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**THE HUMAN RIGHT TO WATER AND
SANITATION: FROM POLITICAL
COMMITMENTS TO CUSTOMARY RULE?**

Gonzalo Aguilar Cavallo*

“The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have little”¹

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¹ President Franklin Delano Roosevelt, Second Inaugural Address (Jan. 20, 1937), in *GREAT SPEECHES* 61 (John Grafton ed., 1999).

ABSTRACT

The human right to water and sanitation is not explicitly recognized in the International Bill of Human Rights. Some scholars deny the legal existence of this right. However, over the last three decades, a number of legal recognitions of certain aspects of this right in specific universal and regional human rights treaties have allowed scholars to evidence the existence of the legal right to water and sanitation. In addition, an increasing number of high level international documents and declarations explicitly recognize the existence of this right, as reflected in declarations of the European Union and the General Assembly of the United Nations. In this context, it may be argued that there is a customary rule of international law *in status nascendi* concerning the right to water and sanitation.

INTRODUCTION

The legal existence of the human right to water and sanitation raises many objections. The lack of explicit recognition of this right in both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights is a strong argument in the debate concerning the existence of this right. In the last three decades, however, an increasing number of international and regional instruments have included clauses codifying aspects of the human right to water and sanitation. Without a doubt, such flourishing initiatives are a response to the growing water crisis.²

A brief depiction of the consequences of the water crisis, which revolves around water scarcity, helps illuminate the situation:

[A]pproximately 884 million people lack access to safe drinking

² UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2006: BEYOND SCARCITY: POWER, POVERTY, AND THE GLOBAL WATER CRISIS 1 (2006). See also UNITED NATIONS DEV. PROGRAMME, WATER GOVERNANCE FOR POVERTY REDUCTION: KEY ISSUES AND THE UNDP RESPONSE TO MILLENNIUM DEVELOPMENT GOALS 2 (2004); WORLD WATER ASSESSMENT PROGRAMME, WATER, A SHARED RESPONSIBILITY: THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 2, at 1 (2006); WWF FRESHWATER PROGRAM, RICH COUNTRIES, POOR WATER 1 (2006).

water[,] . . . more than 2.6 billion do not have access to basic sanitation, and . . . approximately 1.5 million children under 5 years of age die [, while] 443 million school days are lost each year as a result of water—and sanitation—related diseases.³

According to the United Nations (“UN”), the worldwide water crisis is essentially a crisis of governance:

[S]ymptoms of th[e] crisis . . . include: lack of adequate water institutions, fragmented institutional structures (a sector-by-sector management approach and overlapping and/or conflicting decision-making structures), upstream and downstream conflicting interests regarding riparian rights and access to water, diversion of public resources for private gain, and unpredictability in the application of laws, regulations and licensing practices, which impede markets.⁴

According to others, the core of the water crisis lies in the realm of water management and community participation.⁵ Consistent with such arguments, while global and local water governance should be enhanced, states must ensure individuals the right to access clean water and sanitation. Thus, people will be empowered to face the water crisis through adequate water management and water allocation. The protection of human rights and dignity is the underlying principle of such an initiative.

This article examines the international legal basis of the human right to water and sanitation in light of Article 38 of the Statute of the International Court of Justice. The scope and value of non-legally binding international instruments are addressed, while the scope and contours of the right to water are not considered nor the basis of the right from a domestic law

³ The Human Right to Water and Sanitation, G.A. Res. 64/292, ¶ 4, U.N. Doc. A/RES/64/292 (Aug. 3, 2010).

⁴ WORLD WATER ASSESSMENT PROGRAMME, WATER FOR PEOPLE, WATER FOR LIFE: THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT: EXECUTIVE SUMMARY 30 (2003).

⁵ FOOD & AGRIC. ORG. OF THE UNITED NATIONS, CROPS AND DROPS: MAKING THE BEST USE OF WATER FOR AGRICULTURE 13 (2002) (“What is needed is a new water contract. The Green Revolution was staged by scientists. The Blue Revolution should be staged by making water use and management everyone's business: its goal would be to maximize the production of food and the creation of jobs per water unit consumed.”).

perspective. Nonetheless, there is abundant evidence at the national level, both in the form of judicial decisions and constitutional norms, supporting the emergence of the right to water.

