

THE HUMAN RIGHT TO WATER: ANOTHER BUILDING BLOCK IN THE INTERNATIONAL WATER LAW EDIFICE

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Abstract: Water is critical for human survival and existence, as it is for the sustainable development that the international community has renewed as its driving goal for the years ahead. This all lends momentum to a process of global review of the legal instruments that the international community disposes of to address the momentous challenges of the contemporary global water crisis, which is one of scarcity but also of governance and appropriate management of the world's water resources.

In this context, but also in the one of attention to the needs of individual human beings and their equitable and fair access to international goods, new thinking in regard to international water law and the global governance of water resources is called for. This has already conducted the world to operate a number of strategic paradigm-shifts, such as the ones of growing emphasis on international cooperation, holistic management of water resources, their inclusion in an international agenda of sustainable development, with all that this implies in terms of attention to the values of protection of the environment, inclusiveness of all interested actors in participated, transparent processes of management of water resources as well as the recognition that there are advantages in applying economic thinking, tools and incentives in the management of water resources.

As important as these developments are, they also contributed to highlight a paradox within the existing body of international water law as well as the one

of human rights: however crucial water is for human livelihood, however basic the human need for water is, water is nowhere to be found in the International Bill of Human Rights and it is only marginally equated as human right in other international instruments devoted to the protection of human rights, for certain categories of human beings only. This realization, set against the acute horizon of the global water crisis and the process of rethinking of the international law tools for addressing the challenge of global water governance, led to the “tormented” process of legal development of the human right to water, today the human rights to water and sanitation, from only implicit rights referred to other human right to self-standing, autonomous rights, albeit also derived from prior ones. This recognition of these rights seems to have become undeniable in the last decade and is attested by numerous international legal instruments and even an inceptive practice of their implementation. Moreover, the international community, in different for a has, particularly in the last decade and a half, been endeavoring to further develop and clarify the nature and scope of these rights as well as their content and impact, particularly regarding the obligations deriving therefrom for the actors primarily bound to implement them: the States. Albeit there remain outstanding important issues and these legal developments also require maturation and testing through practice, it seems unquestionable that, with the inclusion of these legal instruments, the international law and governance edifice committed to the management of water resources has gained in diversity and also the robustness of legal and institutional responses that the magnitude of the outstanding challenges ahead and the urgent need for action in the field call render well advised.

Keywords: Climate change; cooperation; development; good governance; global water crisis; human right to water; human right to sanitation; international water law; paradigm-shifts; millennium development goals; protection of the environment; sustainable development; sustainable development goals; water management; water scarcity.

“Water is at the core of sustainable development as it is closely linked to a number of key global challenges.”
The Future We Want (Outcome document adopted at Rio+20)

“Environmental, economic and social indicators tell us that our current model of progress is unsustainable. Ours is a world of looming challenges and increasingly limited resources. Sustainable development offers the best chance to adjust our course.”

UN Secretary General Ban Ki-moon

1. Water and sustainable development

Sustainable development was explicitly popularized and contextualized by the Brundtland Commission in the document ‘*Our Common Future*’ where it was defined as “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*”¹ The Brundtland Commission focused on three pillars of human well-being: socio-political, economic and ecological/environmental conditions. The basic concept endorses putting in place strong measures to spur economic and social development, particularly for people in developing countries, while ensuring that environmental integrity is sustained for future generations.

Water is at the core of sustainable development and is critical for human survival, socio-economic development, and healthy ecosystems. It is vital for reducing the global burden of disease and improving the health, welfare and productivity of populations. It is central to the production and preservation of a host of benefits and services for people. Water is also at the heart of adaptation to climate change, serving as the crucial link between the climate system, human society and the environment.

However vital and fundamental to human well-beings, water is a finite and irreplaceable resource. It is only renewable if well managed. Today, more than 1.7 billion people live in river basins where depletion through use exceeds natural recharge, a trend that will see two-thirds of the world’s population living in water-stressed countries by 2025. Water challenges will increase significantly in the coming years due to the fact that population growth and rising incomes will lead to greater water consumption, as well as more waste. As countries develop and populations grow, global water demand (in terms of withdrawals) is projected to increase by 55% by 2050².

1 United Nations, *Our Common Future*, Report of the World Commission on Environment and Development, 1987.

2 WHO/UNICEF Joint Monitoring Programme (JMP) for Water Supply and Sanitation, *WHO/*

Agriculture is by far the most important consumer of water globally, accounting for 70% of water withdrawals worldwide. This figure varies considerably across countries, though. Rainfed agriculture is the predominant agricultural production system around the world. Its current productivity is, on average, little more than half the potential obtainable under optimal agricultural management. It is estimated that, by 2050, world agriculture will need to produce 60% more food globally, and 100% more in developing countries.

Industry and energy together account for 20% of water demand. Developed countries have a much larger proportion of freshwater withdrawals for industry than developing ones, where agriculture dominates. Balancing the requirements of sustainability against the conventional view of industrial mass production creates a number of difficult choices for industry. One of the biggest is globalization. The ensuing issue is how to spread the benefits of industrialization worldwide without unsustainable impacts on water.

The domestic sector accounts for 10% of total water use. Yet, worldwide, even after the momentous effort associated with the Millennium Development Goals (MDG), over 750 million people remain without access to an improved source of water and close to 2.5 billion persist without having access to improved sanitation. The UN further emphasizes that this problem of insufficient access to water results in “*about 1.5 million children under the age of five die each year and 443 million school days are lost because of water- and sanitation-related diseases*”³.

Another area of major concern is the one of cities. The urban population in developing countries will grow dramatically. It shall generate demand well beyond the capacity of already inadequate water supply and sanitation infrastructure and services. More than half the world already lives in urban areas. It is expected that by 2050 more than two-thirds of the global population of 9 billion will be living in cities. Furthermore, most of this growth will happen in developing countries. However, these countries have limited capacity to deal with this rapid change. The growth will therefore also lead to increase in the number of people living in slums, which often have very poor living conditions, including inadequate water and sanitation facilities. The sustainable development of cities shall therefore depend on the development of water resources for economic growth, social equity and environmental sustainability.

But perhaps the most important challenge to sustainable development which

UNICEF, 2014. *Progress on sanitation and drinking-water - 2014 Update*, 2014.

3 “General Assembly Declares Access to Clean Water and Sanitation Is a Human Right.” UN News Center. UN, 28 July 2010; and “Global Issues at the United Nations.” UN News Center. UN, *n.d.*.

arose in the last decades is the ongoing global ecological crisis. It is becoming a barrier to further human development. From an ecological angle, the sustainable development efforts have not been successful. Global environmental degradation has reached a critical level, with major ecosystems approaching thresholds that could trigger significant collapse. Earth's life support systems must be respected, as the very basis of the future sustainable development framework⁴.

2. Water crisis, water scarcity

In view of all these factors and prospects, there is a raising awareness that water became a global issue⁵ and that the Planet is experiencing a global water crisis, a crisis of water scarcity.

Hydrologists typically assess scarcity by looking at the population-water equation. An area is said to be experiencing “*water stress*” when annual water supplies drop below 1,700 m³ per person. When annual water supplies drop below 1,000 m³ per person, the population faces “*water scarcity*”, and below 500 m³ “*absolute scarcity*”.

Water scarcity already affects every continent. Around 1.2 billion people, or almost one-fifth of the world's population, live in areas of physical scarcity, and 500 million people are approaching this situation. By 2025, 1.8 billion people will be living in countries or regions with absolute water scarcity, and two-thirds of the world's population could be living under water stressed conditions. With the existing climate change scenario, almost half the world's population will be

4 United Nations, A/RES/66/288. *The Future We Want*. Outcome Document of the Rio+20 Conference, 2012; UNDESA, *Sustainable Development for the 21st Century Back to our Common Future*, 2012; UNESCO, *UN World Water Development Report 3*. Paris, 2009; UNISDR, *Impacts of Disasters since the 1992 Rio de Janeiro Earth Summit*, 2012; United Nations Environment Programme (UNEP), UN-HABITAT, GRID-Arendal, *Sick Water? The central role of wastewater management in sustainable development. A Rapid Response Assessment*, 2010; UN-Water, *A Post-2015 Global Goal for Water: Synthesis of key findings and recommendations from UN-Water*, 2014; UN-Water, *Sharing benefits, sharing responsibilities*, 2008; WHO, *Global costs and benefits of drinking-water supply and sanitation interventions to reach the MDG target and universal coverage*, WHO/HSE/WSH/12.01, Geneva, 2012; WHO/UNICEF, *Progress on sanitation and drinking-water - 2014 Update*, World Health Organization (WHO), UNICEF, 2014; WWAP, *5th United Nations World Water Development Report 2014: Water and Energy*. Paris, UNESCO, 2014.

5 There is growing recognition that the scope and complexity of water-related challenges extend beyond national and regional boundaries and therefore cannot be adequately addressed by national or regional policies only. In a Report of 2012, the United Nations notes that “*water has long ceased to be solely a local issue*”, United Nations, *Managing Water under Uncertainty and Risk: World Water Development Report 4*, Paris, UNESCO, 2012.

living in areas of high water stress by 2030, including between 75 million and 250 million people in Africa. Additionally, water scarcity in some arid and semi-arid places will displace between 25 million and 700 million people. Sub-Saharan Africa has the largest number of water-stressed countries of any region.

Water scarcity is thus among the main global/glocal problems to be faced both by many national societies and the world in the XXIst century. Water use has been growing at more than twice the rate of population increase in the last century. It is to be recognized however, that water scarcity is both a natural and a human-made phenomenon. There is enough freshwater on the planet for seven billion people. The main problem lies in the fact that this is distributed unevenly and too much of it is wasted, polluted and unsustainably managed⁶. The momentous challenge that water poses to sustainable development concerns its efficient and equitable management, along with good governance. If this intervenes, water can play a key enabling role in strengthening the resilience of social, economic and environmental systems in the context of rapid and unpredictable changes, particularly those related with climate change.

