part from the fact that the members of these institutions (ie governments) have ratified many international human rights treaties, and that member states should take their international human rights obligations into account when acting through international organisations. The same logic applies to other state membership-based international or regional institutions.

Although the international finance institutions have clear human rights obligations there are numerous examples where international finance institutions have been complicit in violations. In one, the IFC provided significant funding for the Tata Mundra coal-fired power plant in Gujarat, India. Construction of the power plant destroyed water used for drinking and irrigation, and destroyed the marine environment and fish populations that local communities rely on for their livelihoods. The IFC has sought to evade responsibility for these harms for over decade now.⁴⁸

⁴⁵ United Nations Guiding principles on business and human rights, 2011, HR/PUB/11/04, https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

⁴⁶ United Nations Guiding principles on business and human rights, 2011, HR/PUB/11/04, https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

⁴⁷ Letter to the President of the World Bank, 12 December 2014, Special procedures mandate-holders of the United Nations Human Rights Council, <https://www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf>

⁴⁸ see <https://earthrights.org/media/farmers-and-fishermen-to-challenge-world-bank-group-immunity-ruling/>

The human rights protections contained in the various safeguard policies of the international finance institutions most relevant to the countries of the GBM and Salween river basins are summarised briefly below. All these banks support private sector investment and activity in various ways. It should be noted that generally alignment of these safeguards with the UNGPs is weak.

- The Asian Development Bank's (ADB) safeguard policy seeks to avoid, minimise, or mitigate adverse environmental and social impacts, and ensure respect for Indigenous Peoples' rights.⁴⁹ The safeguard policy objective to ensure the sustainability of projects, and to support the integration of environmental considerations into the project decision-making process, has positive implications for the protection of some human rights.
- The Asian Infrastructure Investment Bank's Environmental and Social Framework requires that the projects it supports respects Indigenous Peoples' human rights, and environmental and social (but not human rights) due diligence is conducted by the bank for all projects.⁵⁰
- The IFC's Performance Standards requires that business it finances should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to.⁵¹ The IFC also encourages clients, in some high risk circumstances, to conduct human rights due diligence.

The UN Working Group on Business and Human Rights has highlighted the differentiated and disproportionate impact of business activities on women and girls, and the additional barriers they experience in seeking effective remedies. The Working Group has developed guidance for governments and business on how they can work to eliminate discrimination against women and achieve substantive gender equality in the context of meeting their human rights obligations as described in the UNGPs.⁵²

⁴⁹ Asian Development Bank, Safeguard Policy Statement, 2009, <https://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf>

⁵⁰ Asian Infrastructure Investment Bank, Environmental and Social Framework, 2016 amended February 2019, <https://www.aiib.org/en/policies-strategies/download/environment-framework/Final-ESF-Mar-14-2019-Final-P.pdf>

⁵¹ International Finance Corporation, Performance Standards on Environmental and Social Sustainability, 2012, https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS_English_2012_Full-Documents.pdf?MOD=AJPERESSCVID=jkV-X6h

⁵² UN General Assembly, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Gender dimensions of the Guiding Principles on Business and Human Rights, A/HRC/41/43, 23 May 2010, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/146/08/PDF/G1914608.pdf?OpenElement>

Ways governments and businesses can work to eliminate discrimination and achieve substantive gender equality include:

- Taking appropriate steps to ensure that all business enterprises respect women's human rights, including to prevent all forms of discrimination, harassment and violence against women
- Ensuring the participation of women and women's organisations in developing legal and policy measures to implement the UNGPs, including through the development of National Action Plans on Business and Human Rights (NAPs)
- Integrating a gender perspective in mandatory human rights due diligence laws and integrating a gender perspective in carrying out all steps of human rights due diligence processes
- Working to overcome practical barriers, patriarchal norms or threats of violence that might discourage potentially affected women from participating in impact assessment processes
- Ensuring that State-based judicial and non-judicial mechanisms are responsive to additional barriers faced by women in seeking effective remedies for business-related human rights abuses

Women, water and decision-making power

Structured gender relations affect all aspects of life including access to and control over resources, decision-making power, and labour, culture and identity. Across the GBM and Salween river basins women play a prominent role in the productive use and management of water resources. Women divide their time between collecting water for their families, cooking, cleaning, washing and engaging in livelihood activities including in agriculture, forestry and fisheries. If water resources are polluted or depleted, including by private sector activity, women are disproportionately impacted, in part because of their roles in the household and their invisibility in water governance decision-making forums. To take one example, Oxfam research on sugar milling activity in Palia Kalan, along the Makahali river in Uttar Pradesh, found that women's limited participation in issues related to water contamination from the sugar mills and their exclusion from decision-making on water issues thwarted the possibility of inclusive and just community water governance.⁵³

Women's understanding of the use, sharing and conservation of water resources is key to better water governance yet women often have limited control over water resources and their voices are not often heard in decision-making forums. However, there are numerous examples of women exercising leadership on water issues, and working towards greater involvement in water decision-making processes. In Nepal for example Oxfam's TROSA program is supporting 'Women's Empowerment Centre' groups understand their rights, and to identify and advocate solutions for water related (and other) problems in their communities. The Women's Empowerment Centres have successfully worked to ensure the provision of infrastructure and services in their communities, and have transformed women's roles in water governance and management.⁵⁴

⁵³ Mukunda Upadhyay, Evy Mehzabeen, Animesh Prakash and Pankaj Anand, Understanding corporate water stewardship: Narratives from the Sharda basin, Oxfam India 2020, https://www.oxfamindia.org/sites/default/files/2020-04/Policy%20Brief_TROSA.pdf

⁵⁴ Oxfam in Nepal, Stories of women from the Mahakali River basin, 2019, https://cng-cdn.oxfam.org/nepal.oxfam.org/s3fs-public/file_attachments/Stories%20of%20women%20from%20the%20Mahakali%20River%20Basin.pdf

As noted in the previous section, the UN Special Rapporteur on Human Rights and the Environment has made clear that a safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights and that the exercise of human rights, such as freedom of expression, helps to protect the environment.⁵⁵ Both are interrelated and mutually reinforcing. This means governments should:⁵⁶

- Provide a safe and enabling environment for individuals, including human rights defenders, and groups that work on human rights or environmental issues to operate free from threats, harassment, intimidation and violence
- Respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters
- Provide public access to environmental information
- Facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process.