The right to clean, safe water and sanitation has clear roots in international human rights law, international humanitarian law, and international water law. The right to water and sanitation has evolved both in international practice and legal belief, the root of customary international law. In this article, the legal path of the human right to water in customary international law is analyzed. This article contends that contemporary international law has developed a customary international norm *in statu nascendi* recognizing the existence of a human right to water and sanitation. Hence, this article is composed of an analysis of the conventional sources, an analysis of non-legally binding international instruments concerning the right to water and sanitation, and an analysis of the applicable case law.

1. CONVENTIONAL INTERNATIONAL LAW

To date, no international treaty has explicitly recognized the right to water and sanitation. It has been widely acknowledged, however, that a number of international treaties recognize both explicitly and implicitly some aspects of the right to water and sanitation through express references regarding access to safe drinking water and sanitation.⁶ In general terms, these references are part of other human rights, mainly the right to health and the right to enjoy an adequate standard of living. It is noteworthy to acknowledge the existence of implic-

⁶ Human Rights Council Res. 7/22, Human Rights and Access to Safe Drinking Water and Sanitation, 7th Sess., Mar. 3-28, 2008, U.N. GAOR, 63d Sess., Supp. No. 53, A/63/53, at 136 (Mar. 28, 2008) ("Emphasizing that international human rights law instruments, including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child entail obligations in relation to access to safe drinking water and sanitation, . . ."); see also U.N. High Comm'r for Human Rights, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the U. N. High Commissioner for Human Rights and the Secretary General*, ¶ 5(a), U.N. Doc. A/HRC/6/3 (Aug. 16, 2007) [hereinafter Human Rights Council, *Annual Report*].

it references to accessing safe drinking water in human rights treaties as well as the close connection between access to water and a wide range of other human rights.⁷

While this article seeks to base the existence of the human right to water and sanitation in international human rights law, it also addresses conventional sources of international humanitarian law and international environmental law that evidence the close connectedness and interplay between special regimes of international law.⁸

1.1. *Universal Treaties*

In the field of international human rights law, three fundamental treaties expressly refer to specific aspects of the right to water and sanitation: the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”); the 1989 Convention on the Rights of the Child (“CRC”); and the 2006 Convention on the Rights of Persons with Disabilities (“CRPD”).⁹ These treaties are highly relevant and strategic, as CEDAW and CRC have both been ratified by a vast majority of states.¹⁰

First, Article 14(2)(h) of CEDAW recognizes the right to enjoy adequate living conditions, particularly in relation to sanitation and water supply.¹¹ The Committee on the Elimination

⁷ Human Rights Council, *Annual Report*, *supra* note 6, ¶ 5(b).

⁸ *See id.* ¶ 4 (“[T]he intersection between humanitarian and environmental treaties and human rights instruments . . . help[s] clarify the scope and content of human rights obligations in relation to access to safe drinking water and sanitation.”). For a good example of the relationship between human rights and humanitarian law, *see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

⁹ *Cf.* Erik B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 *ECOLOGY L.Q.* 957, 960 (2004); Henri Smets, *The Right to Water as a Human Right*, 30 *ENVTL POL’Y & L.* 248, 249 (2000); Bobby Ramakant, *Water: A Fundamental Human Right*, 3 *DAILY STAR*, no. 826, Sept. 22, 2006, available at <http://www.thedailystar.net/2006/09/22/d609221503113.htm>.

¹⁰ *See* William Schreiber, *Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations*, 48 *NAT. RESOURCES J.* 431, 440 (2008).

¹¹ Convention on the Elimination of All Forms of Discrimination Against Women, art. 14(2)(h), Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force

of Discrimination against Women confirmed in its General Recommendation No. 24 that states parties have an obligation to provide adequate water supply,¹² as women and girls are often most affected by the lack of water accessibility, availability, and safety, especially in poor countries, rural areas, and traditional communities,¹³ and as there are a number of examples of states' failure to recognize women's rights concerning access to water.¹⁴

Second, Article 24(2)(c) of the CRC provides that states shall recognize the right of the child to health and shall ensure provision of clean drinking water.¹⁵ In its General Comment No. 7, the Committee on the Rights of the Child stated that, in light of Article 24, States have a responsibility to "ensure access to clean drinking water and adequate sanitation."¹⁶ In this respect, it has been pointed out that "it is incumbent on society to consider the environment and environmental justice in the context of child health equity."¹⁷ Indeed, the right of the

Sept. 2, 1981).

