

# ADVOCATING FOR A HUMAN RIGHTS-BASED APPROACH TO THE GANGES WATER SHARING TREATY (GWST)

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“The Ganges is not just a river, it is a divine force that sustains life.”

## ABSTRACT

The arsenic contamination crisis in Bangladesh has emerged as one of the most pressing public health emergencies of our time, as labeled by the World Health Organization (WHO). With nearly half of the country’s tube wells tainted by arsenic, this crisis has resulted in widespread health complications such as cancer and cardiovascular diseases. Despite efforts by international intergovernmental organizations like United Nations Children’s Fund (UNICEF) to provide alternative water sources to Bangladesh, a substantial segment of the population—approximately 13 percent according to recent UNICEF surveys—continues to rely on contaminated water. This persistent reliance underscores the urgent need for comprehensive intervention strategies to mitigate health risks and safeguard the Bangladeshi population. In response, this article advocates for a human rights-based approach to addressing the arsenic contamination crisis in Bangladesh, emphasizing empowerment and the recognition of human rights for affected individuals and groups. Collaborative efforts between the governments of India and Bangladesh, international intergovernmental organizations, and civil society actors are deemed essential to address the root causes of water contamination in the Ganges basin and prioritize the health and well-being of affected individuals and populations. Through sustainable and equitable solutions such as water treatment facilities and education campaigns, India and Bangladesh can mitigate the immediate impacts of this public health emergency and uphold the rights of all individuals and communities involved.

**KEYWORDS**

Arsenic contamination crisis; Bangladesh; India; water sharing; public health emergency; human rights-based approach; water pollution; UNICEF; WHO; Ganges; health risks; sustainable solutions; international cooperation; human rights principles.

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**INTRODUCTION**

The arsenic contamination crisis in Bangladesh since the early 1990s has not only persisted but also intensified, evolving into one of the most severe public health emergencies in modern history.<sup>1</sup> With nearly half of the country’s tube wells found to be contaminated with arsenic, this crisis has earned the alarming distinction of being characterized by the World Health Organization (WHO) as “the largest mass poisoning of a population in history.”<sup>2</sup>

Its consequences have been multifaceted, triggering widespread health complications such as cancer and cardiovascular diseases,

1. See e.g., Sk. Akhtar Ahmad et al, *Arsenic Contamination in Groundwater in Bangladesh: Implications and Challenges for Healthcare Policy*, 11 RISK MGMT. AND HEALTHCARE POL’Y 251, 251 (2018).

2. For further references on this issue, see Parijat Sen, *Arsenic: The Largest Mass Poisoning of a Population in History*, BMJ, 346 (June 2013).

impacting the lives of millions of Bangladeshis.<sup>3</sup> This crisis has not only posed significant challenges to public health infrastructure but also underscored the urgent need for comprehensive intervention strategies to mitigate its devastating effects on the population.<sup>4</sup>

In response to this crisis, several organizations, including United Nations Children's Fund (UNICEF), have launched initiatives to provide alternative water sources.<sup>5</sup> These efforts aim to ensure access to clean and safe water for the affected communities. The initiatives include the installation of water purification systems, the distribution of water filtration devices, and the construction of new wells and boreholes. Additionally, educational programs were implemented to raise awareness about the importance of water hygiene and conservation. By addressing both immediate and long-term needs, these organizations strive to mitigate the impact of the crisis and promote sustainable water management practices.<sup>6</sup> This ongoing reliance poses serious health hazards, as many individuals are unaware of the long-term health implications associated with arsenic exposure. Chronic exposure to arsenic can lead to severe health issues, such as skin lesions, cardiovascular diseases, and an increased risk of various cancers. The lack of awareness exacerbates these risks, making it crucial to address both the exposure and the education regarding its harmful effects. Moreover, prolonged ingestion of arsenic contaminated water can cause developmental problems in children and reproductive issues in adults. Despite these and other risks, a lack of public awareness and inadequate infrastructure often perpetuate the dependence on contaminated water sources. To address this critical issue, comprehensive public health campaigns and improved water quality monitoring are essential. These efforts may help educate communities about the dangers of arsenic exposure and promote the adoption of safer water practices.<sup>7</sup>

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3. See Bruce K. Caldwell, et al, *Searching for an Optimum Solution to the Bangladesh Arsenic Crisis*, 56.10 SOC. SCIENCE & MED. 2089, 2089 (2003).

4. For more, see Md. Anwarul Abedin & Rajib Shaw, *Arsenic Contamination in Bangladesh: Contemporary Alarm and Future Strategy*, in DISASTER RISK REDUCTION APPROACHES IN BANGLADESH (Md. Anwarul Abedin & Rajib Shaw eds., 2013), [https://doi.org/10.1007/978-4-431-54252-0\\_9](https://doi.org/10.1007/978-4-431-54252-0_9).

5. See UNICEF, *Strategy for water, sanitation and hygiene 2016–2030*, (2016). See also Jessica-Philips Tyson, *Water, Water Everywhere: An Analysis of the Effectiveness of World Bank's and UNICEF's Efforts to Provide Access to Clean Water in Nigeria* (2011) (Honors Thesis, University of Mississippi), [https://egrove.olemiss.edu/hon\\_thesis/2445](https://egrove.olemiss.edu/hon_thesis/2445).

6. See A. H. Smith et al, *Contamination of Drinking-Water by Arsenic in Bangladesh: A Public Health Emergency*, 78.9 BULL. OF THE WORLD HEALTH ORG. 1093–1103 (2000), <https://www.scielosp.org/pdf/bwho/v78n9/v78n9a05.pdf>.

7. See Christine Marie George et al, *Impact on Arsenic Exposure of a Growing Proportion of Untested Wells in Bangladesh* 11 ENV'T HEALTH, Feb. 2012, <https://doi.org/10.1007/s12017-012-9000-0>.