Doing these things is entirely consistent with governments' existing human rights obligations including, for example, obligations articulated in the UN Declaration on Human Rights Defenders.⁵⁷ Consistent with the corporate responsibility to respect human rights, businesses have a responsibility to avoid causing or contributing to attacks on human rights defenders, and should seek to prevent and address attacks against defenders linked to their own operations and business relationships.⁵⁸

⁵⁵ UN Special Rapporteur on Human Rights and the Environment, Framework Principles on Human Rights and the Environment (2018), <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>

⁵⁶ UN Special Rapporteur on Human Rights and the Environment, Framework Principles on Human Rights and the Environment (2018), <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>

⁵⁷ The declaration's full name is the 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms'

⁵⁸ Time to act: Protect defenders who speak up against business impact on people and planet, 10 December 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25416&LangID=E>

Access to information

Across the countries of the GBM and Salween river basins there are legal requirements, at least on paper, for the disclosure of information generally (such as Bangladesh's Right to Information Act) and more specifically for some environmental information related to private sector activity, typically the disclosure of project Environmental Impact Assessments. In Myanmar for example, Myanmar's Environmental Impact Assessment Procedure requires project proponents to disclose project Environmental Impact Assessments and Initial Environmental Examinations.⁵⁹ Similarly, Nepal's National Environmental Impact Assessment Guidelines requires the disclosure of Environmental Impact Assessment reports for review and comment.⁶⁰

Legal protections that guarantee access to information – which work to support informed public participation in decision-making processes – can of course be wound back to the detriment of potentially affected communities and the environment (and as noted previously some governments are using the currently COVID-19 crisis to do just that). In India for example there is concern that the proposed Environment Impact Assessment (EIA) Notification 2020 (an updated of the 2006 Notification) will weaken public consultation processes and expand the list of projects types where no information can be placed in the public domain.⁶¹ Any effort to weaken public participation or restrict access to information risks undermining fundamental human rights.

⁵⁹ Ministry of Environmental Conservation and Forestry, Government of Myanmar, Environmental impact Assessment Procedure, Notification 616/2015 https://www.myanmar-responsiblebusiness.org/pdf/resources/EIA-Procedures_en.pdf

⁶⁰ National Planning Commission Nepal, National Environmental Impact Assessment Guidelines 1993, https://www.mope.gov.np/download/national%20environmental%20impact%20assessment%20guidelines_1993.pdf.5c279708fcab326b6cb9289b4d551b0d

⁶¹ See for example <https://india.mongabay.com/2020/03/indias-proposed-overhaul-of-environment-clearance-rules-could-dilute-existing-regulations/>

4. THREATS TO RIVERS AND PEOPLE'S RIGHT TO WATER IN SOUTH ASIA

A range of activities and factors negatively impact the rivers of the GBM and Salween basins including unregulated infrastructure developments, unplanned land use practices, climate change, agricultural run-off, poor household waste management practices, increased urbanisation and business activity.

Both SMEs and large multinational enterprises have the potential to degrade and pollute rivers. In the case of multinational enterprises, these can be businesses engaging in activities outside their home state – Chinese and Thai investment in Myanmar's hydropower sector is an example of this. The GBM and Salween river basins are transboundary river systems. Pollution of rivers, and the degradation of natural systems, fisheries and biodiversity can have impacts that cross national boundaries. Pollution from the upper reaches of a river has the potential to impact on communities living in the downstream countries of that river system. These factors have implications for accountability for business related rights violations.

The sections that follow focus on some areas of private sector activity that impact on the environmental health of rivers and their watersheds in the GBM and Salween river basins, and that undermine the human rights of river dependent communities including to water, food, health and a livelihood. The areas we have chosen to focus on in this briefing paper are of particular concern to Oxfam and to the communities we work with. These focus areas also serve to highlight some of the broader challenges that exist in ensuring communities can enjoy their right to water in the context of business activity.

4.1 Sugar industry

Sugarcane is the dominant crop in the Ganges river basin, with Uttar Pradesh the largest sugar producing state in India (India produced more sugar than any other country in 2018/19). Sugar mills are a significant source of pollution of rivers, groundwater and land in parts of the GBM river basin. The sugar industry is also significant water user. Sugar mill effluent produces an obnoxious odour and unpleasant color when released into the environment without proper treatment (as it often the case), and because of its chemical characteristics, rapidly depletes available oxygen when discharged into water bodies adversely impacting aquatic life.⁶² Receiving waters are unfit for drinking and other domestic purposes, and crop yields are reduced if effluent is used for irrigation.

⁶² P. Saranraj and D. Stella, 'Impact of Sugar Mill Effluent to Environment and Bioremediation: A Review' in World Applied Sciences Journal 30 (3): 299-316, 2014, available at https://www.researchgate.net/publication/260289388_Impact_of_Sugar_Mill_Effluent_to_Environment_and_Bioremediation_A_Review

Villages situated near sugar industries have to struggle with safe and clean drinking water. Oxfam has heard directly from community members living near sugar mills that waters run black when the sugar mills dump their wastes in the river – how can we use the water for our needs, they ask? The polluted water is reported to kill fish and rivers are no longer suitable for buffalo to wallow in. Sugar mill effluent discharged into canals and other small waterways can overflow and enter into fields especially during the monsoons, causing crop damage and the death of cattle. For fishing communities downstream of the major sugar production areas, the disposal of toxic sugar milling wastes has significantly disrupted their livelihoods by contributing to a decline in fish populations. As a result, some fisher folks have now turned to other forms of daily wage labor activities or have migrated to other areas in search of a better livelihood.

The sugar industry is both a significant polluter and significant source of livelihoods in sugar producing areas. Many farmers supplying the sugar mills are reliant on the income they earn from sugarcane cultivation. They may face delays in receiving sugarcane supply tickets (or agreements from the sugar mills to purchase their cane) or delays in the release of cane payments. Given that in many cases farmers directly affected by effluent discharge also supply sugarcane to the same mills, they hesitate to lodge formal complaints with the district administration, fearing cancellation of supply tickets by the mills.⁶³ Cane farmers, particular women farmers and farmers with small landholdings, are vulnerable to multiple human rights abuse – linked to pollution of the environment they depend on to grow sugar cane and an inability to seek effective redress for harm.

Sugar mills are a designated ‘gross polluting industry’ in India and are regulated by the Environment (Protection) Act 1986. Sugar mills as such are subject to numerous environmental controls, including requirements for effluent treatment and monitoring. Maximum allowable limits on the discharge of pollutants to the environment are established under the Environment (Protection) Act in a sugar industry standard.⁶⁴

The sugar milling sector is also subject to some enforcement by central and state pollution control boards.⁶⁵ Yet despite the existence of state policies and regulations, the sugar industry remains a significant source of water pollution, and too often complaints by affected communities are not acted on by government authorities.⁶⁶ Poor accountability and transparency on the part of

⁶³ Shankhamala Sen, Namit Agarwal and Pooja Adhikari, Human cost of sugar: A farm-to-mill assessment of sugar supply chain in Uttar Pradesh, Oxfam India 2018, <https://www.oxfamindia.org/workingpaper/human-cost-sugar>

⁶⁴ Central Pollution Control Board, Ministry of Environment, Forest and Climate Change, Government of India, Standards for Emission or Discharge of Environmental Pollutants (sugar industry), <https://cpcb.nic.in/effluent-emission/>

⁶⁵ See for example <https://www.chinimandi.com/cpcb-takes-stern-action-against-27-sugar-mills-in-uttar-pradesh/>

⁶⁶ See for example Shankhamala Sen, Namit Agarwal and Pooja Adhikari, Human cost of sugar: A farm-to-mill assessment of sugar supply chain in Uttar Pradesh, Oxfam India 2018, <https://www.oxfamindia.org/workingpaper/human-cost-sugar>

sugar mill operators, a tendency by sugar mill operators to discredit community data on environmental pollution, a reluctance to engage in dialogue with communities, and the power held by sugar mill operators including over farmers in their supply chains, all leads to a situation where there is often little respect for the rights of local people. However, affected communities have been using the courts and the National Green Tribunal to push relevant government agencies to better prevent pollution.⁶⁷

There are of course many other sources of water pollution in the rivers of the GBM, and Salween, basins. In India, pulp and paper mills, textile factories, tanneries, thermal power plants, and the food, dairy and beverage industries are also highly polluting. Further upstream in Nepal, untreated discharge of industrial waste from breweries, tobacco, cement, steel, paper and leather industries, and human waste (often from hotels) are all key sources of pollution, along with the leaching of pesticides from agriculture, and poor management of solid waste. Another, and one also driven by business interests, is sand mining.