¹² U.N. Comm. on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, ¶ 28, U.N. Doc A/54/38/ Rev.1 (May, 2, 1999).

¹³ Marsha A. Freeman, *The Human Rights of Women under the CEDAW Convention: Complexities and Opportunities of Compliance*, 91 AM. SOC'Y INT'L L. PROC. 378, 379 (1997).

¹⁴ *Id.* at 378. See Aart Hendriks, *The Right to Health: Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and the Women's Convention*, 44 AM. U. L. REV. 1123, 1136 (1995); Margaret Plattner, *The Status of Women Under International Human Rights Law and the 1995 UN World Conference on Women, Beijing, China*, 84 KY. L.J. 1249, 1256 (1996).

¹⁵ Convention on the Rights of the Child, art. 24(2)(c), Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); see also Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1, 7 (1993) ("Water is . . . expressly mentioned in the newest human rights agreement of a universal character, the Convention on the Rights of the Child.").

¹⁶ Comm. on the Rights of the Child, *General Comment No. 7*, ¶ 27(a), U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006).

¹⁷ Council on Cmty. Pediatrics & Comm. on Native Am. Child Health, *Health Equity and Children's Rights*, 125 PEDIATRICS 838, 842 (2010); see also David P. Southall et al., *The Child-Friendly Healthcare Initiative (CFHI): Healthcare Provision in Accordance With the UN Convention on the Rights of the Child*, 106 PEDIATRICS 1054, 1054 (2000) ("Many hospitals in poorly re-

child to access safe drinking water was reiterated during the 1993 World Conference on Human Rights in the Vienna Declaration.¹⁸

Third, Article 28(2)(a) of the CRPD recognizes the right of persons with disabilities to an adequate standard of living and social protection, providing that states shall ensure “equal access by persons with disabilities to clean water services.”¹⁹ In this context, Hunt and Mesquita have noted:

Healthcare facilities, goods, and services require, *inter alia*, skilled medical and other personnel, evidence-based psychosocial interventions, scientifically approved and unexpired drugs, appropriate hospital equipment, safe and potable water, and adequate sanitation. In the context of mental disabilities, this means that, for example, health professionals should be provided with adequate mental healthcare training; and adequate sanitary facilities must be assured in psychiatric hospitals and other support services.²⁰

In a case involving a detained person with a mental disability, the Inter-American Commission on Human Rights relied on the CRPD in making its decision, and pointed out that “[t]he fact that the supposed victim died as a result of his dehydration and malnutrition reveal[ed] that the state failed in its duty to do what was in its power to keep him alive, given his mental and physical disorders.”²¹

The situation in psychiatric institutions is not better. Hunt and Mesquita have noted that persons with mental disabilities are especially affected by poverty due to a lack of access

sourced countries do not have basic water and sanitation, a reliable electricity supply, or even minimal security.”).

¹⁸ World Conference on Human Rights, Vienna, Austria, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 47, U.N. Doc. A/CONF. 157/23 (July 12, 1993).

¹⁹ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 28(2)(a), U.N. Doc. A/RES/61/106 (Dec. 13 2006).

²⁰ Paul Hunt & Judith Mesquita, *Mental Disabilities and the Human Right to the Highest Attainable Standard of Health*, 28 HUM. RTS. Q. 332, 348 (2006).

²¹ See *Victor Rosario Congo v. Ecuador*, Case 11.427, Inter-Am. Comm’n H.R., Report No. 63/99, OEA/Ser.L/V/II.102, doc. 6 rev. ¶ 82 (1999).

to adequate healthcare, food, shelter, water, and sanitation,²² highlighting the fact that

The obligation to *respect* requires states to refrain from denying or limiting equal access to healthcare services and to underlying determinants of health for persons with mental disabilities. States should also ensure that persons with mental disabilities in public institutions are not denied access to healthcare and related support services or to underlying determinants of health, including water and sanitation.²³

Furthermore, according to Benko and Benowitz, children with mental disabilities are exposed to special dangers—even lack of water—in psychiatric institutions.²⁴ It has been argued that access to fresh and safe water is especially precarious, as psychiatric placements can become political weapons.²⁵

In terms of rights, however, the 1985 International Labour Organization's Convention 161 on Occupational Health Services contemplates recognition of some elements of the right to water, especially in its sanitary aspect. Article 5 (b) states, "occupational health services shall have such of the following functions as . . . surveillance of the factors in the working environment and working practices which may affect workers' health, including sanitary installations."²⁶

In the field of international humanitarian law, the 1949 Geneva Conventions guarantee the protection of some aspects of the right to water and sanitation during armed conflicts, es-

²² Hunt & Mesquita, *supra* note 20, at 345 ("As well as an entitlement to healthcare, the right to health includes an entitlement to the underlying determinants of health, including adequate sanitation, safe water, and adequate food and shelter. Persons with mental disabilities are disproportionately affected by poverty, which is usually characterized by deprivations of these entitlements.").