In light of these challenges, this Article advocates for the implementation of a human rights-based (HRB) approach to tackle public health emergencies, such as the arsenic contamination crisis in Bangladesh. By adopting an HRB approach, policies and interventions may be designed to ensure that the basic rights of affected populations are respected and protected. This includes the right to access safe drinking water, the right to health, and the right to information. An HRB approach emphasizes the importance of community participation in decisionmaking processes, ensuring that the voices of those most impacted are heard and considered. Additionally, it calls for accountability mechanisms to monitor the effectiveness of interventions and to address any violations of human rights. By integrating human rights principles into public health strategies, this approach aims to create more sustainable and equitable solutions to public health crises.

Founded on international human rights rules and standards, this tactic aims to empower affected groups and individuals by acknowledging them as rights holders rather than passive recipients of aid. By recognizing people as active claimants of their fundamental rights, this methodology emphasizes their entitlement to safe and adequate resources, as well as their role in influencing and shaping the response to the crisis. It seeks to transform the traditional aid model, which often positions affected individuals as mere beneficiaries of external assistance, into a more inclusive and participatory framework. This perspective not only respects the agency of individuals but also encourages their involvement in decisionmaking processes, fostering a sense of responsibility. By focusing on rights and empowerment, the approach strives to achieve more effective solutions to public health emergencies, ensuring that interventions are aligned with the needs of the communities they aim to support.

The Article is organized into an introduction and five main parts. Part I delves into the contextual backdrop of the arsenic pollution crisis in Bangladesh, elucidating past and current efforts by various stakeholders to manage the situation. Subsequently, Part II provides an overview of the Ganges Water Sharing Treaty, elucidating its structure, purposes, and key principles. The potential role of the responsibility to protect public health is explored in Part III, while Part IV delves into the application of a HRB approach to the Ganges Treaty. The Article concludes by highlighting the potential of such an interpretative approach in effectively addressing and overcoming the specific challenges posed

by water pollution in Bangladesh, contingent upon collaborative efforts between the competent authorities of Bangladesh and India in mitigating the presence of arsenic in drinking water.

In further detail, the Article emphasizes the importance of integrating human rights principles into policy frameworks and decision-making processes to ensure a comprehensive and rights-based response to public health emergencies. It underscores the need for ongoing collaboration between governments, international organizations, and civil society actors to address the root causes of water contamination and prioritize the health and well-being of affected populations.

By adopting a human rights-based approach, this article contends that governments can not only mitigate the immediate impacts of public health emergencies but also lay the groundwork for sustainable and equitable solutions that uphold the rights of all individuals and communities involved.

## I. THE GANGES WATER SHARING TREATY OF 1996

The Bangladesh-India Treaty concerning the Ganges River<sup>8</sup> and the India-Nepal Treaty regarding the Mahakali River<sup>9</sup> were meticulously crafted with the primary objective of resolving longstanding disputes between India and its neighboring nations concerning water allocations.<sup>10</sup> These disputes primarily arose due to India's construction of barrages along the Ganges and Mahakali Rivers, significantly affecting water flow and access for downstream regions.<sup>11</sup>

These treaties epitomize comprehensive agreements delineating the long-term management of water resources within their respective river basins.<sup>12</sup> They meticulously outline specific discharge schedules spanning 30 and 75 years, respectively, aiming to provide clarity and stability in water distribution.<sup>13</sup> However, it is imperative to recognize that the principal focus of these agreements lies in the utilization of water resources rather than their conservation.<sup>14</sup> While these treaties

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8. The agreement on sharing of the Ganges waters at Farakka 1977 can be found at 1066 U.N.T.S 3, <https://treaties.un.org/doc/Publication/UNTS/Volume%201066/v1066.pdf>.

9. See Shaista Tabassum & Nusrat Idris, *India-Nepal Treaty on Mahakali River*, 57.2 PAKISTAN HORIZON 51–61 (2004).

10. See generally Climate Diplomacy, *India and Bangladesh Conflict Over the Ganges River*, <https://climate-diplomacy.org/case-studies/india-and-bangla-desh-conflict-over-ganges-river>.

11. See Arianna Crosera, *The India-Bangladesh Treaty of 1996: Sharing Waters at Farakka - An International Water Law Perspective*, 3 TRENTO STUDENT L. REV. 127, 128 (2021).

12. See Philippe Sands, *Bangladesh-India: Treaty on Sharing of the Ganges Waters at Farakka*, 36.3 INT'L LEGAL MATERIALS 519, 519 (1997).

13. *Id.* at 519.

14. Crosera, *supra* note 11, at 129.

aim to regulate the distribution and utilization of water for various purposes such as irrigation, navigation, and energy generation, they may inadequately address measures aimed at preserving the ecological health and long-term sustainability of these critical river systems.

The overarching objective of these treaties is to resolve protracted disagreements over water entitlements, thereby fostering cooperation and stability in the region.<sup>15</sup> Nevertheless, the emphasis on utilization over conservation raises pertinent questions regarding the potential long-term environmental consequences of these agreements. There is an increasing recognition of the necessity for ongoing evaluation and potential revision to ensure that these treaties effectively balance the needs and interests of all stakeholders while also safeguarding the ecological integrity of the rivers involved.<sup>16</sup>

It is imperative that future discussions and negotiations surrounding these treaties incorporate a more holistic approach prioritizing both the utilization and conservation of water resources. This entails considering the ecological impacts of water management practices and implementing measures to mitigate any adverse effects on the environment and downstream communities. By embracing sustainable and equitable water management strategies, the parties involved can ensure the long-term viability and resilience of these crucial river systems for present and future generations.