3. Water governance, water law: thinking anew

In view of these serious challenges, the international community has had to revise its general thinking in regard to water and in particular the international law governing the use and protection of the precious liquid. This contemporary new thinking and new international law on water does in particular place a clear emphasis on the promotion of cooperation⁷ ⁸. Moreover, in other writings⁹ we have been arguing that in promoting the requisite paradigm-shifts to meet the momentous challenges of our times, it also pursues certain key values or reveals

6 Human Development Report 2006. UNDP, 2006; *Coping with water scarcity. Challenge of the twenty-first century*. UN-Water, FAO, 2007.

7 Christina Leb, *Cooperation in the Law of Transboundary Water Resources*, Cambridge, 2013.

8 For early work along this line of action in the wake of the United Nations Convention, see ILC, “Third Report on the Law of the Non-Navigational Uses of International Watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur”, IBIC, 1982, II, 1, p. 85, para. 85 and A. Tanzi, M. Arcari, *The United Nations Convention*, pp. 182, ff. Some commentators consider it to be a customary rule of international water law: thus, S. McCaffrey, *The Law of International Watercourses*, pp. 470, ff.

9 E.g., Paulo Canelas de Castro, “Water Law: the View Projected by the Epistemic Community”, in *The Permanent Court of Arbitration/Peace Palace Papers, Resolution of International Water Disputes*, The Hague, February 2003, Kluwer Law International, pp. 371-416; and, more recently, Paulo Canelas de Castro, “Trends of Development of International Water Law”, *Beijing Law Review*, 2015, vol. 6, no. 4, accessible at <http://www.scirp.org/journal/BLR/> [ID:330377].

distinct preferences as to the methods of water management: an environment-friendly approach to international water management should be followed; one of social inclusiveness where many other actors beyond States find place; and one which also acknowledges the relevance of sound economic thinking or usage of economic tools in internationally managing water resources.

3.1. New thinking, new overarching goals: water as a catalyst for (“positive”) cooperation

History has often shown that the vital nature of freshwater is a powerful incentive for cooperation and dialogue, compelling stakeholders to reconcile even the most divergent views. Water more often unites than divides people and societies.

3.1.1. Cooperation for peace and security

At the global scale, the effective and mutually beneficial solution of water resources-related problems underlies peace, security and stability of our nations. The planet actually seems to have sufficient water resources to provide “water security” for all. But this can only become a reality if we change our conceptual approaches to water management. Throughout history, nations have learned how to share the benefits of the river. Indeed, at the international level, water has consistently appeared to provide reasons for transboundary cooperation rather than war. Looking back over the past 50 years, there have been some 3 dozens of cases of reported violence between States over water – and most of the episodes have involved only minor skirmishes¹⁰. Meanwhile, more than 200 water treaties have been negotiated¹¹. Some of these treaties have remained in operation even during armed conflict. The clear message deriving from this, is that even the most hostile enemies have a capacity for cooperation on water. States recognize that violence over water is seldom a strategically workable or economically viable option. Paradoxically, disasters can also be powerful catalysts for positive cooperation. This was learned with the Chernobyl disaster, which led to radioactive caesium deposits in reservoirs and increased risk of exposure to radioactivity all the way down to the Black Sea¹². The neighboring States responded thereto by passing

10 Peter H. Gleick and Matthew Heberger, “Water Conflict Chronology”, and, more recently, “Water and Conflict. Events, Trends, and Analysis (2011-2012)”, in Peter H. Gleick *et al.* (eds.), *The World’s Water; The Biennial Report on Freshwater Resources*, vol. 8, respectively at pp. 173-219 (*notius* pp. 183-208) and pp. 158-171.

11 For an analysis of these treaties, see E. Brown Weiss, “The Evolution of International Water Law”, *RCADI*, 2007, t. 331, pp. 238, ff, *notius* 241-244.

12 Philippe Sands, *Chernobyl: Law and Communication*, Cambridge, 1988, Grotius.

new rules and setting up new mechanisms for improving river quality. Gains from cooperation can thus include the costs averted by reducing tensions and disputes between neighbours. Strained interstate relations linked to water management can inhibit regional cooperation across a broad spectrum of matters, including trade, transport. Additionally, the institutions that the riparian States have created in the water treaties to avert conflict have shown extraordinary resilience and the capacity to operate the many changes required¹³. Inversely, failures in cooperation result in social and ecological disasters, as in the Aral Sea and Lake Chad¹⁴. They also expose smaller, vulnerable countries to the threat of unilateral actions by larger, more powerful neighbours.

3.1.2. Cooperation for poverty alleviation and universal water access

Cooperation in water matters also carries benefits in less grandiose areas but not less humanely important. Water contributes to poverty alleviation in many ways – namely, through water supply and sanitation services. Water of appropriate quantity and quality can improve health and, when applied at the right time, can enhance the productivity of land, labour and other inputs. Reaching these goals is achievable and would cost far less than having to provide the necessary health care to treat people suffering from preventable diseases caused by poor water supply and poor sanitation. Each responsible government should provide a solid regulatory framework and implementation structure to manage the use of its water resources for the benefit of the populations under its jurisdiction¹⁵.

3.2. New thinking; new values

3.2.1. Holistic management, sustainable development and environmental sustainability

A first vector of the new international water management vision necessarily departs from the assumption of water as fundamental key to sustainable development; from the understanding that it has value from a social, economic and environmental perspective and that water needs to be managed within a sound, integrated socio-economic and environmental framework, where these different

13 Laurence Bisson de Chazournes, *Fresh Water in International Law*, Oxford, 2015, Oxford University Press, pp. 176-185.

14 Fred Pearce, “Lake Chad: Tragedy of the Floodplains”, *When the Rivers Run Dry. Water – The Defining Crisis of the Twenty-First Century*, Boston, 2006, Beacon Press, respectively, pp. 201-216 and 225-226, as well as pp. 77-87.

15 As advocated in *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (contained in UN Document E/C.12/2002/11).

dimensions are holistically apprehended. As a result, upstream and downstream States, but also all other water stakeholders, including non-governmental ones, will have to be involved in the management of the waters, both regarding original decisions as well as their implementation. It is impossible to maintain the integrity of a balanced ecosystem, a paramount substantive value of this newer international water law of cooperation, without a holistic treatment of all the complex array of issues comprehended in water management, an overall strategy on water resources management.

3.2.2. Inclusiveness, participated management

Such holistic managerial vision, as well as the very properties of water bodies (catchement, basin, watershed, system, course) touch every human being: we all therefore have a shared responsibility for protecting the shared environments surrounding rivers and their associated watersheds, lakes, aquifers. Congruously, the second cardinal preference of this new thinking and newer international water law is one of stakeholders' integration or social inclusiveness. Nurturing the opportunities for cooperation in water management among all stakeholders and improving the comprehension of the challenges and benefits of water cooperation can help build mutual respect, understanding and trust among States and promote peace, security and sustainable economic growth of the States and their societies, along with ecological respect.

For this, a multilevel, inclusive approach for water cooperation and management is required. Water resources management issues must be addressed at the local, national and at appropriate regional and international levels. All stakeholders, from those in watershed governments, to international organizations, the private sector, civil society and academia¹⁶, should be engaged, paying special attention to the livelihoods of the poor and most vulnerable people. Water management choices must also be consistent with other State policies and vice-versa. Throughout the whole process, social, political and economic decisions must be made in a way that seeks to balance and fairly distribute the allocation of water resources while respecting the natural, biophysical limits of the environment that they sustain.

Collaborative water management which mobilizes political will and commitment to address water issues worldwide is crucial. Open discussion of the issues shaping our water resources today and strong citizen participation in decision-making (which is key to fostering good governance and a climate of

16 Paulo Canelas de Castro, "Water Law: the View Projected by the Epistemic Community", in The Permanent Court of Arbitration/Peace Palace Papers, *Resolution of International Water Disputes*, The Hague, February 2003, Kluwer Law International.

accountability and transparency) can stimulate cooperative action and political commitment. Promoting a culture of consultation and increasing participative capacities will help to deliver the appropriate water management decisions¹⁷.

3.2.3. The economization of water

Water can also be seen and is increasingly treated as an economic good¹⁸. Water uses correspond to economic activities, such as *inter alia* navigation, generation of hydroelectric power, irrigation, the supply of water for industrial and domestic purposes. The international law applicable to water has largely been developed to cater for these uses. Various notions, principles, rules, institutions of international economic law have had an influence on the profile and actual regime of water management over times. The notion that water is scarce globally further impacts on a call for further economization of water, which should help induce conservation habits and rational allocation decisions. The realms of international trade, investment and water transfers are thus increasingly called to contribute to the ongoing trend towards applying economic thinking to water management and controlling a *de facto* rising international water market¹⁹. However, the trend towards seeing water, a vital natural resource, as a source of profit also rises questions and anxieties²⁰. Effective water management should also cater for other values. Mutual supportiveness between economic and non-economic values and norms should be called upon. The economization trend that is developing in the context of freshwater management should go hand-in-hand with humanization and ecological-friendly trends. Trade and investment regimes on water cannot ignore the public nature of water resources, their vital character for life, the ensuing public interests thereto²¹.

17 These values and strategies are the subject matter of the model normative treatment set out in the Aarhus Convention.

18 Laurence Boisson de Chazournes, *Fresh Water in International Law*, Oxford, 2013, Oxford University Press.

19 For both trends notably, Antoinette Hildering, *International Law, Sustainable Development and Water Management*, Delft, 2004, Eburon, pp. 95-122; chapters 5 and 6 of L. Boisson de Chazournes and S.M.A. Salman (eds.), *Water Resources and International Law*, Leiden, 2005, Nijhoff; Edith Brown Weiss, Laurence Boisson de Chazournes, Nathalie Bernasconi-Osterwalder (eds.), *Fresh Water and International Economic Law*, Oxford, 2005, Oxford University Press; Edith Brown Weiss (eds.), *International Law for a Water-Scarce World*, The Hague, 2013, Nijhoff.