²³ See Hunt & Mesquita, *supra* note 20, at 348.

²⁴ See Debra Benko & Brittany Benowitz, *The Application of Universal Human Rights Law to People with Mental Disabilities*, 9 HUM. RTS. BRIEF 9, 11 (2001).

²⁵ For a complete report of related abuses in Asia, see Robin Munro, *Judicial Psychiatry in China and its Political Abuses*, 14 COLUM. J. ASIAN L. 1, 105–06 (2000).

²⁶ Convention (No.161) Concerning Occupational Health Services art. 5(b), June 25, 1985, 1489 U.N.T.S. 19 (entered into force Feb. 17, 1988).

pecially the accessibility and availability of water.²⁷ Protocol I from 1977 prohibits attacks and destruction of drinking water installations and supplies.²⁸ Protocol II from 1977 states that the destruction of drinking water installations as a method of combat is prohibited.²⁹

In the context of international water law, there have also been indirect references to the right to water and sanitation in several international treaties. For instance, the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses adopts a clear human rights approach related to water.³⁰ Article 10(2) of the Convention provides that in the event of a conflict between uses of an international watercourse, the conflict shall be resolved with special regard to the requirements of vital human needs.³¹ According to McCaffrey,

²⁷ See Ramakant, *supra* note 9; see also Geneva Convention [III] Relative to the Treatment of Prisoners of War arts. 20, 26, 46, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, arts. 85, 89, 127, Aug. 12, 1949, 6, U.S.T. 3516, 75 U.N.T.S. 135.

²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 54, June 8, 1977, 1125 U.N.T.S. 3.

²⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 5(14), June 8, 1977, 1125 U.N.T.S. 609.

³⁰ Malgosia Fitzmaurice, *The Human Right To Water*, 18 FORDHAM ENVTL. L. REV. 537, 544 (2007). It took more than 25 years for the Convention to come before the General Assembly for adoption on May 21, 1997. A majority of states voted in favor (103 in number), which indicates that the rules embodied in the convention were acceptable; only three states voted against (Burundi, China and Turkey); and 27 abstained (Andorra, Argentina, Azerbaijan, Belgium, Bolivia, Bulgaria, Colombia, Cuba, Ecuador, Egypt, Ethiopia, France, Ghana, Guatemala, India, Israel, Mali, Monaco, Mongolia, Pakistan, Panama, Paraguay, Peru, Rwanda, Spain, Tanzania, Uzbekistan). U.N. GAOR, 51st Sess., 99th plen. mtg., U.N. Doc. A/51/PV.99 (May 21, 1997).

³¹ Convention on the Law of the Non-navigational Uses of International Watercourses, G.A. Res. 51/229, art. 10(2), U.N. Doc. A/RES/51/229 (May 21, 1997). The Resolution must be bearing in mind the assertion by the International Court of Justice in the 1997 *Gabcikovo-Nagymaros* case of the existence of a "basic right to an equitable and reasonable sharing of the resources of an international watercourse." *Gabcikovo-Nagymaros Project* (Hung. / Slovakia), 1997 I.C.J. 7, ¶ 78 (Sept. 25). See also Salman M.A. Salman, *The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?*, 32 WATER INT'L 1, 5 (2007) ("Article 10 has been used,

the 1997 Convention reflects the basic established principles of customary international law.³² Although Schwabach adopts a more blended position,³³ MacCaffrey reaffirms that the “relationship between different kinds of uses” of the water necessitates that “in weighing different kinds of utilization of a transboundary aquifer or aquifer system, special regard shall be given to vital human needs.”³⁴

Legally binding international instruments explicitly recognize some critical elements of the normative content of the human right to water and sanitation, in particular accessibility and availability of clean water and sanitation services. The human right to water has been gradually gaining authority in conventional international law, covering international human rights law, international labor law, international humanitarian law, and international water and environmental law. This recognition is also present in various regional conventions, as developed below.