## II. THE 'INTERNATIONAL RESPONSIBILITY TO PRACTICE PUBLIC HEALTH' AND THE ARSENIC CONTAMINATION CRISIS IN BANGLADESH

Public health crises, as illustrated by the arsenic contamination issue in Bangladesh, have the capacity to disrupt social order, thereby endangering fundamental rights and freedoms enshrined within the framework of international human rights law.<sup>17</sup> These crises not only threaten the human rights to health and life but also exacerbate existing inequalities, hindering individuals and communities from accessing vital resources such as clean water, adequate nutrition, and shelter.<sup>18</sup>

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15. Muhammad Mizanur Rahaman, *The Ganges Water Conflict; a Comparative Analysis of 1977 Agreement and 1996 Treaty*, 1/2 *ASTERISKOS: J. OF INT'L AND PEACE STUDIES* 195–208, (2006) <https://www.internationalwaterlaw.org/bibliography/articles/general/Rahaman-Ganges-Asteriskos.pdf>.

16. Crosera, *supra* note 11, at 129.

17. See Brigit Toebes, *Human Rights and Public Health: Towards a Balanced Relationship*, in *NAT'L SECURITY, PUB. HEALTH: EXCEPTIONS TO HUMAN RIGHTS?* 106–122 (Myriam Feinberg et al eds., 2016).

18. See Gian Luca Burci & Riikka Koskenmäki, *Human Rights Implications of Governance*

Consequently, there arises a pressing need for sovereign states to respond appropriately to such exigencies, particularly when they pose existential threats to their populations.<sup>19</sup>

In this context, it is crucial to analyze the potential roles of governmental entities in addressing global public health crises comprehensively. This involves not only providing immediate assistance to affected individuals but also formulating and implementing enduring strategies for mitigation and recovery.<sup>20</sup> Furthermore, it also involves states prioritizing the equitable distribution of vital resources essential for sustaining life, including high-quality water. By integrating human rights principles into public health emergency responses, governments can enhance their effectiveness in safeguarding the vital entitlements of their citizens. This ensures both immediate relief and sustainable solutions to prevent future crises, thereby upholding the rights and well-being of all affected individuals and communities.<sup>21</sup>

The escalating severity and frequency of public health crises in recent years have spurred the exploration and elaboration of alternative solutions for addressing these challenges. The concept of the ‘international responsibility to practice public health’ has emerged as one such solution. This responsibility, as articulated by Professor David Fidler of Indiana University, encompasses collective and individual actions rooted in public health theory and practice.<sup>22</sup> It bears resemblance to the better-known doctrine of Responsibility to Protect (R2P),<sup>23</sup>

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*Responses to Public Health Emergencies: The Case of Major Infectious Disease Outbreaks, in* HEALTH AND HUMAN RIGHTS IN A CHANGING WORLD 516–525 (Michael A. Grodin et al eds., 3d ed. 2013); Anna Griley, *Arbitrary, Unnecessary Quarantine: Building International and National Infrastructures to Protect Human Rights During Public Health Emergencies*, 34 WIS. INT’L L. J. 914–951 (2017).

19. See Jamie Enoch & Peter Piot, *Human Rights in the Fourth Decade of the HIV/AIDS Response: An Inspiring Legacy and Urgent Imperative*, 19 HEALTH AND HUM. RTS. J. 117 (2017), <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/125/2017/12/Enoch.pdf>

20. See generally Sara E. Davies, *Infectious Disease Outbreak Response: Mind the Rights Gap*, 25 MEDICAL L. REV. 270 (2017); Andrew Lakoff, *Preparing for the Next Emergency*, 19 PUB. CULTURE 247 (2007), [https://www.researchgate.net/profile/Andrew-Lakoff/publication/249879228\\_Preparing\\_for\\_the\\_Next\\_Emergency/links/55b9ca9908aed621de087a6d/Preparing-for-the-Next-Emergency.pdf](https://www.researchgate.net/profile/Andrew-Lakoff/publication/249879228_Preparing_for_the_Next_Emergency/links/55b9ca9908aed621de087a6d/Preparing-for-the-Next-Emergency.pdf)

21. See Roojin Habibi et al, *The Principles and Guidelines on Human Rights and Public Health Emergencies* (University of Groningen Faculty of Law Research Paper No.14/2023).

22. See David P. Fidler, *The UN and the Responsibility to Practice Public Health*, 2 J. OF INT’L LAW AND INT’L RELATIONS 41–62 (2005); see also David P. Fidler, *Public Health and National Security in the Global Age: Infectious Diseases, Bioterrorism, and Realpolitik*, 35 GEO. WASH. INT’L L. REV. 787 (2003).

23. G.A. Res. 63/308 (Oct. 7, 2009), <https://www.refworld.org/legal/resolution/unga/2009/en/69565>

serving as an application of R2P principles in the realm of global public health security.<sup>24</sup>

In addition to Fidler's framework, other scholars have stressed the need for a paradigm shift in global health governance towards a more proactive and inclusive approach.<sup>25</sup> This approach entails not only responding to crises but also prioritizing prevention, capacity-building, and equity in health access.<sup>26</sup> Furthermore, it involves strengthening international cooperation mechanisms and institutions to ensure a coordinated and timely response to emerging health threats.<sup>27</sup>

As outlined in UN Secretary-General Ban Ki-Moon's report 'Implementing the Responsibility to Protect,'<sup>28</sup> the R2P, akin to the responsibility to practice public health, places the primary responsibility on individual states to safeguard their populations from egregious crimes such as war crimes, genocide, ethnic cleansing, and crimes against humanity.<sup>29</sup> This foundational principle underscores the sovereignty of states while emphasizing their duty to ensure the safety and well-being of their citizens.