20 E.g., Maude Barlow, Tony Clarke, *Blue Gold. The Fight to Stop the Corporate Theft of the World's Water*, New York, 2005, The New Press.

21 See Paulo Canelas de Castro, "Towards the harmonization of the human right to water with the protection of international investments in the context of processes of privatization of water

4. Making the new thinking work: water and development

Once the international community integrates the overall goal of cooperation for sustainable development²², and the new thinking on water governance, and undertook an ongoing revision of international water law accordingly, the ensuing key issue becomes one of the implementation or operationalization of this new normative program as well as further development of rules of conduct and institutions to prevent and handle water disputes peacefully. Indeed, the major task which the international community is facing today in the field of water resources, is the transfer of the aforementioned committed obligations relating to water management (environmental-friendly ones, ones of social inclusiveness, as well as economically sensitive ones) into concrete actions that need to be implemented on the ground for the benefit of people, ecosystems and the biosphere as a whole.

Different strategies have been followed by the international community, and particularly the one organised within the United Nations, for pursuing this very broad goal.

One of these, over the turn of the centuries, was the one of associating this new vision of water cooperation and management with the international development efforts. This has been particularly the case with the Millennium Development Goals (MDG), first, and the Sustainable Development Goals (SDG), more recently. The overall idea is that in order to meet multiple goals, water needs to be an intrinsic element in decision-making across the whole spectrum of development efforts. Indeed, given the basic necessity of water to sustain life and its central role in the provision of a wide range of services, water is a crucial and cross-cutting factor at the heart of all the MDG and thence the SDG.

Accordingly, in the MDG context, under MDG 1, access to water for domestic and productive uses (agriculture, industry, and other economic activities) has a direct impact on poverty and food security. In regard to MDG 2, it is obvious that the incidence of catastrophic but often recurrent water events, such as floods or droughts, interrupts educational attainment. Also, access to water, in particular in conditions of scarcity, has important gender related implications, which affect the social and economic capital of women in terms of leadership, earnings and networking opportunities, covered by MDG 3. Relating to MDGs

services? – A new development in International Water Law?”, *Soochow Law Journal*, 2016, vol. XIII, nr. 1, pp. 43-57.

22 Concept Note: PREPCOM Conference, *Towards the UN Conference on Sustainable Development (Rio+20): Water Cooperation Issues*, UNESCO, UN Water, South-South News, UNDP, OSCE Offices in Dushanbe, 19-20 October, 2011; Concept Note: UN Conference on Sustainable Development (Rio+20), *Thematic session on water cooperation*. UNESCO, UN Water, South-South News, UNDP, OSCE Offices in Dushanbe, 2011.

4 and 5, equitable, reliable water resources management programmes reduce poor people's vulnerability to shocks, which in turn gives them more secure and fruitful livelihoods to draw upon in caring for their children. As to MDG 6, access to water and improved water and wastewater management in human settlements, reduce transmission risks of mosquito-borne illnesses, such as malaria and dengue fever. Even more clearly related to water issues, under MDG 7, it is clear that adequate treatment of wastewater contributes to less pressure on freshwater resources, helping to protect human and environmental health. Finally, water scarcity increasingly calls for strengthened international cooperation in the fields of technologies for enhanced water productivity, financing opportunities, and an improved environment to share the benefits of scarce water management, as advocated by MDG 8. Moreover, target 7.C, in particular, aimed to halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation.

The consequence of these associations was that the active participation and cooperation of all sectors, levels of government, and civil society were deemed critical for ensuring better management and allocation of water resources. While recognizing the differentiated responsibilities between developed and developing countries, each State had to take ultimate actions to meet the MDG²³. In particular, this led to a generalised effort at ensuring an enlarged human access to drinking water and sanitation. This resulted in the world having indeed met the target of halving the proportion of people without access to improved sources of water, even five years ahead of schedule. The outcome for the specific target related to basic sanitation was, however, far more disappointing.

As the time limit for the MDG drew to a close in 2015, the global community launched a process to develop a set of Sustainable Development Goals (SDG), which build on the Millennium Development Goals and converge with the post-2015 development agenda. In particular, it undertook stock of how it could move towards a sustainable future²⁴. Critically, it was thought that the MDG framework did not address the full water and development agenda, nor fully recognize its synergies with other areas and concerns. Emphasis on 'sustainability' was not included and human rights and inequalities were also largely ignored in the MDG framework. Subsequently, States have agreed that human rights, equality and sustainability should form the core of the development agenda and be recognized as critical for true development.

23 "Facts and Figures" from the World Water Assessment Programme (WWAP): see UNDP, *Human Development Report 2006. Beyond scarcity: Power, poverty and the global water crisis*. 2006.

24 *E.g., Water in the post-2015 development agenda and sustainable development goals*. Discussion paper, World Bank. Water and Sanitation Program (WSP). March 2014.

Correspondingly, in the 2030 Agenda for Sustainable Development²⁵, which succeeds the MDGs, United Nations Member States reaffirm in paragraph 7 their “*commitments regarding the human right to safe drinking water and sanitation*”. Sustainable Development Goal 6, in particular, states the goal to “*ensure availability and sustainable management of water and sanitation for all*”. The pursuance of this is in the United Nations context entrusted to several agencies and bodies, amongst which UN-Water, whose overarching goal is “*Securing Sustainable Water for All*”. The water goal and targets directly address the development aims of societies, promote human dignity and ensure achievements are sustainable over the long term²⁶.

5. Making the new thinking work: the newest element – human rights to water and sanitation

“It is now time to consider access to safe drinking water and sanitation as a human right, defined as the right to equal and non-discriminatory access to a sufficient amount of safe drinking water for personal and domestic uses — drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene — to sustain life and health. States should prioritize these personal and domestic uses over other water uses and should take steps to ensure that this sufficient amount is of good quality, affordable for all and can be collected within a reasonable distance from a person’s home.”

UN Office of the High Commissioner for Human Rights

5.1. Context

Improving access to safe drinking water and sanitation has thus increasingly been recognized as one of the main challenges of sustainable development, with improper water management held as having a direct impact on human and ecosystem health, food and energy security, among many other areas which support human well-being and livelihoods.

At the end of the MDG process, it was found that 147 countries achieved the MDG target relating to access to drinking water, while 95 met the target for sanitation. Consequently, over 90 percent of the world’s population now use

25 UN Resolution A/RES/70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*.

26 UN-Water, *Water and sanitation interlinkages across the 2030 Agenda for Sustainable Development*, Geneva, 2016.

improved sources of drinking water, and 68 per cent use improved sanitation facilities. The value to households of access to improved water and sanitation facilities includes direct net savings or expenses from buying water from alternative providers and savings in health expenditure to treat water-borne disease and indirect benefits in terms of time freed up to get water closer or into the household, improved nutrition, increased school attendance especially for adolescent girls and the safety and dignity of improved sanitation compared to open defecation of shared facilities. All things considered, however, the statistics on water and sanitation remain alarming. According to a recent census, approximately 800 million people still lacked access to safe drinking water. More than 2.3 billion people still did not have basic sanitation services and close to 900 million people practised open defecation²⁷.

In most developing countries without universal access, use of improved facilities is higher in urban areas than in rural areas. Households not having access to individual piped water connections must rely on alternative sources for water, whose price is often much higher than that of water provided by utility companies. Households in dense urban areas often have few options for improved sanitation and removal of excreta from communities due to a lack of space and service providers. Investment in water and sanitation has also long been recognized as having a very high social rate of return. In 2014, WHO and UNICEF estimated that the return on investment in water and sanitation services in developing countries ranged between US\$5 and US\$28 per dollar. Improved access to safe water and sanitation has many co-benefits in other areas. For example, it has resulted in the number of diarrhoeal diseases attributable to inadequate water, sanitation and hygiene to fall from 1.8 million to 842,000 between 1990 and 2012, with all regions experiencing major declines²⁸.

From another angle, that of the people on the ground, especially the vulnerable, the numbers and factual reality regarding access to water and sanitation translate into hardship, insecurity and loss of livelihoods. Notably, women and girls in some developing countries still embark on dangerous journeys in search of drinking water or to defecate in the open because they do not have access to toilet facilities, which exposes them to violence, including sexual abuse. Further, children are dying from entirely preventable diseases, resulting from poor quality water and sanitation. Diarrhoea is the second leading cause of death in children under 5 years of age.

27 United Nations, *UN Chronicle*, Vol. LV, No. 1, 2018, March 2018, *Achieving Universal Access to Water and Sanitation*.

28 WHO/UNICEF, 2014. *Progress on sanitation and drinking-water - 2014 Update*. 2014, World Health Organization (WHO), UNICEF.

Strategies used all over the world ultimately aim to overcome this plight and instead provide universal access to safe drinking water and basic sanitation²⁹. In that sense, they are directly geared to leaving no one behind: the focus of these efforts and the normative program underlying is thus on people³⁰. It is in this very same normative idea that the establishment of a human right to water sought inspiration and thence what we rather designate as human right to water and sanitation.

5.2. A long, erratic process of normative construction: legal foundations and progressive recognition and establishment of the human rights to safe water and sanitation

The human right to water and sanitation is said to have been implicit in the usually so-called “International Bill of Human Rights”, made of the Universal Declaration of Human Rights of 1948³¹ and the 2 International Covenants of both civic and political rights and economic, social and cultural rights, of 1966³². Explicitly, however, the aforementioned documents do not contain any reference to water, even less to their need or human right thereto. It was thus later and in a piecemeal, gradual way that the right, or rights, as we rather have it, eventually became to establish itself, themselves.

A critical moment and piece in this effort occurred in July 2010, when the United Nations General Assembly adopted resolution 64/292 recognizing that water and sanitation should be a human right: “(...) *the right to safe and clean drinking water and sanitation as a human right (...) is essential for the full enjoyment of life and all human rights*”. Water as a human right is as much about quality, making sure that the water is clean and you do not get sick from drinking it, as it is about quantity or access to water. This initiative contributed to

29 United Nations, *UN Chronicle*, Vol. LV, No. 1, 2018, March 2018, *Achieving Universal Access to Water and Sanitation*.

