Dear Special Rapporteur Heller,

Thank you for the opportunity to provide input on the topic of development cooperation and the human rights to water and sanitation. We would like to draw your attention to two reports published by Human Rights Watch regarding development cooperation and human rights, *Abuse-Free Development: How the World Bank Should Safeguard against Human Rights Violations* and *At Your Own Risk: Reprisals against Critics of World Bank Group Projects*. While these reports do not target projects related to water and sanitation, the recommendations contained within have general application. We believe that you will find them useful in preparing your report.

We would also like to draw your attention to a report published by Human Rights Watch in 2013 on water and sanitation in Zimbabwe’s capital, Harare. In addition, we have included in this submission some preliminary reflections from a research project regarding arsenic in drinking water of the rural population in Bangladesh. The project is ongoing and we will share the research with you in full when it is published.

For your convenience, we have attached the three published reports to this submission.¹

We would also like to address specifically what safeguards can be put in place to ensure that development cooperation advances respect for human rights and does not risk violating rights.

Human Rights Watch advocates for strong safeguards to ensure human rights are respected in the context of development cooperation. Measures that can be taken to ensure that development cooperation related to water and sanitation does not risk violating human rights require:

1. Respect for human rights in policy;
2. Meaningful, effective consultation (or free, prior, and informed consent for indigenous peoples);
3. Human rights due diligence; and

4. Prevention, investigation, and remedy for human rights abuses linked to development projects.

This submission will address each of these in turn.

1. **Respect for Human Rights in Policy and Practice**

Development cooperation should be consistent with international human rights law and the standards set out in relevant human rights treaties as interpreted by the respective treaty bodies with due regard to declarations and documents from UN Special Rapporteurs interpreting applicable human rights standards.

States and international institutions providing development cooperation should commit not to support any activities that will contribute to or exacerbate human rights violations and to respect international human rights in all of its projects, programs, and activities. This is consistent with the legal obligations of donor states and international organizations, and it would be helpful for the Special Rapporteur to emphasize this.

Currently, the World Bank, which as you are well aware is a significant funder for water and wastewater infrastructure projects globally, is in the final stages of revising its safeguard policies. Through the safeguards review process, the World Bank could set a new standard for rights-respecting development cooperation. The World Bank has an opportunity to require respect for human rights in its new policies. Disappointingly, however, in the current draft human rights are addressed only in the non-binding vision statement and, even there, they are referred to as aspirations rather than binding obligations.

Donors should further not fund activities that would violate the human rights obligations of the recipient country under national or international law, including regional treaties and agreements. When the UN Committee on Economic, Social, and Cultural Rights asked governments whether they had raised human rights obligations when negotiating with international financial

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institutions (IFIs) like the World Bank and IMF, one state responded it had not because IFIs do not work through the ministries involved in ratifying and implementing human rights treaties (foreign affairs and justice), but finance ministries. IFIs can, and should, help governments to overcome this hurdle and contribute to harmonizing policies between government ministries by committing not to fund activities that would contravene a country’s human rights obligations. Similarly, all donors working with governments on water and sanitation should seek to promote coordination among ministries engaged in water and sanitation and those focused on implementation of human rights treaties and access to justice to ensure human rights are respected and protected.

Similarly, donors should ensure that subject-specific policies, for example policies on gender, resettlement, or indigenous peoples, meet international human rights law standards. Your report could provide guidance to donors about their specific obligations as they relate to the rights to water and sanitation.

2. Meaningful, Effective Consultation

People should be able to participate in shaping their community and their country’s development agenda, be it through government or through donor processes. Donors, as well as governments, should ensure that their processes are transparent, participatory, and inclusive, and should take all necessary measures to ensure that affected people and civil society, including marginalized groups, have the opportunity to meaningfully participate in the design and implementation of development initiatives. As the United Nations Special Rapporteur on extreme poverty and human rights has stated: “Consultation alone is not enough; those who are affected … must have a say in the decisions that affect their lives.”

States and international organizations engaging in development cooperation have a duty under international law to consult and cooperate with indigenous peoples through their own representative institutions with a view to obtaining their free and informed consent. This is supposed to occur before the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization, or exploitation of mineral, water, or other natural resources, and throughout the project cycle. Donors should maintain consultations and negotiations on important decisions affecting local communities throughout. This duty is derived from indigenous peoples’ land and resource rights. States should also provide effective mechanisms for just and fair redress for any alleged human rights violations.

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7 While these rights are most clearly enunciated in the United Nations Declaration on the Rights of Indigenous Peoples and in the International Labour Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples, they stem from existing international law.

8 UNDRIP, art. 32(2).
violations, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural, or spiritual impact.\textsuperscript{9}

Donors engaged in development cooperation should be diligent in identifying situations that might impinge on consultation. In particular, they should specify that in situations in which there is a high risk of reprisals against people or communities critical of a development cooperation-funded project, the state or international institution providing the assistance will require the involvement of independent specialists who report directly to the funder.