However, in cases where a state is unable or unwilling to fulfill its responsibility to protect its population from serious harm, the international community assumes a collective responsibility to intervene.<sup>30</sup> This intervention may include a range of measures and actions, including diplomatic, economic, and, in extreme cases, military intervention.<sup>31</sup> This underscores the commitment of the international community to uphold fundamental human rights and prevent mass atrocities.<sup>32</sup> Moreover, R2P encompasses not only the response to immediate

24. See ALEX J. BELLAMY, *RESPONSIBILITY TO PROTECT* (2009); Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 *ETHICS & INT'L AFFAIRS* 143 (2010).

25. See Lindsay Wiley, *Moving Global Health Law Upstream: A Critical Appraisal of Global Health Law as a Tool for Health Adaptation to Climate Change*, 22 *GEO. INT'L ENV'T. L. REV.* 439 (2010).

26. See Eric A. Heinze, *Humanitarian Intervention, the Responsibility to Protect, and Confused Legitimacy* 11 *HUMAN RIGHTS & HUMAN WELFARE* 17 (2011); Gareth Evans, *Responsibility to Protect: An Idea Whose Time has Come . . . and Gone?*, 22.3 *INT'L RELATIONS*, 283 (2008).

27. See Sumbal Javed & Vijay Kumar Chattu, *Strengthening the COVID-19 Pandemic Response, Global Leadership, and International Cooperation Through Global Health Diplomacy*, 10 *HEALTH PROMOTION PERSPECTIVES* 300 (2020).

28. The text of the report is available at: <https://www.globalr2p.org/wp-content/uploads/2020/01/2009-UNGA-Debate-Summary.pdf>

29. *Id.*

30. Global Centre for the Responsibility to Protect, *What is R2P?*, <https://www.globalr2p.org/what-is-r2p/>

31. *Id.*

32. *Id.*

humanitarian crises but also proactive measures aimed at preventing such crises from occurring in the first place.<sup>33</sup>

This preventive aspect emphasizes the importance of addressing root causes and promoting conflict resolution and reconciliation to mitigate the risk of future atrocities. Furthermore, R2P extends beyond the immediate response and includes efforts to rebuild affected communities and societies.<sup>34</sup> This entails supporting post-crisis reconstruction, fostering reconciliation processes, and strengthening institutions to ensure lasting peace and stability.

Despite these principles, nearly two decades after the High-Level Panel report first proposed incorporating public health into UN reform, states remain hesitant to endorse R2P doctrines that advocate for outside interference in public health crises affecting specific countries, such as the arsenic pollution crisis in Bangladesh.<sup>35</sup> This reluctance is generally rooted in concerns over national sovereignty and the potential implications of external intervention.<sup>36</sup> Several states fear that endorsing R2P doctrines in the context of public health emergencies could set a precedent for international involvement in a wide range of domestic issues.<sup>37</sup> Furthermore, there is often a lack of consensus on the criteria for intervention and the mechanisms for ensuring accountability and effectiveness.<sup>38</sup> Consequently, while the principles of human rights and international cooperation are widely acknowledged, their practical application in addressing public health crises remains limited. This ongoing hesitation highlights the need for continued dialogue to build trust and develop frameworks that balance respect for sovereignty with the imperative to protect and promote public health globally.<sup>39</sup>

Moreover, the application of R2P in public health contexts raises challenging questions about the appropriate thresholds for intervention, the role of international intergovernmental organizations like the WHO, and the potential for unintended consequences. While R2P provides

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33. RESPONSIBILITY TO PROTECT, *supra* note 24, at 50.

34. *Id.*

35. On these doctrines, *see* RESPONSIBILITY TO PROTECT, *supra* note 24.

36. *See* Marcos Tourinho et al, “*Responsibility While Protecting*”: *Reforming R2P Implementation* 30.1 GLOBAL SOCIETY 134 (2016).

37. *See* Craig Allen & Thérèse O’Donnell, *A Call to Arms?: Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences*, CONFLICT AND SEC. LAW 337 (2012).

38. *See* INTERNATIONAL COMMISSION ON INTERVENTION, STATE SOVEREIGNTY, AND INTERNATIONAL DEVELOPMENT RESEARCH CENTRE, *THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY* (2001).

39. *See* Francesco Seatzu, *Leaving No One Behind: A Human Rights-Based Approach to the Protection of the Victims of Global Public Health Emergencies*, 13 HUM. RIGHTS & INT’L LEGAL DISCOURSE 131 (2019).

a framework for responding to crises where states fail to protect their populations, the unique nature of public health emergencies complicates traditional notions of sovereignty and intervention.<sup>40</sup>

Furthermore, the politicization of public health issues<sup>41</sup> and the uneven distribution of resources and expertise among nations create additional barriers to effective R2P implementation in this domain. Developing countries, in particular, may perceive R2P interventions as paternalistic or driven by ulterior motives, undermining trust and cooperation in addressing shared health challenges.<sup>42</sup>

### III. A HUMAN RIGHTS BASED APPROACH TO THE GANGES WATER SHARING TREATY

This Part introduces an innovative approach grounded in international human rights principles for interpreting the GWST. By applying these principles, the approach aims to ensure that the treaty not only addresses the equitable distribution of water resources but also promotes the protection of fundamental human rights for the populations dependent on the Ganges River.

This approach highlights a state's affirmative duties within two distinct legal frameworks: human rights law and international water law. Under human rights law, states have the obligation to ensure that all individuals have access to sufficient, safe, and affordable water, which is essential for the enjoyment of a range of human rights, including the rights to life, health, and an adequate standard of living.<sup>43</sup> In the context of international water law and policy, states are required to manage shared water resources in a manner that is equitable and reasonable, taking into account the needs and interests of other states and their populations.