30 Recently, by means of General Assembly Resolution 71/222 adopted on 21 December 2016, the General Assembly unanimously proclaimed the period from 2018 to 2028 the “*International Decade for Action, “Water for Sustainable Development. 2018-2028”*”, which commenced on World Water Day, 22 March 2018. This ‘Water Decade’ is the second of its kind, succeeding the first, designated by General Assembly Resolution 58/217 adopted on 23 December 2003, *International Decade for Action, “Water for Life”, 2005-2015*. The launch of this “*International Decade for Action, “Water for Sustainable Development. 2018-2028”*” was seen as an important opportunity for the international community to reiterate its commitment to achieving water-related goals and targets as well as to also offer an opportunity to contribute to the follow-up and review of SDG 6, at the high-level political forum in July 2018.

31 Resolution 217 A (III).

32 See resolution 2200 A (XXI), annex.

solving a normative gap in the construction of an international water law meeting the challenges of the contemporary water crisis and fleshing out in legal form the new thinking and paradigm-shifts in water management that have been taking shape roughly over the last two decades, two decades and a half.

Indeed, the right to water is not specifically mentioned in the Universal Declaration of Human Rights nor in the 1966 adopted UN International Covenants on Human Rights. However, without access to water, other rights could not be exercised such as the “*right to a standard of living adequate for the health and well-being*”, in regard case with Article 6 of the UN Covenant on Civil and Political Rights, which guarantees the right to life, as well as Articles 11 and 12 of the International Covenant on Economic and Social Rights, which together guarantee that adequate standard of living.

For that reason, several Authors have maintained that some of the rights enshrined in the International Bill of Human Rights should be interpreted as encompassing the human right to water: the right to water was not considered as a right in itself in earlier UN human rights texts, but merely as a tool to guarantee other rights.

However, in recent years, water has become a more important issue leading to several international and major United Nations conferences, summits and special sessions and their follow-up meetings³³, directly pertaining to water issues or only indirectly, but where these water issues featured prominently, as well as the adoption of declarations, resolutions and programmes of action which are impacting the global governance of water issues and further shaping this double human right to water and sanitation. Amongst these, in particular, the United Nations Water Conference of Mar del Plata (1977)³⁴, the Dublin Water Conference (1992)³⁵, the Rio de Janeiro International Conference on Water and the Environment (1992)³⁶, the Cairo United Nations International Conference on

33 Recalling the relevant provisions of declarations, resolutions and programmes of action adopted by major United Nations conferences, summits and special sessions and their follow-up meetings, in particular the Mar del Plata Action Plan of 1977; Agenda 21 of the United Nations Conference on Environment and Development of 1992; the Programme of Action of the International Conference on Population and Development of 1994; the International Decade for Action “Water for Life” 2005-2015; General Assembly resolution 54/175 of 17 December 1999; on the right to development and the Millennium Development Goals (2000).

34 It gave rise to the Mar Del Plata Action Plan of the United Nations Water Conference (Report of the United Nations Water Conference, Mar del Plata, 14–25 March 1977 (United Nations publication, Sales No. E.77.II.A.12).

35 Dublin Statement on Water and Sustainable Development.

36 See *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3–14 June 1992, vol. I, Resolutions Adopted by the Conference (United Nations publication,

Population and Development (1994)³⁷, the Istanbul United Nations Conference on Human Settlements, also known as Habitat-II (1996)³⁸, the Millenium Summit (2000), the Johannesburg World Summit on Sustainable Development (2002)³⁹, Rio+20 (2012). These international gatherings have produced declarations, resolutions or other instruments directly supporting this long march towards the recognition of a human right to water^{40 41}. Another major milestone in this process of gradual awareness raising and maturation of both a global concern on

Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

37 *Report of the United Nations International Conference on Population and Development, Cairo, 5-13 September 1994* (United Nations publication, Sales No. E.95.XIII.18).

38 *Report of the United Nations Conference on Human Settlements (Habitat II)*, Istanbul, 3–14 June 1996 (United Nations publication, Sales No. E.97.IV.6), chap. I, resolution 1, annex II.

39 See *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, 26 August–4 September 2002 (United Nations publication, Sales No. E.03.II.A.1 and corrigendum), chap. I, resolution 2, annex.

40 See preamble, chap. I, “Mar Del Plata Action Plan of the United Nations Water Conference” (*Report of the United Nations Water Conference*, Mar del Plata, 14–25 March 1977 (United Nations publication, Sales No. E.77.II.A.12),); see paragraph 18.47 of “Agenda 21”, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex II; Principle No. 3, “The Dublin Statement on Water and Sustainable Development”, International Conference on Water and the Environment (A/CONF.151/PC/112); Principle No. 2, Programme of Action, *Report of the United Nations International Conference on Population and Development, Cairo, 5-13 September 1994* (United Nations publication, Sales No. E.95. XIII.18), chap. I, resolution 1, annex; the Habitat Agenda of 1996. Other relevant normative *topoi* in other international normative texts are paragraphs 5 and 19, recommendation (2001) 14 of the Committee of Ministers to Member States on the European Charter on Water Resources; resolution 2002/6 of the United Nations Sub-Commission on the Promotion and Protection of Human Rights on the promotion of the realization of the right to drinking water. See also the report on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation (E/CN.4/Sub.2/2002/10) submitted by the Special Rapporteur of the Sub-Commission on the right to drinking water supply and sanitation, Mr. El Hadji Guissé.

41 Other relevant documents, resolutions, declarations, programmes of fora, conferences, summits on the subject are the Programme of Action of the International Conference on Population and Development of 1994, the International Decade for Action “Water for Life” 2005- 2015, General Assembly resolution 54/175 of 17 December 1999 on the right to development, 55/196 of 20 December 2000, by which it proclaimed 2003 the International Year of Freshwater, 58/217 of 23December 2003, by which it proclaimed the International Decade for Action, “Water for Life”, 2005–2015, 59/228 of 22 December 2004, 61/192 of 20 December 2006, by which it proclaimed 2008 the International Year of Sanitation, and 64/198 of 21December 2009 regarding the midterm comprehensive review of the implementation of the International Decade for Action, “Water for Life”.

the global water crisis and social expectations leading to the design of the human right to water as a strategy to address it, occurred with the Millennium Summit. By means of the United Nations Millennium Declaration, adopted by the General Assembly September 2000, and specifically MDG 7, the international community made the commitment to halve, by 2015, the proportion of people unable to reach or afford safe drinking water. This decision was replicated in the Johannesburg Plan of Action, whereby the Heads of State and government resolved to extend this commitment to the similar one of halving the proportion of people without access to basic sanitation.

At least equally important was the subsequent adoption, in November 2002, by the Committee on Economic, Social and Cultural Rights of General Comment No. 15 on the right to water⁴². This was conceived as an authoritative interpretation by the international body mandated to oversee the implementation of the 1966 International Covenant. In Article I.1 of this document it is stated that “*The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights*”⁴³. General Comment No. 15 also defined the normative content of the right to water as comprehending the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses⁴⁴.

A further step was taken in 2006 by the former United Nations Sub-Commission on the Promotion and Protection of Human Rights which issued Guidelines on the realization of the rights⁴⁵. These Guidelines led the Human Rights Council (HRC) to adopt decision 2/104 “*human rights and access to water*”, also in 2006.

In March 2008, through resolution 7/22⁴⁶, the Human Rights Council

42 *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (contained in UN Document E/C.12/2002/11).

43 Subsequent resolutions, with some variations, adopt a similar formula. Thus, for instance, HRC Resolution 18/1, of 28 September 2011: “*the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity*”.

44 *Idem*, caption II. *Normative content of the right to water*. See also *infra*.

45 ¹¹ UN Sub-Commission on the Promotion and Protection of Human Rights, *Sub-commission guidelines on the realization of the right to drinking water and sanitation*, Report of the Special Rapporteur El Hadji Guissé, UN document E/CN.4/Sub.2/2005/25, 2006, available at: http://www2.ohchr.org/english/issues/water/docs/SUB_Com_Guisse_guidelines.pdf.

46 Resolution 7/22, the Human Rights Council, *Human rights and access to safe drinking water and sanitation* (available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf). The appointment results from its paragraph 2: “*Decides to appoint, for a period of three years, an independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*”. The mandate shall be extended 3 years later through Resolution 16/2.

decided “*To appoint, for a period of three years, an independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*”. The appointment fell on the Portuguese jurist and scholar Catarina de Albuquerque. Following the terms of the mandate, the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation monitors and reports on States’ implementation of the right to water as well as related violations. Catarina de Albuquerque published her first report on 1st July 2009. In April 2011, through resolution 16/2, the Human Rights Council decided to extend the mandate for a period of three years. Following the official recognition by the UN General Assembly in 2010 of the human right to water, the mandate of the “*Independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*” was extended and renamed to “*Special Rapporteur on the human right to safe drinking water and sanitation*”⁴⁷. Through her thematic reports to the Human Rights Council and to the UN General Assembly⁴⁸, Dra. Catarina de Albuquerque continued to clarify the scope and content of the human right to water (or, as she proposed, the human right to water and to sanitation). In particular, she addressed thematic issues such as: ⁴⁹ Climate Change and the Rights to Water and Sanitation (2009); Human Rights Obligations related to Access to Sanitation (2009)⁵⁰; Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development (2009)⁵¹; Human Rights Obligations

47 Reports by former Special Rapporteur: Private Sector Participation (2010); Stigma (2012); Good Practices (2012); Post 2015 development agenda and MDGs (2012); Sustainability and non-retrogression (2013); Wastewater management (2013); Handbook (2014); Common human rights violations (2014); Participation (2015).

48)A/68/264, Wastewater management in the realization of the rights to water and sanitation (2013); A/69/213, Participation in the realization of the human rights to water and sanitation (2014); A/70/203, Different levels and types of services and the human rights to water and sanitation (2015); A/71/302, Development Cooperation and the realization of the human rights to water and sanitation (2016); A/72/127, Development Cooperation (2017).