**Donors should:**

- Identify people affected by each activity, either directly or indirectly. Consider existing practices of discrimination and exclusion to ensure that all affected groups or individuals are identified, including, for instance, women of all marital statuses, indigenous peoples, women with disabilities, or people who may be perceived to not support the country’s ruling party.
- Ensure that affected people are involved from the early planning stages so as their views will influence the donor’s decision whether to proceed with a proposed project.\textsuperscript{10} Should the project proceed, affected people should have a role in its design and implementation, with those most affected being the most involved.\textsuperscript{11}
- Provide sufficient information in an accessible form to enable people to make informed decisions about projects.\textsuperscript{12} This should include details of the potential impacts of the project, alternative methods for undertaking the project, and potential for mitigation of adverse impacts. The information should be sufficiently accessible to overcome cultural barriers. Provide individuals and communities who may be affected by a project information about potential risks as early as possible in the decision making process.
- Ensure that people can participate freely in discussions about a project, report problems associated with the project, and organize as they may wish. This requires donors examining the degree to which the rights to freedom of expression, association, and assembly are protected in the country, and to take additional measures in certain contexts to ensure that people are able to freely participate in decisions related to the development initiative. In examining the context, donors will need to consider practical as well as legal restrictions on these rights. For example, in certain contexts, despite constitutional protection of the right to free speech, there may be a high number of targeted killings of activists.
- Take additional measures to enable meaningful, inclusive consultation when in difficult operating environments that are not conducive to participative processes. Development cooperation agreements should include a provision explicitly prohibiting recipients of development cooperation from punishing, retaliating, or otherwise acting against a

\textsuperscript{9} UNDRIP, art. 32(3).
\textsuperscript{11} Daniel Bradlow, “The World Bank, the IMF, and Human Rights,” *Journal of Transnational Law and Contemporary Problems*, vol. 6, p. 82.
\textsuperscript{12} Olivier De Schutter, “Report of the Special Rapporteur on the right to food, Addendum, Mission to Mexico,” para. 35.
stakeholder who has made their views heard, however critical they may be, and obligating recipients of development cooperation to take all necessary measures to prevent others from similarly acting against a stakeholder. Recipients of development cooperation should be required to investigate any credible allegation of intimidation, harassment, or retaliation linked to criticism of a funded project, and to provide a remedy for any abuse identified, including criminal sanctions if appropriate.

- Actively work to create safe environments for consultation. This may include seeking an undertaking from the government that there will be no surveillance of donor consultations and no reprisals for people who take part. Such an undertaking should be included as a condition in the loan agreement.\(^{13}\)
- Improve training to enable staff to meaningfully consult with affected people and civil society, including working with interpreters and recognizing diversity in communities.

3. Human Rights Due Diligence

Donors should undertake due diligence to ensure that their development cooperation does not support activities that will contribute to or exacerbate human rights violations. Donors’ due diligence frameworks should enable them to identify the human rights impacts of their activities, take measures to mitigate negative impacts and maximize positive impacts, and avoid projects and programs that will contribute to or exacerbate human rights violations. Due diligence will vary in complexity with the size of programs, projects, advice or other activities, the risk of severe human rights impacts, and the nature and context of its operations. Too often development workers overlook potential adverse rights impacts within water and sanitation projects, seeing any investment in water and sanitation as automatically advancing human rights without doing the due diligence necessary to achieve this.

Human rights due diligence activities should include human rights checks early in the project planning process, at which point donors should assess the present human rights situation in the country, the likely effects of its initiatives, and the potential for effectively mitigating adverse impacts. On the basis of this initial analysis, development partners can determine whether a full human rights impact assessment is required. Donors should publish the rationale for the decision.\(^{14}\) Human rights impact assessments should be carried out in true partnership with the community affected, including those marginalized within that community.

Human rights impact assessments should be an automatic requirement in certain projects, such as those related to major water and wastewater infrastructure, where past experience shows a risk that human rights may be adversely impacted. Human rights impacts of projects funded by development cooperation should be analyzed throughout the lifecycle of a project and beyond since the impact of human rights violations on people’s lives cannot be reduced to a single moment. See attached a case study showing how human rights due diligence could have avoided

\(^{13}\) As Bradlow has said, “It is irresponsible for the Bank to invite people to participate in its activities and then fail to protect them when its interventions result in reprisals from the Borrower State or its agents.” Daniel Bradlow, “The World Bank, the IMF, and Human Rights,” pp. 87-8.

a World Bank investment in water and other basic services contributing to forced evictions, accompanied by violence, and reduced access to the very basic services the project was meant to support.\textsuperscript{15}

In order to respect international human rights law, development cooperation should prohibit violations of those human rights, which are non-derogable. Donors should only consider measures which may have retrogressive human rights’ impacts after determining that there are no reasonable alternatives and that such measures are non-discriminatory, necessary, and proportionate taking into account the overall human rights situation.\textsuperscript{16} Due diligence reporting should be detailed and transparent. In the instance that development cooperation has adverse impact for human rights, donors and recipients should publicly and explicitly explain any adverse impact and justify why in context it should be viewed as respecting human rights and explain measures taken to mitigate and remedy any adverse rights impacts.\textsuperscript{17}

Remediation measures should be developed in partnership with those who are impacted and transparently administered. Access to forms of redress should not threaten or undermine access to judicial remedies.