By adopting a dynamic interpretation of the GWST, which primarily operates as a horizontal regime among states, and investigating its interaction with human rights law, functioning as a vertical regime between states and individuals, a dual focus is established.

This dual focus facilitates a more comprehensive understanding of the treaty's implications and effects, particularly concerning the protection and fulfillment of human rights related to water access and

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40. *Id.*

41. See e.g., Daniel S. Goldberg, *Against the Very Idea of the Politicization of Public Health Policy*, 102 AM. J. PUB. HEALTH 44–49 (2012).

42. See Fidler, *supra* note 22, at 44.

43. G.A. Res. 64/292 (Jul. 28, 2010). See also Peter H. Gleick, *The Human Right to Water*, 1.5 WATER POLICY, 487–503 (1998).

sanitation in the Ganges River basin. By acknowledging the complex interrelationships between various legal frameworks, this work seeks to illuminate the responsibilities that states assume under international treaties. These responsibilities include ensuring that water resources are distributed fairly and equitably, while simultaneously upholding core principles of human rights. The goal is to provide a comprehensive understanding of how legal obligations related to water access and human rights are intertwined and to highlight the importance of fulfilling these obligations to promote justice and equality. Moreover, it seeks to explore avenues for enhancing the treaty's effectiveness in promoting sustainable water management practices that prioritize the well-being of all stakeholders, including marginalized communities and vulnerable populations.

Through this innovative approach, the current work endeavors to bridge the gap between traditional interpretations of the GWST and evolving human rights norms, thereby contributing to more inclusive and rights-based approaches to water governance. By embracing the dynamic nature of international law and its intersection with human rights, this work advocates for a holistic understanding of Bangladesh and India's international responsibilities in managing water resources of the Ganges River basin.

The imperative to examine the relationship between the GWST and international human rights law and policy has become increasingly pressing in light of a significant normative development on a global scale. On August 3, 2010, the UN General Assembly (UNGA) adopted a resolution on the human right to water and sanitation, garnering widespread support.<sup>44</sup> This resolution affirms the right to safe and clean drinking water and sanitation as a fundamental human right essential for the full realization of life and all human rights and freedoms.<sup>45</sup> Furthermore, it calls upon states and international organizations to allocate financial resources, provide capacity-building and technology transfer, and enhance international assistance and cooperation, particularly in developing countries. These measures are aimed at ensuring universal access to safe, clean, accessible, and affordable drinking water and sanitation.

Additionally, in line with the fundamental principles of equitable and reasonable utilization and participation outlined in the GWST, Article XII emphasizes the importance of considering vital human needs

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44. G.A. Res. 64/292 (Jul. 28, 2010).

45. *See also* Daphina Misiedjan, *TOWARDS A SUSTAINABLE HUMAN RIGHT TO WATER: SUPPORTING VULNERABLE PEOPLE AND PROTECTING WATER RESOURCES* 20 (2018).

in cases of conflicting water usage. This aspect is implicitly addressed through the reference to good faith in implementing the agreement. This provision emphasizes the obligation of India and Bangladesh to refrain from actions that could directly or indirectly impede each other's access to water resources in the Ganges River basin, which are necessary for sustaining essential human needs such as drinking water and food production.

Given the significant albeit indirect correlation between Article XII of the GWST and the recent acknowledgment of the right to water as an international human right, this work contends that the affirmative obligation imposed on India and Bangladesh constitutes a crucial element in applying a human rights-based approach to the treaty. However, the implementation of such an approach presents challenges. Potential conflicts may emerge between the human rights framework and international water law and policy, resulting in fragmentation within the international legal system.<sup>46</sup> That being said, it is also true that fragmentation presents opportunities for dialogue and synergy within international law, as acknowledged by the International Law Commission (ILC) Study Group on Fragmentation.<sup>47</sup>

This work will now explore the concept of a state's 'positive obligations,' elucidating its significance and precedence over other legal categories of human rights obligations. Additionally, it will explore the structural interaction between international human rights principles and international water law and policy. Furthermore, it will examine how the human rights dimension of the GWST aligns with the positive duties and obligations of India<sup>48</sup> and Bangladesh<sup>49</sup> to ensure vital human needs, both within and beyond the scope of Article IX.

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46. *Id.* at 47–94.

47. Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.702, ¶ 9 (2006). See also Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. OF INT'L LAW 553 (2002); Tullio Treves, *Fragmentation of International Law: The Judicial Perspective*, 27 AGENDA INTERNACIONAL 214, 227 (2009).

48. India has signed the Universal Declaration of Human Rights and has also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

49. Bangladesh ratified ICESCR and ICCPR in 1998 and 2000 respectively.

### A. Reconceptualizing State Obligations in International Human Rights Law: Beyond the Dichotomy of Positive and Negative Duties

The domain of human rights law encompasses a broad array of obligations and duties imposed on states, which can be categorized as either ‘positive’ or ‘negative’.<sup>50</sup>

This classification stems from the conventional division between civil and political rights, which entail prohibitive (i.e., negative) obligations preventing state interference, and economic, social, and cultural rights, which impose positive obligations on states to enact measures ensuring the realization of specified rights.<sup>51</sup> While the former is breached by state action contrary to the safeguarding of rights, the latter is violated by a state’s failure to take requisite actions, such as neglecting to legislatively protect rights.