4.2 Sand mining

Rapid urbanisation is a key factor behind the significant global increase in demand for sand. Our cities are literally built on sand – sand is used in land reclamation schemes, and is an essential ingredient in concrete and asphalt. Sand can be extracted from a range of environments, including rivers, beaches and the seafloor and being a ‘common pool resource’ (meaning that almost anyone can access and potentially extract and trade sand), is at risk of overexploitation and degradation.⁶⁸

Sand mining is common across all countries in the GBM basins but is particularly prevalent in India.⁶⁹ There are policy regimes aimed at protecting riverine environments in Bangladesh, India and Nepal (typically spread across different levels of government, and between environmental protection and mines and minerals legislation)⁷⁰ and guidelines for sustainable sand mining management – such as India’s Sustainable Sand Mining Management Guidelines.⁷¹ However, local communities are not always consulted prior to the issuing of mining licences, standards for environmental assessment are low, few benefits (beyond employment) flow to local communities and more sand is often extracted than is

⁶⁷ K Alley and T Mehta, ‘The experiment with rights of nature in India’ in C la Follett and C Master (eds) *Sustainability and the rights of nature in practice*, 2020

⁶⁸ Aurora Torres, Jodi Brandt, Kristen Lear and Jianguo Liu, ‘A looming tragedy of the sand commons’ in *Science*, 357 (6355), 970-971, available at

https://www.researchgate.net/publication/319535816_A_looming_tragedy_of_the_sand_commons

⁶⁹ United Nations Environment Programme, *Sand and Sustainability: Finding new solutions for environmental governance of global sand resources*, 2019,

<https://wedocs.unep.org/bitstream/handle/20.500.11822/28163/SandSust.pdf?sequence=1&isAllowed=y>

⁷⁰ For an overview of the policy regimes in Nepal and India see Policy Entrepreneurs Inc. (2019) *Built on Sand: An Examination of the Practice of Sand Mining in South Asia with observations from the Mahakali and the Teesta Rivers*, http://pei.center/wp-content/uploads/2019/09/Built-On-Sand_TROSA_PEI.pdf

⁷¹ Ministry of Environment, Forest and Climate Change, Government of India, *Sustainable Sand Mining Management Guidelines 2016*, <http://mines.bih.nic.in/Docs/Sustainable-Sand-Mining-Management-Guidelines-2016.pdf>

permitted. Research in India and Nepal has found that institutions, especially those at the local level, responsible for managing and monitoring sand mining are constrained by a lack of adequate human resources and technical expertise.⁷² Further, responsibility for regulation of sand mining occurs at the district level. This limits the possibility of managing rivers on a basin scale, and has the potential to reduce consideration of cross-district impacts when approving individual operations or determining river 'replenishment rates'.⁷³

Most sand mining in the region is informal and often illegal. The Indian sand mining sector features a mixture of self-organised entrepreneurship by villagers, and criminal actors often referred to as 'sand mafias'.⁷⁴ The so-called 'sand mafias' operate as fragmented structures with transient memberships, and use violence, political affiliation (enabled by high levels of corruption), and regenerative properties to ensure continued operation.⁷⁵

Sand mining from rivers can profoundly affect river ecosystems. Sand mining can alter the composition and movement of sediment along river courses, change the shape of river beds and other large scale river features, exacerbate erosion, alter flow regimes, damage engineering structures such as structures for water supply, and impact on water quality through pollution.⁷⁶ Sand mining can also cause decreases in groundwater levels affecting water supply and quality. These changes can then affect the productivity of fisheries, and riverbank crops, and the suitability and accessibility of water for personal and domestic use.⁷⁷ This can disproportionately impact on women most given they are typically responsible for collecting water for household use, and given their significant contribution to agriculture. However, sand mining, and the associated trucking activities and shops and restaurants that pop up around sand mining areas, are an important livelihood for many poor riverine communities. These communities are vulnerable and depend on rivers for multiple needs. Communities often turn to sand mining when their fishing rights are taken from them (for example when private fishing

⁷² Policy Entrepreneurs Inc. (2019) Built on Sand: An Examination of the Practice of Sand Mining in South Asia with observations from the Mahakali and the Teesta Rivers, <http://pei.center/wp-content/uploads/2019/09/Policy-Brief-Built-on-Sand-20Sept2019-Final.pdf>

⁷³ Koehnken, L., and Rintoul, M. (2018) Impacts of sand mining on ecosystem structure, process and biodiversity in Rivers. WWF, https://www.panda.org/our_work/water/freshwater_news/?333451/Uncovering-sand-minings-impacts-on-the-worlds-rivers

⁷⁴ Prem Mahadevan, Sand mafias in India: disorganized crime in a growing economy, 2019, Global Initiative Against Transnational Organized Crime, <https://globalinitiative.net/wp-content/uploads/2019/07/Sand-Mining-in-India-Report-17Jul1045-Web.pdf>

⁷⁵ Aunshul Rege (2016) Not biting the dust: using a tripartite model of organized crime to examine India's Sand Mafia, International Journal of Comparative and Applied Criminal Justice, 40:2, 101-12, available at https://www.researchgate.net/publication/281359381_Not_Biting_the_Dust_Using_a_Tri-Partite_Model_of_Organized_Crime_to_Examine_India's_Sand_Mafia

⁷⁶ Koehnken, L., and Rintoul, M. (2018) Impacts of sand mining on ecosystem structure, process and biodiversity in rivers. WWF, https://www.panda.org/our_work/water/freshwater_news/?333451/Uncovering-sand-minings-impacts-on-the-worlds-rivers and United Nations Environment Programme, Sand and Sustainability: Finding new solutions for environmental governance of global sand resources, 2019, <https://wedocs.unep.org/bitstream/handle/20.500.11822/28163/SandSust.pdf?sequence=1&isAllowed=y>

⁷⁷ Aurora Torres, Jodi Brandt, Kristen Lear and Jianguo Liu, 'A looming tragedy of the sand commons' in Science, 357 (6355), 970-971, available at https://www.researchgate.net/publication/319535816_A_looming_tragedy_of_the_sand_commons

actors invade local spaces and occupy those places that had been traditionally used by local communities), when waters are diverted from waterways either intermittently or permanently or are polluted. So while sand mining can be tenuous, poorly paid, dangerous and often exploitative it is nevertheless an important source of income for many communities.