Where damage is irreparable, measures should involve sufficient and prompt monetary and non-monetary compensation for victims, which may include environmental remediation to end ongoing risks for further damage. For example, contaminated source water can have multi-generational impacts and may require long-term planning and funding for both for health and other services to victims and source water remediation to end exposure.\textsuperscript{18}

When assessing development projects in the water and sanitation sector, some donors have a tendency to assess projects based on what they term “outputs” (i.e. “the hardware”) rather than what might be termed “outcomes” (i.e. the actual service provided). In water projects, this can mean that donors count the number of water points or water connections established, but do not pay close attention to the quality and safety of the water provided, the ongoing functionality of those water points or connections, or the actual number of people served by this water. There is rarely attention to such issues over time, or whether people served have means to report grievances with such services.

Human Rights Watch believes that aligning development projects in the water and sanitation sector with the human rights to water and sanitation requires close attention to the actual service provided. When indicators for assessing development projects do not include such issues, the important rights principles of sufficiency, safety, acceptability, accessibility, and affordability can be overlooked. Project monitoring should include issues such as safety, ongoing functionality, and access. In practical terms, it may be unrealistic to expect project implementers to undertake such monitoring. For this reason, Human Rights Watch recommends that donors in

\textsuperscript{15} See Human Rights Watch, \textit{Abuse-Free Development}, p. 30.


\textsuperscript{17} Daniel Bradlow, “The World Bank, the IMF and Human Rights,” p. 86.

the water and sanitation sector ensure independent third-party assessment of broad project outcomes as a mandatory component of water and sanitation projects.

Human Rights Watch has concluded based on analysis of legal standards and findings from our reports that human rights impact assessments should:

- Consider all human rights that could be impacted by the relevant activities, including:
  - Patterns of exclusion and multiple forms of discrimination, including gender, disability, age, race, national, ethnic or social origin, descent, religion, political opinion or affiliation (perceived or real), sexual orientation, marital status, and geographic location.\(^\text{19}\)
  - The environment for expression, association, and assembly, including whether repressive NGO laws exist or are about to be enacted; the degree to which civil society can operate freely; the extent to which public protests are allowed; and potential for violence or government reprisals against protestors, those taking strike action, or critics.\(^\text{19}\)
  - The framework for land ownership, whether the government forcibly evicts people in violation of international law.\(^\text{20}\)
  - The degree to which people whose rights are violated have access to justice, including through a formal legal system, traditional systems, as well as alternative dispute mechanisms. Consider whether grievance mechanisms are culturally appropriate; accessible in terms of language, cost, and inclusion of people with disabilities; transparent in decision-making; accountable; and provide measures to prevent against reprisals.\(^\text{20}\)
  - Human rights impact assessments should draw on disaggregated data to ensure analysis of the different impacts on marginalized groups.\(^\text{20}\)

- Consider reports of UN treaty bodies, the UN Human Rights Council, national human rights institutions, and NGOs in order to identify the risks.\(^\text{20}\)
- Seek to identify ways to maximize positive human rights impacts, which would be in line with donors’ development mandate.\(^\text{20}\)
- Consider whether there are development alternatives with less harmful impacts.\(^\text{20}\)
- Consider if and the degree to which adverse rights impacts can be mitigated. Mitigation measures may include: changing the project venue; measures to overcome entrenched discrimination, including special trainings for marginalized peoples;\(^\text{21}\) and efforts to get governments and other development partners to commit to protect the rights of protesters, critics, and people who file complaints.

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\(^\text{19}\) Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, pp. 267-8.


\(^\text{21}\) As the Convention on the Rights of Persons with Disabilities provides: “Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms: CRPD, art. 2.
4. Remedy for Human Rights Abuses Linked to Development Projects

The right to a remedy for violations of human rights is itself a core right. Once victims of human rights violations are identified, it will be essential to remedy the violations. Victims of human rights violations have a right to equal and effective access to justice; adequate, effective, and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

Donors should support recipient governments to create and uphold strong remedies for human rights violations, including human rights violations that development cooperation activities have contributed to or exacerbated. They should further take all necessary measures to ensure that people who seek justice for alleged human rights violations do not face reprisals.

In addition, donors should develop their own independent accountability processes through which affected people, their representatives, or concerned NGOs can seek redress for human rights abuses linked directly or indirectly to activities financed by or otherwise supported by the donor. Such accountability mechanisms should be independent, offer mediation, compliance review and an advisory function, and be empowered to monitor how the donor is implementing their decisions.22

We hope that this submission and the attached materials will be helpful as you prepare your report. We would be happy to discuss this further at your convenience.

Sincerely,

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22 For a full list of recommendations, see C. Daniel, K. Genovese, M. van Huijstee & S. Singh (Eds.), Glass Half Full? The State of Accountability in Development Finance, (Amsterdam: SOMO, 2016)