In practice, identifying and attributing responsibility to states for failing to meet their international duties and obligations—whether these obligations are categorized as “negative” (such as refraining from harmful actions) or “positive” (such as taking proactive measures to ensure certain outcomes)—can be quite complex. This complexity arises from various factors, including the need for clear evidence of a breach, the interpretation of international norms, and the application of legal standards to diverse and sometimes ambiguous situations. Consequently, determining the extent of a state’s liability and the appropriate remedies for such breaches often involves intricate legal analysis and diplomatic negotiations.<sup>52</sup> It seems more pertinent to assert that the protection of human rights necessitates a state’s conduct to be directed towards protecting the individual in a real and practical way, irrespective of whether such protection demands ‘positive’ or ‘negative’ actions.<sup>53</sup>

For example, the preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950<sup>54</sup> highlights the commitment of the signatory governments to implement measures that uphold and ensure the collective protection of the rights outlined in the Universal Declaration of Human Rights (UDHR).

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50. See Dinah Shelton & Ariel Gould, *Positive and Negative Obligations*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* (Dinah Shelton ed., 2013).

51. See RICCARDO PISILLO-MAZZESCHI, *INTERNATIONAL HUMAN RIGHTS LAW: THEORY AND PRACTICE* 135–155 (2021).

52. *Id.*

53. *Id.*

54. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5, 4 November 1950, <https://www.refworld.org/legal/agreements/coe/1950/en/18688> [accessed 16 October 2024].

<sup>55</sup> This preamble reflects the signatories' dedication to aligning their national policies and legal frameworks with the principles enshrined in the UDHR, thereby reinforcing their obligation to promote and safeguard fundamental human rights across member states.

Furthermore, in its 1979 decision *Ireland v. The United Kingdom*, the European Court of Human Rights clarified the objective obligations set forth by the Convention<sup>56</sup>. The Court emphasized that contracting states are not only required to respect the rights and freedoms guaranteed by the Convention but also have a duty to actively prevent and remedy any violations that may occur at lower levels of government or within other subordinate entities. This means that states must ensure effective measures are in place to both protect and enforce these rights, thereby securing their enjoyment for individuals within their jurisdiction.<sup>57</sup>

Similarly, the American Convention on Human Rights of 1969 (ACHR) imposes obligations on state parties to both respect and guarantee the rights recognized within the Convention. This entails that states not only refrain from interfering with or violating these rights but also take proactive measures to ensure their protection and implementation within their national legal systems. The ACHR provides a framework for the standards and practices required to uphold these rights, guiding how they should be integrated and enforced domestically to ensure effective human rights protection for all individuals under the jurisdiction of the state parties.

Furthermore, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have identified three specific types of obligations that states must fulfill. These obligations include:

- (1) Refraining from Violations: States are required to abstain from actions that infringe upon human rights. This means that governments should not engage in activities that directly violate the rights enshrined in international human rights instruments.
- (2) Preventing Violations: States have a duty to take proactive measures to prevent human rights violations. This responsibility extends not only to actions by state actors but also to the prevention of violations by non-state actors, ensuring that the environment is safeguarded against abuses.

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55. Adopted by General Assembly Resolution 217 A(III) of 10 December 1948. The Universal Declaration is available in 369 language variations on the website of the Office of the United Nations High Commissioner for Human Rights.

56. *Ireland v. the United Kingdom*, 2 Eur. Ct. H. R. 25, ¶ 239 (1977).

57. *Id.*

(3) Conducting Thorough Investigations: States must carry out comprehensive and effective investigations into allegations of human rights violations. This includes establishing the facts of the case and holding those responsible for such violations accountable through legal and judicial processes.

These obligations underscore the comprehensive nature of state responsibilities in the protection and promotion of human rights within their jurisdictions.<sup>58</sup>

Similarly, at the international level, the International Covenant on Civil and Political Rights (ICCPR)<sup>59</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR) outline states' responsibilities to respect, protect, and progressively fulfill human rights.<sup>60</sup>

Despite the existence of various interpretations regarding the categorization of state duties and obligations in international human rights law, ranging from tripartite typologies to trilogies like protect, respect, and remedy, the overarching goal remains the same: to ensure the effective observance of human rights.<sup>61</sup> This requires moving beyond traditional dichotomies and adopting a more nuanced understanding of the duties and obligations of states in both promoting and safeguarding human rights. Such an approach acknowledges the intricate and multifaceted nature of modern human rights discourse. By embracing this complexity, states and international bodies can more effectively address the diverse challenges and demands of contemporary human rights protection, ensuring that all aspects of rights and responsibilities are comprehensively and meaningfully addressed.

## B. The Interplay Between Human Rights and Water Governance

The intersection of water governance and human rights represents a crucial area within public international law, reflecting the evolving nature of both domains and their profound impact on global well-being.<sup>62</sup> At its core, this interaction emphasizes the recognition and protection of water-related rights as integral components of human dignity and

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58. For references on this issue, see Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U. J. INT'L L. & POL'Y 333, 333 (1996).

59. Human Rights Comm., *The Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

60. U.N. Econ. and Soc. Council, *The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, U.N. Doc. E/1991/23 (14 December 1990), <https://www.refworld.org/legal/general/cescr/1990/en/5613>

61. See Shelton & Gould, *supra* note 50.

62. See INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES, (Laurence Boisson de Chazournes et al eds., 2013).

welfare.<sup>63</sup> Over time, the concept of human rights has expanded to encompass emerging rights,<sup>64</sup> such as the right to water, which was formally recognized in 2010.<sup>65</sup> This acknowledgment marked a significant milestone in understanding access to clean and safe water as a fundamental human entitlement, essential for the realization of other human rights and freedoms.