1.2. Regional Treaties

In the past decade, in regions such as America, Asia, Afri-

together with other similar provisions in other international legal instruments, by a number of authors in the field to support the notion of a human right to water.”). Cf. Fitzmaurice, *supra* note 30, at 389.

³² Stephen McCaffrey, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls*, in INTERNATIONAL WATERCOURSES – ENHANCING COOPERATION AND MANAGING CONFLICT 17, 26–27 (Salman M. A. Salman & Laurence Boisson de Chazournes eds., 1998); Salman, *supra* note 31, at 638.

³³ Aaron Schwabach, *United Nations Convention on the Law of Non-navigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians*, 33 TEX. INT'L L. J. 257, 278 (1998) (“Although support for the Convention was considerably less than universal, there may be few pre-existing rules of customary international law to displace.”).

³⁴ Stephen C. McCaffrey, *The International Law Commission Adopts Draft Articles on Transboundary Aquifers*, 103 AM. J. INT'L L. 272, 275–76 (2009). See also *id.* at 276 (“The intrinsic importance of this principle is magnified by its coming the closest in both instruments to recognizing the human right to water.”); Stephen McCaffrey, *The Contribution of the United Nations Convention in the Law of the Non-Navigational Uses of International Watercourses*, 1 INT'L J. GLOBAL ENVTL. ISSUES 250, 255 (2001).

ca, the Middle East, and Europe, there have been an increasing number of international instruments that refer to normative contents of the human right to water and sanitation.

1.2.1. America

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (also known as the Protocol of San Salvador) contains an implicit recognition of the need for water and sanitation services.³⁵ Article 11(1) of the Additional Protocol provides, “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services.”³⁶ Water supply and sanitation form part of the basic services that a State must provide to its population.³⁷

Likewise, Article III(1)(a) of the 1999 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities sets out that “the states parties [shall] undertake . . . (1) To adopt . . . : a) Measures to eliminate discrimination gradually and to promote integration by government authorities and/or private entities in providing or making available goods, services, facilities.”³⁸ Services and facilities include access to water supply and hygiene installations.³⁹

³⁵ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), arts. 10-12, Nov. 17, 1988, 28 I.L.M. 156.

³⁶ *Id.* art. 11(1).

³⁷ JOHN SCANLON ET AL., *WATER AS A HUMAN RIGHT* 8 (2004) (“It is undoubtable that basic public services include water supply and sanitation: a report made by the Inter-American Commission on the Human Rights Situation of Brazil clearly proves this by claiming that ‘there was inequality in the access to basic public services: 20.3% of the population have no access to potable water and 26.6% lack access to sanitary services.’”).

³⁸ Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities art. 3(1)(a), Jun. 7, 1999, AG/RES. 1608 (XXIX-0/99).

³⁹ Independent Expert on the on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, Human Rights Council, U.N. Doc. A/HRC/15/31 (June 29, 2010) (by Catarina de Albuquerque) [hereinafter

1.2.2. Asia

The region of South Asia has made institutional and normative progress in the field of human rights, including the protection of access to safe drinking water and sanitation.⁴⁰ For instance, the member States of the South Asia Association for Regional Cooperation (“SAARC”) signed the Social Charter of the SAARC in 2004.⁴¹ Article III(4) of the Social Charter de-

Promotion and Protection of all Human Rights].

⁴⁰ The ASEAN Intergovernmental Commission on Human Rights (“AICHR”) was launched by the Heads of State/Government of the Member States of the Association of Southeast Asian Nations (“ASEAN”) at the 15th ASEAN Summit in Thailand on October 23, 2009. Ass’n of Southeast Asian Nations [ASEAN], *Secretariat Bulletin, October 2009: ASEAN Intergovernmental Commission on Human Rights Launched by ASEAN Leaders during the 15th ASEAN Summit Cha-am Hua Hin, Thailand, 24 October 2009*, (Oct. 24, 2009), available at <http://www.aseansec.org/23112.htm#Article-14a>. On this occasion, the ASEAN Member States emphasized “the importance of the AICHR as a historic milestone in ASEAN community-building process and as a vehicle for progressive social development and justice, the full realization of human dignity and the attainment of a higher quality of life for ASEAN peoples.” ASEAN, *Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights*, at ¶ 4 (adopted Oct. 23, 2009), available at <http://www.aseansec.org/documents/Declaration-AICHR.pdf>. One of the leading purposes of the AICHR is “[t]o uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.” ASEAN Intergovernmental Commission on Human Rights [AICHR], *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights*, at ¶ 1.6, (adopted July 20, 2009), available at <http://www.asean.org/DOC-TOR-AHRB.pdf>. ASEAN was established on August 8, 1967, and includes Brunei Darussalam, Cambodia, Indonesia, Lao Peoples Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam. See Charter of the Association of Southeast Asian Nations art. 1-2, Nov. 20, 2007, available at <http://www.aseansec.org/21069.pdf>.