49 A/HRC/10/6, Preliminary Report laying out the Mandate Workplan.

50 A/HRC/12/24, 1 July 2009, *Human Rights Obligations related to Access to Sanitation*: The report focuses on the human rights obligations related to sanitation. After reviewing the inextricable links between sanitation and a range of human rights, the independent expert concludes that an analysis of sanitation in a human rights context must go beyond linking it to other human rights, because this would fail to fully capture all of the dimensions of sanitation. She suggests that, although there is an ongoing discussion on whether sanitation should be recognized as a distinct right, recent developments at the international, regional and national levels demonstrate a trend towards recognition; specifically, considering the right to sanitation as an explicit component of the right to an adequate standard of living.

51 A/HRC/10/1, of 22 February 2009.

Related to Non-State Service Provision in Water and Sanitation (2010); The MDGs and the human rights to water and sanitation (2010)⁵²; Progress report on the compilation of Good Practices (2010); Good practices compilation (2011)⁵³; Financing for the Realization of the Rights to Water and Sanitation (2011)⁵⁴; Planning for the realization of the rights to water and sanitation (2011)⁵⁵; Stigma and the realization of the human rights to water and sanitation (2012)⁵⁶; Integrating non-discrimination and equality into post-2015 development agenda for water, sanitation and hygiene (2012)⁵⁷; Sustainability and non-retrogression in the realisation of the rights to water and sanitation (2013)⁵⁸; Wastewater management in the realization of the rights to water and sanitation (2013)⁵⁹ 60; Handbook for realizing the human right to safe drinking water and sanitation (2014)⁶¹; Common violations of the human rights to water and sanitation (2014)⁶²; Participation in the realization of the human rights to water and sanitation (2014)⁶³; Affordability of water and sanitation services (2015)⁶⁴; Different levels and types of services and the human rights to water and sanitation (2015)⁶⁵; Gender equality in the realization

52 A/65/254.

53 *Report of the Special Rapporteur on the human right to safe drinking water and sanitation, A/HRC/15/31* (1 July 2010, presents a framework for assessing good practices from a human rights perspective, using five normative criteria (availability, quality/safety, acceptability, accessibility and affordability) and five cross-cutting criteria (non-discrimination, participation, accountability, impact and sustainability) and A/HRC/15/31/Add.1, *Progress report on the compilation of Good Practices*.

54 A/66/265.

55 A/HRC/18/33 (UNGA Doc. 4th July 2011), in accordance with Council resolutions 7/22 and 16/2: she focuses on national and local planning for the implementation of the rights to water and to sanitation, highlighting the importance of having a vision and political will to ensure the realization of those rights.

56 A/HRC/21/42, *Stigma and the realization of the human rights to water and sanitation* (2012).

57 A/67/270.

58 A/HRC/24/44, *Sustainability and non-retrogression in the realisation of the rights to water and sanitation* (UNGA Doc., 11 July 2013), focusing on sustainability in the realization the human rights to water and sanitation.

59 A/68/264, *Wastewater management in the realization of the rights to water and sanitation*.

60 Mr. Leo Heller was appointed in November 2014, and began his work on the mandate on 1 December 2014.

61 A/HRC/27/55, Add. 3.

62 A/HRC/27/55, *Common violations of the human rights to water and sanitation*.

63 A/69/213, *Participation in the realization of the human rights to water and sanitation*.

64 A/HRC/30/39, *Affordability of water and sanitation services*.

65 A/70/213, *Different levels and types of services and the human rights to water and sanitation*.

of the human rights to water and sanitation (2016)⁶⁶; Development cooperation and the realization of the human rights to water and sanitation (2016)⁶⁷; Service Regulation (2017)⁶⁸; Development Cooperation (2017)⁶⁹. In this capacity, she also made numerous country reports⁷⁰. It was on the basis of this mandate that recommendations to Governments, to the United Nations and other stakeholders were subsequently provided, thereby contributing to the development of the policy and normative thinking of the international community in regard to the subject matter^{71 72 73}.

In the mean time, the human right to water which, according to some Authors and their interpretations, figured already implicitly in treaties, such as, for instance, the International Covenant on Economic Social and Cultural Rights, has also been recognized in international law through a range of international binding

66 A/HRC/33/49, *Gender equality in the realization of the human rights to water and sanitation*.

67 A/71/302, *Development Cooperation and the realization of the human rights to water and sanitation*.

68 A/HRC/36/45, *Service Regulation* (2017).

69 A/72/127, *Development Cooperation* (2017).

70 A/HRC/12/24/Add.1, Mission to Costa Rica (2009); A/HRC/15/55, Mission to Bangladesh; A/HRC/15/31/Add.3, Mission to Egypt, A/HRC/15/31/Add.2, Mission to Slovenia (2010); A/HRC/15/55 *Joint report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Cardona, and the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque* - Mission to Bangladesh (3–10 December 2009; UNGA Doc. 22 July 2010); A/HRC/18/33/Add.2, Mission to Slovenia, A/HRC/18/33/Add.3, Mission to Japan, A/HRC/18/33/Add.4, Mission to USA (2011); A/HRC/21/42/Add.1, Mission to Senegal, A/HRC/21/42/Add.2, Mission to Uruguay, A/HRC/21/42/Add.3, Mission to Namibia (2012); A/HRC/24/44/Add.1, Mission to Kiribati, A/HRC/24/44/Add.2, Mission to Tuvalu, A/HRC/24/44/Add.3, Mission to Thailand (2013); A/HRC/27/55/Add.1, Mission to Brazil, A/HRC/27/55/Add.2, Mission to Jordan (2014); A/HRC/33/49/Add.1, Mission to El Salvador, A/HRC/33/49/Add.2, Tadjikistan, A/HRC/33/49/Add.3, Botswana (2016); A/HRC/36/45/Add.1, Mission to Portugal, A/HRC/36/45/Add.2, Mission to Mexico (2017).

71 Other relevant resolutions on the matter are: HRC decision 2/104; HRC resolution 7/22, of 28 March 2008; HRC resolution 12/8, of 1 October 2009; HRC resolution 15/9 of 30 September 2010; HRC/15/31, of 1 July 2010, *Human Rights Obligations Related to Non-State Service Provision in Water and Sanitation*; HRC resolution 16/2, of 24 March 2011; HRC resolution 18/1; HRC resolution 21/2; HRC resolution 24/18; HRC resolution 27/7; HRC resolution 33/10; GA resolution 64/292; GA resolution 68/157; GA resolution 70/169; GA resolution 72/128.

72 All the information on the Works undertaken by Dr. Catarina Albuquerque, both as “*Independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation*” as well as “*Special Rapporteur on the human right to safe drinking water and sanitation*”, may be found at www.ohchr.org.

73 Catarina de Albuquerque was succeeded in the task in 2014 by Leo Heller, from Brazil.

documents, including international human rights treaties⁷⁴. They are, however, of a specific matter or related to specific categories of human beings, generally taken as more vulnerable in regard to access to water and sanitation. Thus, the main international treaties explicitly recognizing the human right to water include the 1979 Convention on the Elimination of All Forms of Discrimination Against Women⁷⁵, whose Article 14 (2) reads: “*States parties shall take all appropriate measures to eliminate discrimination against women in rural areas to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular shall ensure to women the right: ... (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.*”; the 1989 Convention on the Rights of the Child⁷⁶, whose article 24 states: “*States parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health ... 2. States parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, (...) the provision of adequate nutritious foods and clean drinking water (...)*”; and Article 28 (2) (a) of the Convention on the Rights of Persons with Disabilities⁷⁷, which provides: “*States parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures to ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs*”.

Outside of the realm of international law of human rights, other treaties,

74 See article 14, paragraph 2 (h), Convention on the Elimination of All Forms of Discrimination Against Women; article 24, paragraph 2 (c), Convention on the Rights of the Child; Article 28(2) (a) of the Convention on the Rights of Persons with Disabilities; articles 20, 26, 29 and 46 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1949; articles 85, 89 and 127 of the Geneva Convention relative to the Treatment of Civilian Persons in Time of War, of 1949; articles 54 and 55 of Additional Protocol I thereto of 1977; articles 5 and 14 of Additional Protocol II of 1977.

75 ¹² *United Nations Treaty Series*, vol. 1249, No. 20378; also available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

76 *United Nations Treaty Series*, vol. 1577, No. 27531 also available at <http://www2.ohchr.org/english/law/crc.htm>.

77 Resolution 61/106, annex 1.

both global⁷⁸ or regional⁷⁹ in scope, equally comprehend provisions on the human right to water or to sanitation. Mention can thus be made to articles 20, 26, 29 and 46 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1949; articles 85, 89 and 127 of the Geneva Convention relative to the Treatment of Civilian Persons in Time of War, of 1949; articles 54 and 55 of Additional Protocol I thereto of 1977; articles 5 and 14 of Additional Protocol II of 1977.

Moreover, this is also the case with conventions specifically related to water resources or watercourses, which, although in a not too frequent way, also make reference to the human right to water or allow for such interpretative construction. The clearest case is the one of Senegal River Charter of 2002, in its article 4⁸⁰. At the regional level, article 4, (2) b) of the Water and Health Protocol to the Helsinki Water Convention on the protection and utilization of transboundary watercourses and international lakes, adopted under the auspices of the United Nations Economic Commission for Europe in 1992 establishes that States Parties are to “*adopt all appropriate measures*” for ensuring an “*adequate supply of drinking water*” and an “*adequate sanitation*” for ensuring sufficient protection of human health and of the environment. Furthermore, at global level, the Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses, declared that, in determining vital human needs in the event of conflicts over the use of watercourses “*special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation*”⁸¹.

Additionally, also rules or standards, which albeit non-binding are nonetheless normatively influential, again both of a global⁸² or regional⁸³ reach,

78 E.g., Article 5 of ILO Convention No. 161 of 1985 on Occupational Health Services; and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, (*United Nations Treaty Series*, vol. 75, No. 973).