Key actors in shaping the discourse on the right to water include bodies like the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Council.<sup>66</sup> Through various reports and resolutions, these entities have underscored the obligation of contracting states to ensure universal access to water and sanitation services, emphasizing the progressive realization of these rights.<sup>67</sup> Central to understanding state obligations and duties in the realm of human rights is the CESCR ‘trilogy,’ which delineates responsibilities to respect, protect, and fulfill human rights.<sup>68</sup> This framework guides states in their duty to uphold human rights standards, necessitating proactive actions and measures to prevent violations and address shortcomings effectively.<sup>69</sup>

In the context of international water agreements like the GWST of 1996, the imperative to safeguard water resources aligns with the broader international human rights framework. India and Bangladesh, having signed the GWST, as well as the ICESCR and ICCPR, are tasked with striking a balance between their commitments to equitably utilize the water resources of the Ganges basin and safeguarding the fundamental rights of individuals and local communities reliant on these vital resources.

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63. See Laurence Boisson de Chazournes, Christina Leb, Mara Tignino, Introduction, in Laurence Boisson de Chazournes, Christina Leb, Mara Tignino (eds.), *supra* note 49, 1–24.

64. Additionally, you can consult the Charter of Emerging Human Rights at <https://www.socialjustice.ie/system/files/file-uploads/2021-09/charteremergingrights.pdf>.

65. G.A. Res. 64/292 (Jul. 28, 2010).

66. U.N. Econ. and Soc. Council, The Right to Water (Arts. 11 and 12 of the Covenant), U.N. Doc. E/C.12/2002/11 (20 January 2003), <https://www.refworld.org/legal/general/cescr/2003/en/39347>

67. See Salman M.A. Salman, *The Human Right to Water—Challenges of Implementation*, 106 PROC. OF THE ANN. MEETING (AM. SOC. OF INT'L L.) 44, 44–46 (2012).

68. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), E/C.12/GC/19, 4 February 2008, <https://www.refworld.org/legal/general/cescr/2008/en/41968> (para. 43); UN Economic and Social Council, General Comment No. 18: The Right to Work (Art. 6 of the Covenant), E/C.12/GC/18, UN Committee on Economic, Social and Cultural Rights (CESCR), 6 February 2006, <https://www.refworld.org/legal/general/cescr/2006/en/32433> (para. 22).

69. See Asbjorn Eide (Special Rapporteur on the Right to Adequate Food as a Human Right), *Rep. on the Right to Adequate Food as a Human Right*, ¶ 66 U.N. Doc. E/CN4/Sub.2/1987/23 (1987).

### C. The Human Right to Water and the GWST

The human right to water has garnered significant attention, especially in relation to global initiatives aimed at achieving the Sustainable Development Goals (SDGs) that focus on water and sanitation. This right is increasingly recognized as fundamental to ensuring health, dignity, and well-being for all individuals. In the context of the SDGs, which emphasize universal access to clean water and sanitation by 2030, the human right to water is seen as essential for advancing these goals and addressing critical issues such as water scarcity, inequality, and the impacts of climate change.<sup>70</sup>

Acknowledging the critical importance of access to safe drinking water resources for both India and Bangladesh, it is evident that effective implementation of the GWST is essential to support Sustainable Development Goal 6 (SDG 6). SDG 6 aims to ensure availability and sustainable management of water and sanitation for all. The GWST, which governs the sharing of the Ganges River's waters between the two countries, plays a pivotal role in managing this vital resource. Proper execution of the treaty's provisions can enhance cooperation, optimize water use, and address challenges related to water scarcity and pollution. This, in turn, contributes to achieving SDG 6 by promoting equitable access to safe and clean drinking water, thus supporting broader goals of health, well-being, and sustainable development for both nations.<sup>71</sup> Proper execution further underscores the dynamic interplay between international human rights law and international water law, emphasizing the necessity for comprehensive and integrated approaches to water governance.

In the context of the GWST, which regulates the allocation and management of the Ganges River's waters between India and Bangladesh, the human right to water introduces a legal framework. This framework ensures that the principles of human rights are embedded in water governance, guiding how resources are shared and managed. The human right to water mandates that all individuals have access to sufficient, safe, and affordable water, thus influencing the treaty's implementation and reinforcing the need for equitable and just management practices. Integrating human rights considerations into the GWST can enhance its effectiveness

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70. See Otto Spijkers, *The Sustainable Human Right to Water as Reflected in the Sustainable Development Goals*, 13 *UTRECHT L. REV.* 18 (2020).

71. The text of the SDGs and related targets is available at <https://www.un.org/sustainabledevelopment/sustainabledevelopment-goals>. For a commentary, see *THE UN SUSTAINABLE DEVELOPMENT GOALS: A COMMENTARY* (Ilias Bantekas & Francesco Seatzu eds., 2023).

by ensuring that the distribution of the river's resources upholds human dignity and supports sustainable development goals.

This integration necessitates a reexamination of existing water management practices to ensure they align with principles of equity, non-discrimination, and sustainability. Such a reassessment should encompass not only the fair allocation of water resources between India and Bangladesh but also the protection of water quality and ecosystems throughout the Ganges basin. By addressing these elements, the GWST can better serve the needs of all affected communities while preserving the health and sustainability of the river environment. By adopting a human rights-based approach, India and Bangladesh, as signatories to the GWST, ICESCR, and ICCPR, can address not only the immediate challenges related to water allocation but also broader issues of social justice, environmental protection, and sustainable development.

This approach will significantly contribute to advancing the well-being of both present and future generations by fostering a more equitable and sustainable framework for resource management. By integrating considerations of human rights and environmental stewardship into the policy and management practices, it ensures that the needs and rights of current populations are met while preserving resources and conditions for future generations. This holistic approach not only addresses immediate concerns but also lays a foundation for long-term sustainability and resilience, thereby promoting overall societal welfare across temporal boundaries. The implementation of the GWST in accordance with international legal obligations is essential for ensuring access to drinking water resources for both India and Bangladesh. Article IX of the GWST implicitly highlights the significance of taking into account essential human needs when addressing conflicts over water usage in the Ganges, thereby establishing a direct connection between water governance and human rights obligations.