⁴¹ The Member States of the SAARC are Bangladesh, Maldives, Bhutan, Nepal, India, Pakistan, Sri Lanka, and, as of 2007, Afghanistan. Cf. Mohammed Mohsin, *The Twelfth SAARC Summit: Quest for Durable South Asian Cooperation*, 12 S. ASIAN SURV. 35, 35 (2005); Smruti S. Pattanaik, *Making Sense of Regional Cooperation: SAARC at Twenty*, 30 STRATEGIC ANALYSIS 139, 141–45 (2006) (“Stability in the region is essential for regional cooperation. At the 12th South Asian Association for Regional Cooperation summit of regional leaders in January 2004, governments drafted a new social charter that notes “the promotion of health as a regional objective.”); Ritu Sadana et al., *Importance of Health Research in South Asia*, 328 BRIT. MED. J. 826, 829 (2004).

clares, “States Parties agree that access to basic education, adequate housing, safe drinking water and sanitation, and primary health care should be guaranteed in legislation, executive and administrative provisions, in addition to ensuring of adequate standard of living, including adequate shelter, food and clothing.”⁴² Within the framework of the SAARC, there is an explicit recognition of the State obligation to provide access to safe drinking water and sanitation. This framework may be interpreted as an autonomous recognition of the right to water and sanitation, independent from the human right to health or food.

1.2.3. Africa

The 1981 African Charter on Human and Peoples’ Rights “recognizes a right to work under equitable and satisfactory conditions, a right to health, and a right to education. Some prominent socioeconomic rights are not mentioned by name, such as the right to food and water (or nutrition), social security, and housing.”⁴³ According to Heyns, “the socio-economic rights in the Charter have received scant attention from the [African] Commission [on Human and Peoples’ Rights], but in a prominent case the Commission dealt with the issue and in effect held that the internationally recognized socio-economic rights that are not explicitly recognized in the Charter should be regarded as implicitly included.”⁴⁴

Additionally, Article 14(2)(c) of the 1990 African Charter on the Rights and Welfare of the Child (“ACRWC”), similar to the CRC, establishes the obligation to ensure the provision of adequate safe drinking water, which is derived from the right to enjoy the best attainable state of physical, mental, and spir-

⁴² South Asian Association for Regional Cooperation [SAARC], South Asian Association for Regional Cooperation Social Charter art. 3(4), Jan 4, 2004, *available at* http://www.saarc-sec.org/uploads/document/SOCIAL%20CHARTER_20100414104318.doc.

⁴³ Christof Heyns, *The African Regional Human Right System: The African Charter*, 108 PENN. ST. L. REV. 679, 690 (2004).

⁴⁴ *Id.* at 691; *see* Soc. & Econ. Rights Action Ctr. for Econ. & Soc. Rights v. Nigeria, *Comm’n No. 155/96*, Afr. Comm’n H.P.R. (2001).

itual health.⁴⁵ According to Thompson, with this list of measures included in the ACRWC, “the member States have shown much insight and perception in appreciating some of Africa’s gravest problems [such as] the provision of adequate nutrition and safe drinking water.”⁴⁶ Such insight is advantageous, as the water supply and sanitary conditions for children in African schools are far from optimal.⁴⁷

Like at the international level, there is also an explicit recognition in Africa of elements of the right to water in the context of women’s rights. The 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa links the right to food and the obligation to ensure access to clean drinking water.⁴⁸ This regional convention also recognizes the right to a healthy and sustainable environment.⁴⁹

In this broader aspect, the 2003 African Convention on the Conservation of Nature and Natural Resources also sets out the states parties’ obligation to guarantee for their population a sufficient and continuous supply of clean water.⁵⁰ Further-

⁴⁵ See Ramakant, *supra* note 9; SCANLON ET AL., *supra* note 37, at 5; see also African Charter on the Rights and Welfare of the Child art. 14(2), July 11, 1990, OAU Doc. CAB/LEG/153 (entered into force Nov. 29, 1999).