79 E.g., African Charter on the Rights and Welfare of the Child (article 14); Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (article 15). Other regional commitments include the Protocol on Water and Health, adopted by the United Nations Economic Commission for Europe in 1999, the European Charter on Water Resources, adopted by the Council of Europe in 2001.

80 See L. Boisson de Chazournes, R. Desgagne, M.M. Mbengue, C. Romano, *Protection internationale de l’environnement*, pp. 297-312.

81 *Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses*, UN Doc. A/51/869, of 11 April 1997.

82 See, in particular, the 2006 Sub-Commission on the Promotion and Protection of Human Rights’ *Guidelines for the Realization of the Right to Drinking Water and Sanitation*.

83 E.g., the Abuja Declaration, adopted at the first Africa-South America summit in 2006, the message from Beppu, adopted at the first Asian-Pacific Water Summit in 2007; the Delhi

converge on promoting the further realization of human rights obligations related to access to safe drinking water and sanitation in many areas of action. This is demonstrated, exemplarily by certain provisions of the Standard Minimum Rules for the Treatment of Prisoners⁸⁴; the United Nations Rules for the Protection of Juveniles Deprived of their Liberty⁸⁵; the United Nations Principles for Older Persons⁸⁶; the Guiding Principles on Internal Displacement⁸⁷; ILO Recommendation No. 115 of 1961 on Workers' Housing⁸⁸; FAO's Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national security⁸⁹.

Finally, in 2010, through political declarations or resolutions, the UN

Declaration, adopted at the third South Asian Conference on Sanitation, in 2008, the Sharm el-Sheikh Final Document, adopted at the Fifteenth Summit Conference of Heads of State and Government of the Movement of Non-Aligned Countries, in 2009; and the Colombo Declaration, adopted at the fourth South Asian Conference on Sanitation, in 2011.

- 84 See "15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness." and "20. (2) Drinking water shall be available to every prisoner whenever he needs it."
- 85 Article 34: *Sanitary installations should be so located and of a sufficient standard to enable every juvenile to comply, as required, with their physical needs in privacy and in a clean and decent manner.*" and Article 37: *"Every detention facility shall ensure that every juvenile receives food that is suitably prepared ... Clean drinking water should be available to every juvenile at any time."*
- 86 "Independence: 1. *Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help.*"
- 87 "Principle 18: 1. *All internally displaced persons have the right to an adequate standard of living. 2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to: (a) Essential food and potable water; (...) (d) Essential medical services and sanitation. 3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.*"
- 88 "Suggestions concerning methods of application (...): 7. *The housing standards referred to in paragraph 19 of the General Principles should relate in particular to ... (b) The supply of safe water in the workers' dwelling in such ample quantities as to provide for all personal and household uses; (c) Adequate sewage and garbage disposal systems; ... 8. Where housing and accommodation for single workers or workers separated from their families is collective, the competent authorities should establish housing standards providing, as a minimum, for: ... (c) Adequate supply of safe water; (d) Adequate drainage and sanitary conveniences; ..."*
- 89 "3.6 *In their poverty reduction strategies, States should also give priority to providing basic services for the poorest, and investing in human resources by ensuring access to ... clean drinking water, adequate sanitation ...*"; "8.1 *States should facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with their national law and with international law and protect the assets that are important for people's livelihoods. States should respect and protect the rights of individuals with respect to resources such as land, water, ...*".

General Assembly and the UN Human Rights Council explicitly declared access to water as a human right and recognised that there was a connected, but, as both the doctrine and some resolutions eventually put it, also separate, human right to sanitation.

As mentioned, partially impelled by the works of the Special Rapporteur, other subsequent resolutions and discussions within the family of the UN have continued connecting both rights. Thus occurred, for instance, in 28 September 2011, through UN Human Rights Council Resolution 18/190, which takes the human right to safe drinking water and sanitation a step further in that it not only welcomes the submission of the compilation of good practices on the right to safe drinking water and sanitation, in which the Special Rapporteur put particular emphasis on practical solutions with regard to the implementation of the human right to safe drinking water and sanitation, but it also calls on States to ensure enough financing for the sustainable delivery of water and sanitation services.

Also, in May 2011, the World Health Organization (WHO), through Resolution 64/24, made a call to Member States *“to ensure that national health strategies contribute to the realization of water- and sanitation-related Millennium Development Goals while coming in support to the progressive realization of the human right to water and sanitation that entitles everyone, without discrimination, to water and sanitation that is sufficient, safe, acceptable, physically accessible and affordable for personal and domestic uses”* and to WHO’s Director General *“to strengthen WHO’s collaboration with all relevant UN-Water members and partners, as well as other relevant organizations promoting access to safe drinking-water, sanitation and hygiene services, so as to set an example of effective intersectoral action in the context of WHO’s involvement in the United Nations ‘Delivering as One initiative’, and WHO’s cooperation with the United Nations Special Rapporteur on the human right to safe drinking water and sanitation with a view to improving the realization of the human right to water and Sanitation”*.

5.3. Content and impact

Possibly one of the clearest definitions of the human right to water has been issued by the United Nations Committee on Economic, Social and Cultural Rights. This treaty body interpreting legal obligations of State parties to the International Covenant on Economic, Social and Cultural Rights issued in 2002 the aforementioned non-binding interpretation or General Comment No. 15⁹¹

90 A/HRC/RES/18/1, of 28 September 2011.

91 General Comment No. 15 (2002) of the Committee on Economic, Social and Cultural Rights on the right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights). See *Official Records of the Economic and Social Council, 2003, Supplement*

which affirms that access to water as a human right stands as a condition that is essential for the full enjoyment of life and all human rights. In the same vein goes General Assembly resolution 64/292 of 28 July 2010, which recognized the right to safe and clean drinking water and sanitation as a human right.

Both General Comment nr. 15 as well as a number of subsequent resolutions of both the General Assembly⁹² and the Human Rights Council⁹³ further clarify the origin of this derivative right by saying that “*the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health*” (a reference to articles 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights), “*as well as the right to life and human dignity*”⁹⁴.

More recently, some resolutions⁹⁵, claiming that they reflect the coinciding understanding by the Committee on Economic, Social and Cultural Rights and the Special Rapporteur on the human right to safe drinking water and sanitation⁹⁶, speak of the rights to safe drinking water and sanitation, call for treating the right to safe water and the right to sanitation as (related, but also) different rights. They admit that these rights are closely related, and especially that both rights are components of the right to an adequate standard of living⁹⁷. However, it is also sustained that the rights to safe drinking water and sanitation have special features that warrant a distinct treatment justified by the need to address specific challenges in their implementation. It is argued that this is needed particularly in

No. 2 (E/2003/22), annex IV, and the Statement on the right to sanitation of the Committee of 19 November 2010 - *Idem*, 2011, *Supplement No. 2* (E/2011/22), annex VI.

92 General Assembly resolution 64/292 of 28 July 2010, which was pioneer in recognizing the right to safe and clean drinking water and sanitation as a human right, but also Resolutions 68/157 of 18 December 2013, 70/189, of 17 December 2015, and 72/178, of 19 December 2017.

93 Human Rights Council resolutions 7/22 of 28 March 2008, 12/8 of 1 October 2009, 15/9 of 30 September 2010, 16/2 of 24 March 2011, 18/1 of 28 September 2011, 21/2 of 27 September 2012, 24/18 of 27 September 2013, 27/7 of 2 October 2014, 33/10 of 29 September 2016 (this later one, uncharacteristically, was voted).

94 *E.g.*, paragraph 1 of Resolution 18/1 of the Human Rights Council, adopted on the 28th of September of 2011. Previous relevant resolutions of the Human Rights Council are, *inter alia*, resolutions 7/22 of 28 March 2008, 12/8 of 1 October 2009, 15/9 of 30 September 2010, 16/2 of 24 March 2011.

95 General Assembly resolution 72/178, of 19 December 2017 and Human Rights Council resolution 33/10 of 29 September 2016.

96 This is spelled out in very clear terms in her *Realising the Human Rights to Water and Sanitation: A Handbook by the Special Rapporteur Catarina de Albuquerque*, Lisboa, 2014, p. 19.

97 See HRC Resolution 33/10, of 29 September 2016.

regard to sanitation, that too often remains neglected, were it not to be addressed as a separate right⁹⁸.

In regard to the contents of this right or these rights, General Comment nr. 15 stated that “*The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses*”. This is to be granted without discrimination. It further stated that “*An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements*”⁹⁹.

Subsequent resolutions trail the same pathway: for instance, Human Rights Council Resolution 27/7, of the 2nd of October 2014, states that “*the human right to safe drinking water entitle(s) everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use*”.

In special regard to the right to sanitation, still coupled to the one of safe water or already decoupled, it is said that “*the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity*”¹⁰⁰.

Different UN bodies have endeavoured to determine further the implications of these conditions of “*sufficient*”, “*safe*”, “*accessible*” and “*affordable*” water/sanitation, “*without discrimination*”.

Accordingly, “*sufficient*”, sometimes also equated or designated as “*availability*”, water is deemed to be the water supply for each person which is sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation,

98 See Catarina de Albuquerque: “*Defining the human rights to water and sanitation as separate and distinct allows governments, civil society and other stakeholders to create standards specifically for the human right to sanitation and for its realisation. Distinguishing between these two rights also makes it easier for States and other stakeholders to understand the distinct responsibilities, obligations and roles implicit in the realisation of each of them. The situation of people who lack sanitation differs from that of people who lack water. One household’s lack of adequate, safe and hygienic sanitation can have a negative impact on the health not just of the people in that dwelling, but also on others living nearby (even where these neighbours do have access to sanitation). This means that people have a responsibility to improve their sanitation, for the sake of those around them as well as their own. One household’s lack of access to water, on the other hand, would not generally have such an impact on the health and access to water of its neighbours*”.