Enforcing sand mining guidelines and better regulating the sector to reduce its impact on the environment and on peoples' right to water, and to ensure respect for the labour rights of people engaged in the sector, is extremely challenging given the informal and often illegal nature of the sand mining sector. The violence and corruption that this enables much sand mining activity to continue is a particular challenge. However, guidelines are important (given their role in setting environmental, social and human rights standards of practice) and their development can help build technical capacity in the institutions responsible for managing and monitoring sand mining. With these outcomes in mind Oxfam in Nepal has been supporting the Bhimdatta municipality (in Sudurpashchim Pradesh province), local communities and sand mining contractors develop sand mining guidelines.⁷⁸ It is hoped these guidelines will contribute to ongoing river basin policy formulation in Nepal and act as a pilot guideline for use elsewhere in Nepal. Oxfam's has also developed a set of recommendations on gender justice and the extractive industries – some of these recommendations are relevant to the sand mining sector (for example that governments promote women's economic empowerment by creating incentives for companies to engage women-owned businesses in their supply chains and to provide technical training for women at the local level, and to prioritise and support women's leadership and equitable participation in extractive industries policy-setting forums).⁷⁹

4.3 Large infrastructure projects

Large infrastructure projects bring potential benefits and threats to the people of the GBM and Salween river basins. For example, inland navigation – including between countries – has the potential to support the livelihoods of riverine communities who are engaged in farming, fisheries and navigation and to support the development of cross-border agricultural value chains.⁸⁰ Inland navigation projects, particularly between Bangladesh and India, are attracting increased interest from governments and donors such as the World Bank who see the potential for increased trade and investment. Bangladesh and India have agreed to increase the number of routes and establish new ports of call under

⁷⁸ Oxfam in Nepal, River Sand Mining Guideline for ensuring environmentally sustainable and socially responsible mining in transboundary Mahakali river, https://cng-cdn.oxfam.org/nepal.oxfam.org/s3fs-public/file_attachments/Sandmining%20Policy%20Brief.pdf

⁷⁹ Oxfam International, Position paper of gender justice and the extractive industries, 2017, https://s3.amazonaws.com/oxfam-us/www/static/media/files/EI_and_GJ_position_paper_v.15_FINAL_03202017_green_Kenny.pdf

⁸⁰ Saurabh Kumar, Susan Mathew and Veena Vidyadharan, Promoting Trade and Tourism in Transboundary Waterways of Meghna Basin, CUTS, 2019, <https://cuts-citee.org/pdf/promoting-trade-and-tourism-in-transboundary-waterways-of-meghna-basin.pdf>

the Protocol on Inland Water Transit and Trade between Bangladesh and India.⁸¹ However, the dredging required to maintain the navigability of rivers can impact on river ecosystems and aquatic biodiversity, and heavy river traffic and underwater noise can reduce fish productivity and migration.⁸² Leaking cargo and malfunctioning boats can pollute rivers. Environmental concerns have been sidelined. For example, some concern has been expressed that there is no clarity on requirements for strategic or cumulative environmental assessments of inland navigation projects even though the sector requires regular dredging and the development of infrastructure such as cargo terminals.⁸³ Along with better understanding the potential environmental impacts of this activity, the human rights impacts also need to be understood.

Large hydropower dams are particularly contentious as they can cause major changes to river flow regimes, destroy fisheries, reduce sediment transport downstream, cause loss of productive land and force the relocation of entire communities, and, as an impact of these latter two issues, conflict between communities. Hydropower projects can be found in each of the countries of the GBM and Salween river basin countries. Their development often has the backing of a strong hydropower lobby, commercial and policy banks (these are often foreign banks) and the international financial institutions, such as the IFC.

In Myanmar for example, the development of hydropower dams on the Salween river is particularly contentious as the Salween river is currently free flowing and many communities and CSOs are fighting to keep it that way. As the IFC's own Strategic Environment Assessment (SEA) of the hydropower sector in Myanmar found, keeping the Salween river free flowing would help protect important freshwater and terrestrial habitats; maintain sediment and nutrient delivery to floodplains that support vegetation, agriculture, and fisheries; and maintain river connectivity, flows, water quality, and fish migration.⁸⁴ There are multiple connections between these factors and human rights, including the right to water. The SEA in fact recommends that no dams are built on the Salween mainstream, and four other mainstream river systems in Myanmar. Yet there are currently plans for a series of mainstream dams that would have very significant environmental impacts on the river system, and on people's human rights. The SEA does though identify potential candidates elsewhere in Myanmar for further hydropower development despite these other areas being conflict-prone, and

⁸¹ Ministry of Shipping, Government of India, press release on Second Addendum on Protocol on Inland Water Transit and Trade between India and Bangladesh, 2020, 20 May 2020, https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1625342&fbclid=IwAR3Zx25ZfPaznx6Zjegyyuzq7K7hRdmTkUeHfyWTclcrjhqS_2H8E-3KBsU

⁸² IUCN, Report on the Proceedings of the 1st Bangladesh-India Joint Consultation on Sustainable Development of Inland Waterways Transport and Fish Biodiversity Conservation, 2-3 November 2016, Dhaka, Bangladesh, https://www.iucn.org/sites/dev/files/content/documents/report_bridge_gbm_dhaka_workshop_final.pdf

⁸³ IUCN, Report on the Proceedings of the 1st Bangladesh-India Joint Consultation on Sustainable Development of Inland Waterways Transport and Fish Biodiversity Conservation, 2-3 November 2016, Dhaka, Bangladesh, https://www.iucn.org/sites/dev/files/content/documents/report_bridge_gbm_dhaka_workshop_final.pdf

⁸⁴ International Finance Corporation, Strategic Environment Assessment of the Myanmar hydropower sector, 2018, https://www.ifc.org/wps/wcm/connect/f21c2b10-57b5-4412-8de9-61eb9d2265a0/SEA_Final_Report_English_web.pdf?MOD=AJPERES&CVID=mslr9yx

being vulnerable in terms of social and livelihoods indicators. This is highly problematic given the entrenched and decades-long nature of internal conflict in Myanmar.⁸⁵

Women are often disproportionately impacted by large scale dam development. Women may lose their traditional means of livelihood when they lose access to their land, which can affect food security and access to water and sanitation; a loss of access to and control over resources such as land, rivers, forests, and fodder can increase workloads; and displacement can cause fragmented social and familial ties, a loss of mobility, poor health and restricted access to health care facilities.⁸⁶

⁸⁵ International Rivers, Strategic Environmental Assessment of the Myanmar Hydropower Sector: Discussion Brief, https://www.internationalrivers.org/sites/default/files/attached-files/sea_brief_-_english_version.pdf

⁸⁶ Gitta Shreshta et al, Gender in hydropower: a long way to go, India Water Portal, 22 July 2019, <https://www.indiawaterportal.org/articles/gender-hydropower-development-long-way-go>

Special focus on fisheries: the right to a safe, clean, healthy and sustainable environment and the right to decent work

Fisheries are an important livelihood for millions of people in the GBM and Salween river basins. In Bangladesh for example, an estimated 11% of the population depends on the fish sector, which is largely informal, for their livelihood – this includes traditional fishers and labourers engaged in the sector. A clean and healthy environment supports the livelihoods of these people. However, the obstruction of fish migration routes by embankments and water control structures (including to increase agriculture production), excessive extraction of surface water and groundwater for irrigation, industrial pollution and habitat destruction in Bangladeshi rivers and floodplains have all contributed to declining fish stocks and fish biodiversity,⁸⁷ adversely impacting peoples' livelihoods and right to food.