⁴⁶ Bankole Thompson, *Africa’s Charter on Children’s Rights: A Normative Break with Cultural Traditionalism*, 41 INT’L & COMP. L.Q. 432, 436 (1992).

⁴⁷ Michel Bonnet, *Child Labour in Africa*, 132 INT’L LAB. REV. 371, 376 (1993) (“They can hardly hear the lesson or read the writing on the blackboard—if blackboard and chalk are available, which is far from being the general rule. Sanitary conditions are even worse, with no latrines and no water supply.”); Michael Noble et al., *Developing a Child-Focused and Multidimensional Model of Child Poverty for South Africa*, 12 J. CHILD. & POVERTY 39, 39 (2006) (“[A]nalysis of the 10 percent sample of the South African 2001 Census reveals that high levels of childhood deprivation still prevail. For example, of those under the age of eighteen, 11.8 percent live in informal dwellings or shacks, 37.7 percent do not have piped water in their homes or within 200 meters of where they live, 49.3 percent do not have a refrigerator in their homes, and 60.8 percent do not have a flush toilet in their homes.”).

⁴⁸ See Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art. 15, July 11, 2003, OAU Doc. CAB/LEG/66.6 (entered into force Nov. 25, 2005).

⁴⁹ *Id.* art. 18.

⁵⁰ African Convention on the Conservation of Nature and Natural Resources art. 7(2), July 11, 2003, OAU Doc. CAB/LEG/24.1 (“The Parties shall .

more, the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (also known as the Kampala Convention) includes two provisions requiring that water must be supplied to keep satisfactory conditions of dignity and must be respected by both state parties and non-state actors (such as armed groups).⁵¹

Finally, the Senegal River Water Charter, signed in May 2002, expressly recognizes the fundamental human right to potable water.⁵²

1.2.4. Arab Region

The Arab Charter on Human Rights, adopted in 2004 by the League of Arab States, explicitly refers to access to drinking water as a derivation of the right to health. Article 39(2) provides that states parties recognize the right to enjoyment of the highest attainable standard of physical and mental health, noting that in order to comply with this right, they shall take measures such as “(e) [ensuring] the basic nutrition and safe drinking water for all; [and] (f) [c]ombating environmental pollution and providing proper sanitation systems.”⁵³

1.2.5. Europe

An implicit recognition of certain elements of the right to water can be found in Europe through the principles contained

. . . endeavor to guarantee for their populations a sufficient and continuous supply of suitable water.”). The Convention is a revised version of the 1968 Algiers Convention. See African Convention on the Conservation of Nature and Natural Resources art. 7(2), Sept. 15, 1986, OAU Doc. CAB/LEG/24.1 (entered into force June 16, 1969).

⁵¹ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) art. 7(5)(c), Oct. 22, 2009, 49 I.L.M. 86.

⁵² Charte des Eaux du Fleuve Senegal [The Water Charter of the Senegal River] art. 2, *adopted* May 28, 2002; Fitzmaurice, *supra* note 30, at 545.

⁵³ See Arab Charter on Human Rights art. 39(2), *adopted* May 22, 2004 (entered into force Mar. 15, 2008), *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005); Mervat Rishmawi, *The Arab Charter on Human Rights and the League of Arab States: An Update*, 10 HUM. RTS. L. REV. 169, 171-72 (2010).

in the 1999 London Protocol on Water and Health.⁵⁴ Article 5 sets forth, *inter alia*, that “[s]pecial consideration should be given to the protection of people who are particularly vulnerable to water-related disease” and that “[e]quitable access to water, adequate in terms both of quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion.”⁵⁵

1.3. *Relevance of International and Regional Conventions*

Overall, the main features of the recognition given by international and regional conventions of the right to water are as follows:

First, to date, there is no explicit recognition of the right to access to water and sanitation in international conventional law.⁵⁶ One of the weaknesses of the international and regional conventions’ recognitions are their lack of clarity as to an explicit human right to water and sanitation. It is not yet a

⁵⁴ Fitzmaurice, *supra* note 30, at 545. The London Protocol principles reached an impact beyond the European context. Sub-Commission on Human Rights Res. 2000/8, Promotion of the Realization of the Right to Drinking Water and Sanitation, 25th Sess., Aug. 20, 2000, U.N. Doc. E/CN.4/Sub.2/2000/46, at 31 (Nov. 23, 2000) (“Bearing in mind the Protocol on Water and Health to the 1992 Convention on the Use of Transboundary Watercourses and International Lakes, adopted in London in 1999 under the auspices of the Economic Commission for Europe, which refers to the principle of equitable access to water which should be provided for all members of the population (art. 5(l)).”).