While the GWST does not explicitly recognize the human right to water, it inherently contributes to the practical realization of such a right, particularly in terms of water access and sanitation. Moreover, States party to the GWST bear positive obligations and duties to promote integrated water management and abstain from actions that hinder access to water resources in the two contracting countries.<sup>72</sup>

The following section will delve into the international human rights perspective in interpreting and applying the GWST provisions,

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72. See Article IX of the GWST, encapsulating the principle of no harm to either party' extends its scope beyond the mere management of the waters of Ganges to encompass considerations for addressing essential human needs.

examining its implications for ensuring fair and equitable access to water resources for all stakeholders.

#### D. Positive Human Rights Duties and Obligations for Ensuring Vital Human Needs within the GWST

So far, discussions have centered around formulating the ‘general principles’ of the GWST, with equitable and reasonable utilization assuming particular significance concerning the human rights aspect of this treaty.<sup>73</sup> The significance of this approach becomes evident in light of the urgent need to address vital human needs through the utilization of Ganges watercourses and their waters, aiming for sustainable utilization and benefits thereof.<sup>74</sup>

Article IX of the GWST not only grants India and Bangladesh the right to utilize the waters of the Ganges River but also imposes a reciprocal duty on both nations to collaborate in the equitable sharing and management of these waters. This provision underscores the dual nature of the treaty’s framework: while it provides both countries with access to this vital resource, it simultaneously obliges them to engage in cooperative efforts to ensure that the distribution and use of the water are managed in a manner that is fair, sustainable, and in accordance with the agreed terms.

The implicit recognition of ‘vital human needs’ in Article IX of the GWST underscores the treaty’s acknowledgment of the essential relationship between water governance and human rights. Its implicit retention signifies a commitment to ensuring sufficient water to sustain human life, including drinking water and water for food production. Although the concept of vital human needs may not perfectly align with the traditional logic of the GWST, which was primarily designed as a legal instrument for state-to-state interactions, it is crucial to analyze it within the broader context of international legal documents advocating for sustainable development and human-centered approaches.

Principle 1 of the Rio Declaration emphasizes the centrality of human beings in sustainable development, linking the factors related to social and economic needs in the GWST to the overarching human rights dimension.<sup>75</sup> Moreover, the protection of international water-

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73. Crosera, *supra* note 11, at 129.

74. See A.B.M Enamol Hassan, *Indian Hegemony on Water Flow of the Ganges: Sustainability Challenges in the Southwest Part of Bangladesh*, 1 SUSTAINABLE FUTURES 100002 (2019). [https://www.researchgate.net/publication/337626937\\_Indian\\_hegemony\\_on\\_water\\_flow\\_of\\_the\\_Ganges\\_sustainability\\_challenges\\_in\\_the\\_southwest\\_part\\_of\\_Bangladesh](https://www.researchgate.net/publication/337626937_Indian_hegemony_on_water_flow_of_the_Ganges_sustainability_challenges_in_the_southwest_part_of_Bangladesh)

75. Principle 1 of the Rio Declaration on Environment and Development states: “Human beings are the focus of sustainable development efforts. They have the right to lead healthy and

courses under Article 21 (2) of the GWST explicitly prohibits pollution that may endanger safe water supplies essential for vital human needs. This underscores the GWST's commitment to safeguarding water resources in a manner that ensures the fulfillment of basic human rights and freedoms, aligning with the principles of sustainable development outlined in Agenda 21.<sup>76</sup>

#### IV. CONCLUSION

In conclusion, embracing a novel international human rights-based perspective on the GWST of 1996 marks a departure from the conventional horizontal relationship solely between states. Instead, it signifies a shift towards a more nuanced dimension that acknowledges the implications of this framework on both the state parties, India and Bangladesh, and the individuals within their jurisdictions. Aligned with the general principles of the international human rights regime, this approach underscores the affirmative duty of India and Bangladesh to uphold and safeguard the human right to water and sanitation in the interpretation and application of the GWST. This human right is deemed essential for the complete realization of life and all other fundamental human rights and freedoms.

By acknowledging and prioritizing this obligation, India and Bangladesh can contribute to ensuring equitable access to the water resources of the Ganges River, thereby promoting the well-being and human dignity of individuals within their territories. The acknowledgment of this emerging human right underscores the imperative for the two state parties to the GWST to guarantee the fulfillment of vital human needs in all instances involving the treaty's application. Derived from the general principles of the international human rights regime, this positive obligation mandates proactive actions and measures by India and Bangladesh to prevent violations, extending beyond situations of conflicts between water uses as delineated in Article IX of the GWST. Moreover, India and Bangladesh are obligated to remedy any breaches already occurred, as stipulated in Article IX of the GWST.

Therefore, recent developments recognizing the human right to water as a human right impose a due diligence obligation on India and Bangladesh to ensure vital human needs when implementing the GWST. The continuous dialogue between the regimes of human rights and international water law nurtures a dynamic exchange of ideas,

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productive lives in harmony with nature." Rep. of the U.N. Conf. on Env't and Dev., U.N. Doc. A/CONF.151/26, vol. I (1992).

76. Rep. of the U.N. Conf. on Env't and Dev., U.N. Doc. A/CONF.151/26, vol.II (1992).

gradually replacing fragmented international legal structures with a unified framework. Within this framework, positive obligations and duties serve as a unifying factor among India and Bangladesh, fostering international cooperation and mutual understanding.

Furthermore, these positive human rights obligations are crucial in advancing the Sustainable Development Goals, especially in guaranteeing equitable access to water resources and fostering sustainable water management practices between India and Bangladesh. Positive human rights obligations lay the groundwork for the adoption of a novel human rights-based approach to the GWST, aligning international water law and policy with general principles of human dignity and equity.