A lack of decent working conditions in the fishing sector, particularly for labourers, further undermines the rights of those people dependant on the sector for their livelihoods. Labouring in the fishing sector is hazardous, wages are low and labourers are vulnerable to becoming indebted to boat owners if they turn to boat owners for small loans – which is often the case when low wages prevents the accumulating of savings. In Bangladesh, a management system has been established that imposes a ban on fishing Hilsa for more than two months of the year in an attempt to reverse declining numbers of this important fish. Fishers who defy the ban in order to earn some income or to catch food to eat face the risk of jail time or the destruction of their fishing nets.⁸⁸ The owners of fishing boats in situations where labourers are caught defying the ban face no such sanction. Formalisation of the fishing sector in Bangladesh has the potential to put labourers engaged in the sector in a better position. Licencing enterprises engaged in the sector would make it easier to ensure compliance with rules around safety, wages, and insurance for example.

There is growing recognition of the link between labour rights and environmental stewardship – for example, exploitative labour practices and environmental destruction have been well documented in the Thai fishing sector.⁸⁹ This has lead some to ponder how gains one side of this coin may benefit the other side.⁹⁰

⁸⁷ Mostafa Ali Reza Hossain, 'An overview of fisheries sector of Bangladesh' in Research in Agriculture, Livestock and Fisheries, 1(1): 109-126, <https://www.banglajol.info/index.php/RALF/article/view/22375>

⁸⁸ Enamul Mazid Khan Siddique, Opinion: the human cost of Hilsa conservation, 17 December 2018, <https://www.thethirdpole.net/2018/12/17/opinion-the-human-cost-of-hilsa-conservation/>

⁸⁹ David Brow et al, 'Modern slavery, environmental degradation and climate change: Fisheries, field, forests and factories' in Environment and Planning E: Nature and Space, 0(0) 1-17, <https://journals.sagepub.com/doi/full/10.1177/2514848619887156>

⁹⁰ see for example <https://www.undp.org/content/undp/en/home/blog/2019/the-link-between-human-rights-and-the-environment.html>

5. ADDRESSING THE THREATS TO RIVERS AND PEOPLES' RIGHT TO WATER

A range of complementary approaches can address the threats from private sector activities on the transboundary rivers of the GBM and Salween river basins, and to peoples' right to water and other fundamental human rights. Some of these are discussed in the sections that follow.

5.1 National Human Rights Institutions

Guaranteeing access to remedy for victims of business-related human rights abuse is the critically important third pillar of the UNGPs. As noted earlier there are many mechanisms through which remedy can be sought – one of these are NHRIs. NHRIs have fewer legal or practical barriers that might prevent people from using them to seek justice compared to the courts.

NHRIs are independent bodies established by law with powers to promote and protect human rights. Their responsibilities vary but may include providing human rights education, providing advice to governments and other stakeholders, investigating human rights abuses, and receiving and resolving complaints. The Paris Principles set out the minimum international standards required for NHRIs to effectively fulfil their role.⁹¹ These include need for a broad mandate, guarantees of independence, autonomy from government, adequate powers of investigation and adequate resources.

With regards to business related human rights abuses, NHRIs can act as important bridge-builders between rights-holders, governments, civil society and businesses, including through supporting human rights defenders and by building partnerships to promote access to justice.⁹² Among GBM and Salween river basin countries there is some attention to business and human rights issues from NHRIs, including from the National Human Rights Commission Bangladesh,⁹³ National Human Rights Commission of India⁹⁴ and the National Human Rights Commission of Thailand.

The Thai Human Rights Commission is important because of its willingness to investigate business related human rights by Thai companies overseas. The Thai Human Rights Commission has investigated human rights abuses linked to Thai sugar companies operating in Cambodia, Thai coal mining in Myanmar and the

⁹¹ Paris Principles, <https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx>

⁹² UN Human Rights Special Procedures, Concept Note Global consultation on the role of NHRIs in facilitating access to remedy for business-related human rights abuses, https://www.ohchr.org/Documents/Issues/TransCorporations/Concept_Note_EN.pdf

⁹³ See https://www.ohchr.org/Documents/Issues/Business/Remedy/NHRC_Bangladesh.pdf

⁹⁴ National Human Rights Commission of India, Strategic Plan 2018-2021, https://nhrc.nic.in/sites/default/files/Strategic_Plan_2018_2021_1.pdf

proposed Hatgyi dam on the Salween river in Myanmar.⁹⁵ The Thai Human Rights Commission is a good example of a remedy mechanism that has developed an extraterritorial mandate and that is willing to conduct investigations into allegations of human rights violations abroad by corporations domiciled in Thailand. Other NHRIs in the countries of the GBM and Salween rivers, and elsewhere, could replicate this approach.

5.2 National Action Plans on business and human rights

NAPs are being developed by governments to implement the UNGPs, and are being encouraged to do so by a range of stakeholders including the UN Working Group on Business and Human Rights and CSOs, including Oxfam.

NAPs have the potential to ensure:

- Greater coordination and coherence within government on the range of public policy areas that relate to business and human rights
- An inclusive process to identify national priorities and concrete policy measures
- Transparency and predictability for stakeholders
- A platform for ongoing multi-stakeholder dialogue that includes representatives from CSOs, trade unions and adversely affected groups.⁹⁶

Many areas of public policy are potentially relevant to the issue of business and human rights, including with regards to water. A key step in developing a NAP recommended by the UN Working Group on Business and Human is to gather evidence to better understand adverse business-related human rights impacts, and identify gaps in government and business implementation of the UNGPs. These mapping exercises recognise the reality that the policy measures and actions needed to better protect human rights vis-à-vis business activity sit across many areas of public policy.

Thailand is the only GBM or Salween river basin country to have developed a NAP.⁹⁷ The Thai NAP was published at the end of 2019 after a three-year development process that involved civil society input and broad consultation, and that was based on a national baseline assessment. Of particular interest and relevance to the other countries of the GBM and Salween river basins is that the Thai NAP focussed on just four priority areas: labour rights (including in the fisheries sector), natural resources and the environment (where public participation is often lacking), human rights defenders and cross border (or

⁹⁵ Thai ETO Watch WG, Thai Outbound Investments in the Mekong Region and Myanmar, 2017, https://earthrights.org/wp-content/uploads/TOI-Briefer_11_16.pdf and Earth Rights International, The Hgtgyi dam: A case of Thai investment in Myanmar, 2018 <https://earthrights.org/wp-content/uploads/HatgyiBriefer.pdf>

⁹⁶ UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights, November 2016, https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf

⁹⁷ Ministry of Justice Thailand, First National Action Plan on Business and Human Rights (2019-2022), <https://www.th.undp.org/content/thailand/en/home/library/other-publications/thailand---national-actions-plan-on-business-and-human-rights-.html>

overseas) investment. The Thai NAP importantly recognised the application of the UNGPs to Thai outbound investment. These are issues for all GBM and Salween river basin countries and show that NAPs have the potential to prioritise rights to water and environmental issues.