99 UN Committee on Economic, Social and Cultural Rights, *General Comment 15*, para. 2.

100 Thus, Human Rights Council Resolution 33/10, of 29 September 2016.

personal and household hygiene¹⁰¹. According to the World Health Organization (WHO), between 50 and 100 litres of water per person per day are needed to ensure that most basic needs are met and few health concerns arise.

“*Safe*” water is the (quality of) water required for each personal or domestic use which is free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health¹⁰². Measures of drinking-water safety are usually defined by national and/or local standards for drinking-water quality. The World Health Organization (WHO) Guidelines for drinking water quality provide a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking water.

“*Acceptable*” water, implies that water should be of an acceptable colour, odour and taste for each personal or domestic use. All water facilities and services must be culturally appropriate and sensitive to gender, lifecycle and privacy requirements¹⁰³.

To be “*physically accessible*” means that everyone has the right to a water service that is physically accessible within, or in the immediate vicinity of the household, educational institution, workplace or health institution. According to WHO, the water source has to be within 1,000 metres of the home and collection time should not exceed 30 minutes.

The requirement of “*affordable*” calls for water and water services to be economically accessible for all. The United Nations Development Programme (UNDP) suggests that water costs should not exceed 3 per cent of household income. This does not imply that water provision be made free of charge.

Moreover, States are expected to take reasonable steps to avoid a contaminated water supply and to ensure there are no water access distinctions amongst citizens.

If one differentiates the human right to water and the human right to sanitation, then, in this latter case, the criterium of “*availability*” comes first. It seems to imply that there must be a sufficient number of sanitation facilities to ensure that all of the needs of each person are met. Where facilities are shared, long waiting times should be avoided. In addition, the collection, transport, treatment and disposal (or reuse) of human excreta, and associated hygiene must be ensured. Also, facilities to meet hygiene requirements must be available wherever there are toilets and latrines, where water is stored and where food is being prepared and

101 CESCR, *General Comment No. 15* (E/C.12/2002/11), para. 12 (a).

102 CESCR, *General Comment No. 15* (E/C.12/2002/11) and CESCR, *Statement on the right to sanitation* (E/C.12/2010/1), para. 12.

103 ESCR, *General Comment No. 15* (E/C.12/2002/11) and CESCR, *Statement on the right to sanitation* (E/C.12/2010/1), para. 12 (b).

served, particularly for hand-washing, menstrual hygiene management and the management of children's faeces¹⁰⁴. It also requires that sanitation and hygiene facilities and services must not only be available at the household level, but in all places where people spend significant amounts of time. This includes health and educational institutions such as schools and clinics, detention centres such as prisons, and workplaces, markets and other public spaces.

“*Accessibility*” becomes the second requirement. It demands that water and sanitation infrastructures must be located and built in such a way that they are genuinely accessible, with consideration given to people who face specific barriers, such as children, older persons, persons with disabilities and chronically ill people. More specifically, this translates into a number of more specific requirements, particularly in regard to: the design of facilities (water and sanitation facilities must be designed in such a way that users can physically access them; for example, the pump fitted to a public well must be easy to use for older persons, children and persons with disabilities, and the location must also be within reach and accessible to all at all times); the time and distance taken to reach a sanitation facility (this factor determines the amount of water that users will collect and whether they will use sanitation facilities or resort to defecating in the open); consequently, sanitation facilities must be placed within, or in the immediate vicinity of, each household, workplace, educational and health institution, as well as any other place where people spend significant amounts of time¹⁰⁵. Access at the household level is always preferable, but, in the process of progressive realisation of this right, intermediate solutions, such as communally used water-points, may comply with human rights obligations in the short term). Physical security of users is also at stake and this implies that sanitation facilities must be easily reachable via safe paths, for what well-lighting at night contributes)¹⁰⁶.

The criteria of “*quality*” and “*safety*” of the sanitation services must be ensured to protect the health of users and the general public. From the perspective of the human right to sanitation, this implies that sanitation facilities must be safe to use and must effectively prevent human, animal and insect contact with human excreta, to ensure safety and to protect the health of users and the community. Toilets must be regularly cleaned and provide hygiene facilities for washing hands

104 Independent Expert on human rights to water and sanitation, *Human rights obligations related to sanitation*, Human Rights Council resolution 12/24 (2009), paras. 63 and 70.

105 CESCR, *General Comment No. 15* (E/C.12/2002/11) and CESCR, *Statement on the right to sanitation* (E/C.12/2010/1).

106 Independent Expert on human rights obligations related to access to safe drinking water and sanitation, on the human rights to water and sanitation, *Human rights obligations related to access to sanitation*, 2009 (A/HRC/12/24), paras. 73 and 75.

with soap and water. More particularly, women and girls require facilities to enable menstrual hygiene management, including the disposal of menstrual products. Ensuring safe sanitation further requires hygiene promotion and education, to ensure that people use toilets in a hygienic manner¹⁰⁷.

“*Affordability*” means that people must be able to afford to pay for their water sanitation services and associated hygiene. This means that the price paid to meet all these needs must not limit people’s capacity to buy other basic goods and services, including food, housing, health and education, guaranteed by other human rights. While services do not have to be provided free of charge, this is balanced by States having an obligation to provide free services or put adequate subsidy mechanisms in place to ensure that services always remain affordable for the poor.

The “*acceptability*” or “*dignity*” of any sanitation service implies that these services will not be used if they fail to meet the social or cultural standards of the people they are meant to serve. Acceptability has important implications for dignity and privacy, which are themselves human rights principles that permeate international human rights law and are especially relevant to the human right to sanitation and associated hygiene. Sanitation facilities will only be acceptable to users if the design, positioning and conditions of use are sensitive to people’s cultures and priorities. Sanitation facilities that are used by more than one household should always be separated by gender and constructed in such a way that they ensure privacy. Toilets for women and girls must have facilities for menstrual hygiene management and for the disposal of menstrual materials¹⁰⁸. Particularly with respect to sanitation and associated hygiene, a number of practices exist that are unacceptable from a human rights perspective. These include manual scavenging (the manual emptying of pit latrines, which is associated with specific scheduled castes in the Indian subcontinent) and the taboos attached to women and girls during menstruation. States must ensure that these practices are eliminated, which will often require a range of measures, including changes to the physical infrastructure, concerted political leadership, awareness raising and legal and policy change.

5.4. State obligations in realising the human rights to water and sanitation

Today all States have at least ratified one human rights convention which explicitly or implicitly recognizes the right, and they all have signed at least one

107 Independent Expert on human rights obligations related to sanitation, *Human rights obligations related to sanitation*, 2009 (A/HRC/12/24), para. 74.

108 Independent Expert on human rights obligations related to sanitation, *Human rights obligations related to sanitation*, 2009 (A/HRC/12/24), para. 80.

political declaration recognizing this right. Some States have even enshrined this right in their national Constitution¹⁰⁹. When incorporated in national legal frameworks, this right is articulated to other water rights within the broader body of water law.

The main responsibilities to deliver on this normative message and to ensure that people can enjoy this “*sufficient, safe, accessible and affordable water and sanitation, without discrimination*” in accordance to this human right to water and sanitation are placed primarily upon State governments.

5.4.1. Nature of State obligations

It is therefore important firstly to apprehend the nature of such State obligations: they are not limitless. On the contrary, as happens with all rights under the International Covenant on Economic, Social and Cultural Rights, a principle of progressive realisation applies and they are conditioned by maximum available resources. Indeed, in accordance with Article 2 (1) of the ICESCR, States are required to take steps to progressively realise economic, social and cultural rights. But such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant¹¹⁰. States have an obligation to move as quickly and effectively as possible towards full realisation of the human rights to water and sanitation, using the maximum available resources. The failure to do so would be contrary to the obligations of States under the Covenant¹¹¹. While recognising that the full realisation of this type of human rights may take time, and that in complying with such duties, States have to balance technical, economic and political constraints¹¹², the notion of progressive realisation can not be equated with an excuse for States not to act; rather, it acknowledges that full realization is sought, albeit normally gradually achieved¹¹³. Progressive realisation requires not only an increase in the number of people with access to water and sanitation, with a view to achieving universal access, but also an improvement in the general levels of service for present and future generations¹¹⁴.

109 This is the case, for instance, of South Africa.

110 CESCR, *General Comment No. 3: The nature of States parties' obligations* (E/1991/23), para. 2.

111 OHCHR, *Austerity measures may violate human rights*: <http://www.ohchr.org/EN/NewsEvents/Pages/AusterityMeasures.aspx>.

112 CESCR, *General Comment No. 3* (E/1991/23), paras. 2 and 9.

113 CESCR, *General Comment No. 15* (E/C.12/2002/11), para. 18.

114 UNGA Resolution 64/272: *The human right to water and sanitation*, 2010 (A/64/L.63/Rev.1 and Add.1), para. 2; UN-Water, *Target A: Safe drinking water, sanitation and hygiene*: <http://www.unwater.org/topics/water-in-the-post-2015-development-agenda/target-a-safe-drinking-water-sanitation-and-hygiene/en/>.

Retrogression in the enjoyment of the rights contained in the Covenant therefore frustrates the object and purpose of the treaty obligation. The Committee recognises that the resources available to States for the implementation of economic, social and cultural rights will vary with time and economic cycles. Even if resources are very limited, as during financial or economic crises, States should, as a matter of priority, seek to ensure that everyone has access to, at the very least, minimum levels of rights. States should also take measures to protect poor, marginalised and disadvantaged individuals and groups by using targeted programmes, among other approaches¹¹⁵. For the Committee, “*any deliberately retrogressive measures require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources*”¹¹⁶.

This obligation to access and use the maximum available resources includes the State’s duty to raise adequate revenues, through taxation and other mechanisms, and to seek international assistance where necessary¹¹⁷. This clause is flexible and merely acts as a safeguard, to ensure that States do not attempt to meet their international obligations with mere empty promises and half-measures.

Although the progressive realisation of economic, social and cultural rights may be a gradual and continuous process, there are also immediate obligations.