India has begun to develop a NAP. That process began in late 2018 with the publication of a 'zero draft' NAP.⁹⁸ In early 2020 India's Ministry of Corporate Affairs invited further public comment and input. CSOs have called on the Indian Government to ensure India's NAP addresses the dispossession of communities from their land, water and other natural resources necessary for their lives and livelihoods; addresses human rights violations where the environment and ecology intersect with business activity, and to ensure that the NAP addresses rights of informal sector workers.⁹⁹

Elsewhere in South and South East Asia, Indonesia and South Korea have developed NAPs, and Japan and Pakistan are also developing their own NAPs. Preparatory work on a NAP has commenced in Bangladesh and Nepal is working to incorporate business and human rights issues into its 5th National Human Rights Action Plan.

5.3 Tackling corruption

Access to remedy for those people whose rights have been undermined by corruption enabled or illegal business activity is critically important given the illegal nature of such activity. In the case of sand mining in India for example, the courts have been used to restrict sand mining activities – which can be an important form of remedy for affected people in many circumstances. Regarding use of the courts to seek remedy for business related human rights harm, states have an obligation to ensure that the courts are able to operate free from political and economic pressures, and that justice is not prevented by corruption of the judicial process or the existence of legal or practical barriers that might prevent people from using the courts.

Remedy in the context of corruption enabled or illegal business activity could also include criminal prosecution of bribery cases linked to the business activity. It could also involve seeking compensation or guarantees to improve practice and prevent any future harm along supply chains – seeking compensation from developers and construction companies (and their financiers) found to have used illegally mined sand in their activities is one example.

The UN Working Group on Business and Human Rights is currently undertaking work aimed at better connecting the business and human rights and anti-

⁹⁸ Ministry of Corporate Affairs Government of India, National Action Plan on Business and Human Rights Zero Draft, http://mca.gov.in/Ministry/pdf/ZeroDraft_11032020.pdf

⁹⁹ Human Rights and Business Network-India, Recommendations for India's National Action Plan on Business and Human Rights, 9 March 2020 and World Benchmarking Alliance, <https://www.ihrb.org/other/governments-role/commentary-indias-national-action-plan>

corruption agendas.¹⁰⁰ This is necessary work given that too often corruption prevents more responsible business practice. The outcomes of this work may usefully inform policy responses to business and human rights issues in GMB and Salween river basin countries, particularly in sectors where corruption is prevalent.

5.4 Community-initiated water governance projects

Numerous examples exist across the GBM and Salween river basins of communities working together to protect their rights to their natural resources – including from private sector activity. Two examples from Myanmar are given below. These examples show how communities have given practical effect to their right to self-determination, and how they have clearly articulated what self-determined development means to them in the context of community reliance on the environment for their livelihoods and other needs and interests.

Daw Lar lake is the largest freshwater lake in Karen State, Myanmar, and is connected to the Salween river via naturally formed streams. The lake fills with water when the Salween river swells each year with the rainy season (although the lake is getting drier each year). The lake and its watershed support the fishing and farming based livelihoods of local communities. Threats to the lake, its watershed and to peoples' livelihoods stem from a diversity of groups vying for influence over the area, and current laws that do not address how customary practices of land, water, and natural resource management are to be protected.¹⁰¹ Quarrying activities, plans for expansions of rubber plantations, and a previous government proposal to grant a concession to a private company for commercial fishing in the lake without community knowledge or consent present specific threats.

Communities around Daw Lar lake initiated a community based water governance (CBWG) process aimed at protecting the area's rich biodiversity, maintaining people's culture and livelihoods, and defending community rights to govern their natural resources.¹⁰² Through the CBWG process communities sought legal recognition of their traditional ownership and governance of Daw Lar lake, and of their livelihood systems. Daw Lar Lake has been officially registered as a Fishery Reserve with the Karen State Department of Fisheries. It is hoped legal recognition will help address the threats posed by private sector activity, and related community concerns about their long-term entitlement to access the lake.¹⁰³

¹⁰⁰ UN Working Group on Business and Human Rights, Connecting business and human rights with anti-corruption: Preliminary concept note by the UN Working Group on Business and Human Rights, <https://www.ohchr.org/Documents/Issues/Business/WGCorruptionBHR.pdf>

¹⁰¹ KESAN, Community Based Water Governance: A briefing report on Daw Lar Lake, June 2018

¹⁰² KESAN, Community Based Water Governance: A briefing report on Daw Lar Lake, June 2018

¹⁰³ Saw John Bright, 'Rites, rights and water justice in Karen State: a case study of community-based water governance and the Hatgyi dam' in Knowing the Salween River: Resource politics of a contested transboundary river, 2019, https://link.springer.com/chapter/10.1007/978-3-319-77440-4_5

Similarly, the Salween Peace Park is rooted in ethnic Karen customary management systems, sustainable livelihoods, environmental protection and democratic governance, but at the landscape level.¹⁰⁴ The Salween Peace Park is a collaborative initiative between Karen communities, Karen CSOs, and the Karen National Union Mutraw District leaders that promotes peace and self-determination, environmental integrity and cultural survival. It is governed by a 106 member General Assembly and Charter, which has been endorsed by 75% of the voting-age population.¹⁰⁵ The Peace Park covers an area of more than 5,500 km² that is home to approximately 70,000 people. The Salween Peace Park Charter makes clear that infrastructure and development projects can only proceed with the support of local people,¹⁰⁶ or, in other words, only with their free, prior and informed consent. The Peace Park is also seeking to prioritise small hydropower and decentralised solar power, and sustainable forest management over massive dams on the Salween River and large-scale mining and rubber plantations,¹⁰⁷ developments that have the potential to adversely people's right to water and to a safe, clean, healthy and sustainable environment.

The central Myanmar government has not yet recognised the Salween Peace Park initiative, and conflict exists in and around the Peace Park despite a ceasefire agreement between the Burmese army and Karen National Union.¹⁰⁸ However, the absence of government recognition of the Peace Park initiative, or willingness to respect human rights more generally, does not mean that other actors, including businesses, can ignore community rights to self-determination or community determined priorities and strategies for the development and use of their natural resources. The corporate responsibility to respect human rights requires businesses to respect the right to self-determination, and to free, prior and informed consent.¹⁰⁹

5.5 Bringing a human rights lens to environmental assessment and water governance tools

In section 5.2, the potential for human rights focussed NAPs to prioritise water and environmental issues was discussed. Bringing a human rights lens to environmental assessment and water governance tools is also needed as the connection between these is missing. Tools such as SEA, integrated resource planning and river basin planning have the potential to address private sector

¹⁰⁴ KEASN, Achievements and activities Overview 2018, http://kesan.asia/wp-content/uploads/2019/09/Briefer_KESAN-2018-Activities.pdf

¹⁰⁵ Salween Peace Park Charter Briefer, <http://kesan.asia/wp-content/uploads/2019/01/SPP-Briefer-1.pdf>

¹⁰⁶ Charter of the Salween Peace Park, December 2018, <http://kesan.asia/wp-content/uploads/2018/12/SPP-Charter-Eng.pdf>

¹⁰⁷ KEASN, Salween Peace Park: A vision for an indigenous Karen landscape of human-nature harmony in Southeast Myanmar, <http://kesan.asia/wp-content/uploads/2019/04/Salween-Peace-Park-Flyer-Updated-Eng.pdf>

¹⁰⁸ See [http://kesan.asia/wp-content/uploads/2020/04/KPSN_Karen-heartlands-under-attack-Briefer - English.pdf](http://kesan.asia/wp-content/uploads/2020/04/KPSN_Karen-heartlands-under-attack-Briefer-English.pdf)

¹⁰⁹ International Working Group for Indigenous Affairs, IWGIA Report 16 - Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples, 2014, https://www.iwgia.org/images/publications//0684_IWIA_report_16_FINAL_eb.pdf

impacts on water resources including at the basin-wide level, and are promoted as good practice by numerous stakeholders, including the ADB and World Bank, and some CSOs.

SEA can minimise adverse environmental and social impacts through improved policy and planning process, provide a framework for project-level assessment and coordination including to understand cumulative impacts, and build consensus and trust through multi-stakeholder dialogue.¹¹⁰ For example, SEA can be used to examine the social, economic and environmental impacts of hydropower at a broad strategic level, rather than at the level of individual hydropower projects. Best practice principles that should guide SEA processes include a commitment to broad consultation and participation, openness and transparency, access to information, and the meaningful examination of alternatives.¹¹¹ These principles should also guide other processes including integrated resource planning and river basin planning.

These tools and approaches do by their very nature prioritise environmental and social issues (alongside economic issues), but they do not prioritise to human rights.¹¹² While issues such as food, health and drinking water might be considered they are not necessarily framed as human rights issues, or as impacts potentially felt by individual rights holders. Further these processes tend to be collective in focus, and accepting of some adverse impacts on certain individuals within a community in exchange for the greater good or positive impacts for the majority of impacted people.¹¹³ The potential for these tools to address private sector impacts on water resources, including at the basin-wide level, would be improved by more a more explicit consideration of human rights issues, including the right to water.

5.6 Improving regional cooperation

Improving water governance, and addressing the many threats from private sector activities to peoples' right to water, requires greater regional cooperation. This already happens to some degree but more is needed. Early warning systems (for floods and other disasters), trade and navigation, fish conservation, and

¹¹⁰ Asian Development Bank, Strategic Environmental Assessment in the Greater Mekong Subregion, 2015, <https://www.adb.org/sites/default/files/publication/158167/strategic-environmental-assessment-gms.pdf>

¹¹¹ International Rivers, Strategic Environmental Assessment of the Myanmar Hydropower Sector: Discussion Brief, https://www.internationalrivers.org/sites/default/files/attached-files/sea_brief_-_english_version.pdf

¹¹² See for example Fernando Loayza (ed), Strategic environmental assessment in the World Bank: learning from recent experience and challenges, 2012, World Bank, <http://documents.worldbank.org/curated/en/729811468331017746/pdf/728950ESW0whit0200ENV0SEA0p0ub0final.pdf>; Winfeld, D. et al, River Basin Planning: An Indian Guide, Australian Water Partnership, 2020, <https://waterpartnership.org.au/wp-content/uploads/2019/10/India-RBP-Guide.pdf>; and G. Pegram, et al, River basin planning: Principles, procedures and approaches for strategic basin planning, UNESCO, 2013, <https://www.adb.org/sites/default/files/publication/30248/river-basin-planning.pdf>

¹¹³ Götzmann, N. et al, 'Social and human rights impact assessments: what can they learn from each other?' in Impact Assessment and Project Appraisal, 34 (1), 2016, <https://www.tandfonline.com/doi/abs/10.1080/14615517.2015.1096036>

pollution – all of which has some connection to the private sector – are issues that would benefit from greater regional consideration and cooperation.

There is already considerable regional cooperation on navigation and trade, with SASEC prioritising the promotion of inland water transport for example.¹¹⁴ The ADB, which is secretariat for SASEC and is its major development partner, is well placed to facilitate a focus on the environmental and human rights impacts of transboundary inland water transport. One approach could be to undertake a human rights compatible SEA of the dredging and infrastructure needed to facilitate greater cross border inland water transport. This would allow potential impacts on transboundary rivers, such as the Meghna river, to be identified. Any SEA should include consideration of relevant human rights issues, such as potential impacts on the right to water, and rights to food, health and a livelihood. Such an SEA could then form the basis for regional cooperation aimed at avoiding and redressing potential adverse impacts from this sector.

More generally, there is a need for SASEC and other sub-regional initiatives including BIMSTEC (whose work, including on inland water transport and fisheries, has implications for water governance) to have a more explicit focus on human rights in the context of their areas of focus. Member states of each initiative should take their international human rights obligations into account when acting through these initiatives, which have to date largely ignored issues of human rights.

The Mahakali Treaty is a bilateral water resources treaty signed between India and Nepal in 1996. It is the only one of its kind in the GBM and Salween river basins. The treaty aims to ensure the fair sharing of waters from the Mahakali river between both countries. Article 7 of the Treaty states that India and Nepal must not use, obstruct or divert waters from the Mahakali river without the agreement of the other so that the flow and level of the river is maintained.¹¹⁵ The treaty isn't focussed on private sector issues, and is the subject of some community complaint,¹¹⁶ and poor implementation but nevertheless shows that bilateral cooperation, or at least a high level commitment to cooperation, is possible, even on contentious issues like water sharing and distribution.

Regional cooperation would also be improved if the governments of the countries of the GBM and Salween river basins (including China, as an upstream country) sign key international treaties. Relevant treaties are the Convention on the protection and use of transboundary watercourses and international lakes (1992) and the Convention of the law of the non-navigational uses of international watercourses (1997). The 1992 convention focuses on preventing and

¹¹⁴ South Asia Subregional Economic Cooperation Operational Plan 2016–2025 Update, Asian Development Bank, 2020, <https://www.adb.org/sites/default/files/institutional-document/551061/sasec-operational-plan-2016-2025-update.pdf>

¹¹⁵ Mahakali Treaty 1996, http://mowr.gov.in/sites/default/files/MAHAKALI_TREATY_19961.pdf

¹¹⁶ See for example Strengthening the institutional framework for cooperative governance in the Mahakali/Sharda Basin in India and Nepal: BRIDGE workshop report, Nepal, June 2018, https://www.iucn.org/sites/dev/files/content/documents/mahakali_workshop_report_jun2018.pdf

controlling pollution likely to have a transboundary impact, and ensuring ecologically sound and equitable water use.¹¹⁷ The convention also encourages bilateral and regional cooperation to implement environmental impact assessments relating to transboundary waters, and to develop harmonised policies, programmes and strategies aimed at preventing and controlling transboundary impacts. The 1997 convention includes obligations related to pollution, notification in emergency situations and notification of 'planned measures', and obligations to not cause significant harm.¹¹⁸ Even in the absence of governments signing these treaties (which the geopolitics of the region does make unlikely), efforts to harmonise policies, programmes and strategies, including in relation to private sector impacts on transboundary rivers, is needed.