The obligation to respect, protect, and fulfill human rights in a non-discriminatory way is a duty that is immediately binding¹¹⁸. It should also be accepted that ancillary procedural obligations like the ones of a participation and accountability are of immediate application and impact the progressive realization of the more substantive measures undertaken in fulfilment of the right. The General Comment defines the States Parties’ obligations as “constant and continuing”, which means that the States a constant and uninterrupted duty to move expeditiously and effectively toward the full realization of the rights¹¹⁹. The obligation to take steps, which must be deliberate, concrete and targeted toward the full realization of the rights is also of an immediate character¹²⁰.

115 CESCR, *General Comment No. 15* (E/C.12/2002/11), paras. 17, 19, 37 (f) and 41.

116 CESCR, *General Comment No. 3, The Nature of States Parties’ Obligations* (E/1991/23), para. 9.

117 *Idem*, para 13.

118 *Ibidem*, para. 10, and CESCR, *General Comment No. 15* (E/C.12/2002/11), para. 37.

119 CESCR, *General Comment No. 15* (E/C.12/2002/11), para. 18.

120 Salman M.A. Salman and Siobhan McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions*, Washington, 2004, The World Bank, p. 65.

5.4.2. Content of specific State obligations

Secondly, it is crucial to comprehend the content of the specific obligations imposed on the States, which is of a threefold type, as happens with all human rights: States must respect, protect and fulfil human rights. Some are presented as “negative” duties of the States Parties, or duties that demand their forbearance. As with other issues relating to these obligations, their contents are clarified in General Comment No.15 on the human right to water¹²¹ and the Independent Expert’s report on the right to sanitation of 2009¹²².

The obligation “*to respect*” the human rights to water and sanitation is essentially an obligation requiring that States Parties refrain from interference directly or indirectly with the enjoyment of the right to water. It means that States may not prevent people from enjoying their human rights to water and sanitation; for example, by selling land with a water source on it that is used by the local population without providing an adequate alternative, thus preventing users from continuing to access the source. Indeed, States Parties must refrain from engaging in any practice that denies or limits equal access to adequate water or sanitation, or arbitrarily interferes with customary or traditional arrangements for water allocation or sanitation, or unlawfully diminishes or pollutes water or access to sanitation facilities. This even requires that States Parties refrain from actions that limit access to or destroy water services or infrastructure as well as sanitation facilities as punitive measures. The obligations are essentially “negative” in nature, resembling those associated with civil and political rights¹²³.

The obligation “*to protect*” the human rights to water and sanitation requires that States must prevent third parties from interfering in any way with people’s enjoyment of the human rights to water and sanitation¹²⁴. This obligation includes, *inter alia*, adopting the necessary and effective legislation and other measures to restrain third parties from denying equal access to adequate water or to water sanitation facilities. Protection also requires preventing third parties, when they control or operate water services or sanitation services from compromising equal, physical access, affordable access to sufficient, safe, acceptable water and

121 CESCR, General Comment No. 15 (E/C.12/2002/11), paras. 20-29.

122 Independent Expert on human rights obligations related to sanitation, *Human rights obligations related to sanitation*, A/HRC/12/24 (2009).

123 For a discussion of the “positive/negative” rights dichotomy and the parallels and distinctions between the obligations resulting from ICESCR and those associated with those deriving from ICCPR, see Philip Alston and Gerard Quinn, “Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights”, *Human Rights Quarterly*, 1987, vol. 9, pp. 156-229 and Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development*, 1995, Clarendon Press.

124 CESCR, *General Comment No. 15* (E/C.12/2002/11), paras. 23-24.

sanitation.

A third type of specific obligation for States Parties to the Covenant is the obligation “*to fulfill*”. General Comment nr. 15 explains that this obligation can be disaggregated into obligations to facilitate, promote, and provide¹²⁵. The obligation to facilitate requires that States take positive actions to assist individuals and communities to enjoy the rights to water and sanitation. The obligation to fulfill the human rights to water and sanitation requires States to ensure that the conditions are in place for everyone to enjoy the human rights to water and sanitation. This does not mean that the State has to provide the services directly, unless there are individuals or groups of people who cannot access their human rights through other mechanisms. The obligation to promote obliges States to take steps to ensure that there is appropriate education concerning the hygienic use of water or sanitation, protection of water sources or sanitation facilities, and methods to minimise water wastage. The obligation to provide refers to the need for States to adopt the necessary measures directed toward the full realization of the rights to water and sanitation, such as granting sufficient recognition to the rights within national, political and legal systems; adopting water and sanitation strategies, and ensuring that water and sanitation is affordable, accessible and safe for everyone.

The obligation of States to guarantee that the human rights to water and sanitation are enjoyed “*without discrimination*” pervades all these three obligations. Indeed, equality and non-discrimination¹²⁶ are the bedrock principles of human rights international law. The Universal Declaration of Human Rights (UDHR) proclaims in article 1 that “*All human beings are born free and equal in dignity and rights*”, and article 2 explains that “*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (...)*”.

Discrimination is either *de jure* (direct), meaning that it is enshrined in laws, or *de facto* (indirect), resulting from policies or actions that are purportedly neutral, but have a discriminatory impact. Both of these forms of discrimination are prohibited, although the second can be harder to identify and address.

States are also required to ensure that individuals and groups enjoy substantive

Equality. This means that States must take active and affirmative measures to ensure that all people enjoy their full human rights and their right to equality, in

125 CESCR, *General Comment No. 15* (E/C.12/2002/11), paras. 25-29.

126 Articles 1 and 2, Universal Declaration of Human Rights (UDHR); article 2 (2), ICESCR; article 4 (1), International Covenant on Civil and Political Rights (ICCPR).

terms both of opportunity and of results, irrespective of their position in society.

The principles of non-discrimination and equality recognise that people face different hurdles and have different needs, whether because of inherent characteristics or as a result of discriminatory practices, and therefore require differentiated support or treatment: sometimes States parties have to take affirmative action to diminish or eliminate conditions that cause or perpetuate discrimination.

In order to reach equality of water and sanitation service provision, States must work towards eliminating existing inequalities. This requires knowledge of disparities in access, which typically exist not only between and within groups with different incomes, but also between and within rural and urban populations. There are further disparities based on gender and the exclusion of disadvantaged individuals or groups.

6. Remaining discussions

The fact that it is today undisputable that an internationally recognized human right to water and sanitation or the human rights to safe water and to sanitation has/have been added to the body of law devoted to meeting the challenges of global water scarcity and seeking to help ensure sustainable development does not imply that every important issue for the well calibrated global governance of waters has been clearly settled. Two problems in particular seem to stand out in such context, calling for further elaboration¹²⁷: the one of the transboundary effects of the human right to water and the one of the implications of treating water as an economic good and of trading water rights.

6.1. Does the human right to water hold transboundary effects?

This first issue¹²⁸ is connected with the fact that some scholars and some non-governmental organizations argue that the right to water also has a transborder or extraterritorial aspect. They argue that given the fact that water supplies naturally overlap borders, States also have a legal obligation not to act in a way that might have a negative effect on the enjoyment of human rights in other States. Even more complex and contentious is the suggestion, equally made by other Authors, that

127 This is incompatible within the confines of this article. We pledge to return to this either on a new article or on an enhanced version of the current one.

128 For some time there was a deliberate strategy of not engaging into this intricate issue: this is evidenced, for instance, by the following passage of Human Rights Council Resolution 18/1: *“Affirming the need to focus on local and national perspectives in considering the issue, leaving aside questions of international watercourse law and all transboundary water issues, ...”*.

a shortage in the quantity of water might imply that water should be transferred from one country to another¹²⁹. The issue may become even more acute in a context of uncertainty associated with climate change.

6.2. How far should one go with the economization of water?

As previously seen, the increasing scarcity of water resulting from the fact that the world population tripled while the demand for water increased six-fold is seen by many, even of an environmentalist affiliation, who are committed to exploring other ways of countering an inefficient use of water resources and environmental degradation, as justifying the association of a pricetag to water uses, the establishment of water markets, and regimes of trading water rights, even internationally. In the same vein, but with another argumentative line of thinking, are those who preach the management of water companies along economic sound thinking and even the need for privatization of water services. This line of reasoning is however opposed by those who stress the public and environmental nature of water and ask for its management to obey to rules of political accountability. The recognition of a human right to water is sometimes seen as implying the exclusion of a private sector involvement and economic reasoning in its management or the provision of water services and even requiring, in some more extreme readings, that water should be provided against no cost because the right is universal and water is essential to life.

7. Need for action

With the recognition of water as object of a self-standing human right and associated right to sanitation therein based, and the reform of international water law that has occurred over the last two decades, and which further inscribes water as a fundamental element of the overall sustainable development effort, the international community is evidencing a determination to go beyond words and truly take action, to take rights seriously. Organised in the UN, along with the global civil society, the international community has the means and mechanisms to monitor the progress of States in realizing the right to water and sanitation and to exert pressure on them and to hold them accountable. Having recognized safe and clean drinking water and sanitation as human rights, and with a new body of law which preaches environmental, participatory and inclusive decision-making and management, as well as the relevance of economic thinking, in the pursuance of the overarching goal of sustainable development, the international community

129 Stephen C. McCaffrey, "Human Right to Water: Domestic and International Implications", *Georgetown International Environmental Law Review*, 1992, n.1, p. 5.

adds pressure onto local and national authorities to deliver what is pledged in terms of water supply and clean water as well as appropriate sanitation. Tellingly, this human right to water has already been invoked in a few international (such as the Inter-American Court of Human Rights) and national (noticeably of South Africa, India) courts, as well as other adjudicative bodies¹³⁰, having thus given rise to international jurisprudence as to its content and import, which should repercute in the maturation of these international law instruments.

The time is definitely ripe for action since, according to the UN World Water Development Report, by 2050, at least one in four people is bound to live in a country affected by recurring or chronic shortages of freshwater and a sizeable portion of the Humanity still lacks appropriate improved sanitation.

130 International Centre for Settlement of Investment Disputes.