Regional cooperation isn't just confined to what governments can do. Businesses can and should also work together to improve business respect for human rights. The UN Development Programme's Business and Human Rights Asia-Pacific project and the India Responsible Business Forum are two examples of platforms for networking and information exchange. Opportunities also exist for greater networking and collaboration between national chambers of commerce to advance business respect for human rights and more responsible business practice including in relation to rivers and the environment more broadly. For example, the Federation of Indian Chambers of Commerce and Industry has hosted conferences on biodiversity and ecosystem management, and land restoration, and sharing the outcomes of those conferences and encouraging other national chambers of commerce to host similar events elsewhere in the region might be advantageous.

¹¹⁷ Convention on the Protection and Use of Transboundary Watercourses and International Lakes Helsinki, 17 March 1992, Article 2, <https://www.unece.org/fileadmin/DAM/env/water/pdf/watercon.pdf>

¹¹⁸ Convention on the Law of the Non-Navigational Uses of International Watercourses. New York, 21 May 1997, https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf

6. RECOMMENDATIONS

A number of areas emerge where the potential to bridge the gap between business and human rights, and water governance practice exists. Some specific recommendations are made below that are aimed at promoting respect for human rights in the context of business activity where business activity is impacting on rivers and their watersheds. These are presented alongside the core obligations of governments and businesses with respect to human rights including the right to water.

In making the recommendations that follow Oxfam encourages all stakeholders in the countries of the GBM and Salween river basins to work together to achieve better outcomes for river dependent communities. Oxfam also encourages stakeholders to hold each other accountable where specific obligations exist.

In all this it is critically important to ensure public access to environmental information, and public participation in decision-making. Too often affected communities and CSOs are excluded from decision-making process, and from dialogues on private sector activity and development. Women's understanding of the use, sharing and conservation of water resources is key to better water governance yet their voices are rarely heard in decision-making forums. In the case of Indigenous Peoples, the UNDRIP specially promotes the rights of Indigenous Peoples to participate in decision-making in matters which affects their rights, however, this rarely happens. Decision-making processes must be inclusive of affected communities, including women, Indigenous Peoples and human rights defenders. Decision-making power cannot rest solely with government and business elites.

6.1 Meeting human rights obligations

- Governments and businesses have different human rights obligations including with regards to the right to water. The state has a duty to protect against human rights abuse by third parties, including business (states have both domestic and extraterritorial obligations here); business has a responsibility to respect human rights and address adverse impacts with which they are involved; and both states and businesses should provide access to remedy for victims of business related human rights abuse. The state duty to protect is in addition to obligations to respect and fulfil human rights, including the right to water. Oxfam encourages states and business the GBM and Salween river basins to not only meet their obligations but, in the case of business, demand government does too.

Responsible business practice and business respect for human rights

All businesses must respect human rights. In relation to water this means businesses should not divert, degrade, deplete or pollute water sources if doing so would undermine people's right to sufficient, safe, acceptable, physically accessible and affordable water, or if local communities rely on those water sources for food, health and a livelihood.

Consistent with the UNGPs businesses should:

1. Assess the potential and actual negative human rights impacts of their own activities, or which may be linked to them through their business relationships through due diligence processes, and for SMEs through more informal processes, and prevent, mitigate or otherwise address any negative impacts.
2. Provide mechanisms through which grievances can be raised by affected community members and remedies sought.
3. Avoid causing or contributing to attacks on human rights defenders, and seek to prevent and address attacks against defenders linked to their own operations and business relationships.

Beyond the specific principles outlined above there is a fundamental need for businesses to more fully embrace responsible and inclusive business practices. This means business should:

1. Engage in dialogue with affected communities
2. Be open to understanding community information on potential business impacts (rather than discrediting community experiences or data)
3. Engage in prior consultation and share information with communities (consistent with the principle of free, prior and informed consent)
4. Ensure there are opportunities for communities to benefit equally and fairly from business activity.

- Oxfam also encourages governments and businesses in the GBM and Salween river basins to be guided by the UN Working Group on Business and Human Rights' gender guidance. Doing so will ensure that women, along with men, can realise their right to water, and with that their rights to food, health, a livelihood and culture.
- Oxfam encourages GBM and Salween river basin governments to strengthen access to remedy for victims of business-related human rights abuse including to support the independence, capacity and effectiveness of NHRIs. Oxfam also encourages governments to develop an extraterritorial mandate for their NHRIs so that NHRIs can investigate and address allegations of human rights violations abroad by corporations domiciled in their territory.
- Oxfam encourages governments and businesses in the GBM and Salween river basins to engage positively with community-initiated water

governance projects, and to respect community determined priorities and strategies for the development and use of their natural resources. Oxfam also encourages governments and businesses to respect Indigenous Peoples rights to self-determination, and other rights promoted in the UNDRIP.

- Oxfam encourages GBM and Salween river basin governments to provide a safe and enabling environment for human rights defenders and CSOs working on water issues, and encourages businesses to prevent and address attacks against human rights defenders linked to their activities. The physical violence, illegal arrest, arbitrary detention and judicial harassment, and restrictions on freedom of expression and association that is working to silence human rights defenders must stop.
- Oxfam has previously stressed the importance of all stakeholders working together to improve the water governance and the sustainability of business activities that directly affect the health of rivers. We reiterate this here. We also add that there is a need to ensure that human rights issues are given sufficient attention in collaborative work and multi-stakeholder initiatives, including the development of sector specific guidelines for responsible business practice.

6.2 Bridging the gap between the right to water, water governance and business and human rights

- Oxfam encourages all governments in the GBM and Salween river basins to develop a NAP and for these plans to give significant attention to the right to water (and related environmental protection issues). Oxfam also encourages governments to prioritise in their NAPs the protection of human rights defenders, and the protection of informal sector workers, especially where the livelihoods of these workers are closely linked to the natural environment. Oxfam also encourages governments to ensure NAP development processes are inclusive and involve the meaningful participation of civil society and affected communities, and that NAPs are based on thorough baseline assessments.
- Oxfam encourages all stakeholders to commit to bringing a human rights lens to environmental assessment and water governance tools, such as SEA, integrated resource planning and river basin planning. Oxfam encourages all stakeholders (including human rights, impact assessment and water planning practitioners) to work together to develop and test methodologies. The UN Working Group on Business and Human Rights, and the UN Special Rapporteur on Human Rights and the Environment are potential allies in this work.
- Corruption has the potential to undermine the realisation of human rights, including in the context of business activity. Oxfam encourages all stakeholders in GBM and Salween river basin countries to consider the

outcome of the UN Working Group on Business and Human Rights' study on the connection between business, human rights and corruption, and to develop measures to address corruption when it does negatively impact human rights, including on the right to water.

- Improving regional cooperation on water governance issues has the potential to improve environmental and human rights outcomes. Oxfam encourages greater regional cooperation, aimed at ensuring a safe, clean, healthy and sustainable environment, and avoiding and redressing potential adverse impacts on peoples' rights including from business activity. Harmonising policies, programmes and strategies, including on environmental impact assessment processes, at a catchment level is also encouraged. Further, governments should ensure that sub-regional initiatives such as SASEC and BIMSTEC have a more explicit focus on protecting and respecting human rights.

This paper was written by Christina Hill (Independent Consultant) for the Transboundary Rivers of South Asia (TROSA) programme.

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