⁵⁵ SCANLON ET AL., *supra* note 37, at 8; Econ. & Soc. Council, Econ. Comm’n for Europe, *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, U.N. Doc. MP.WAT/2000/1 (Oct. 18, 1999). Conversely, the 1996 revised European Social Charter is silent on the issue of water and sanitation. Revised European Social Charter, *adopted* May 3, 1996, ETS No.163 (entered into force June 1, 1999).

⁵⁶ SYLVIE PAQUEROT & FREDERIC LASSERRE, *EAU DOUCE: LA NÉCESSAIRE REFOUNDATION DU DROIT INTERNATIONAL* [FRESHWATER: THE NECESSARY REBUILDING OF INTERNATIONAL LAW] 183 (2005); SCANLON ET AL., *supra* note 37, at 12 (“[T]his right has not been clearly defined in international law and has not been expressly recognized as a fundamental human right.”); Stephen Tully, *A Human Right to Access Water?: A Critique of General Comment No. 15*, 23 NETH. Q. HUM. RTS 35, 43 (2005) (“An entitlement to access water for personal or domestic use available to all does not exist under contemporary international law.”).

stand-alone right. Most of the above mentioned instruments recognize the state's obligation to provide access to safe drinking water and sanitation only within the context of the human right to health or to an adequate standard of living.

It is notable, however, that there is underway a worldwide process towards an explicit recognition and a definition of the human right to water and sanitation. Therefore, while in the twentieth century it was necessary to infer the right to water from basic instruments of international human rights law,⁵⁷ in the twenty-first century the increasing number of international instruments that recognize some contents of the human right to water and sanitation makes such an inference less necessary.

The international paradigm concerning water as a human right has been to identify some precise obligations regarding drinking water provisions and water supply in the context of children's rights, women's rights, and rights of persons with disabilities, both at universal and regional levels. An international conventional containing an explicit recognition of the right to water would change this discussion.

Why is an explicit conventional recognition of the right to water important? Because individuals and communities, with special attention to individuals and groups who have traditionally faced difficulties, need to be entitled to a clear and integral right to water in order to claim their vital water needs. States and other duty-bearers need to be accountable for water provision. A conventional recognition must call for redress mechanisms. Moreover, the explicit recognition of an independent right to water must provide a symbolic message in the middle

⁵⁷ McCaffrey, *supra* note 15, at 7; see Eibe Riedel, *The Human Right to Water*, in WELTINNENRECHT. LIBER AMICORUM JOST DELBRÜCK 585 (2005) ("The reason for a general abstinence in this matter is simple: In 1966 there was much less water degradation, water seemed to be abundant and often free of charge, available like the air we breathe."); see also Amanda Cahill-Ripley, *The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water*, 9 INT'L J. HUM. RTS. 389, 390 ("Within the International Bill of Human Rights there is no mention of water. However, it is possible that the framers of the International Bill of Rights had realized that water was to be such a scarce resource in the future, they would have explicitly codified the right within these instruments.").

of the global water crisis.

Second, most of the international and regional legal instruments recognizing some elements or contents of the right to water and sanitation refer to the human rights of women, children, and disabled persons because most of the accessibility, availability, and safety of water concerns are faced by such groups, especially in developing countries and rural areas.⁵⁸ Hence, efforts to achieve sustainable development target mainly women, youth, children, and other vulnerable groups.⁵⁹

Third, several scholars argue that there is no legal priority assigned to domestic human consumption of water, either conventionally or customarily.⁶⁰ It is true that there is not yet a general conventional rule affirming the water human needs priority, but in the particular case of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, Article 10(2) provides that in the event of a conflict between uses of an international watercourse, it shall be resolved with special regard being given to the requirements of vital human needs.⁶¹ Consequently, in the event of conflict of uses, the Convention adopts a clear human rights approach related

⁵⁸ Human Rights Council, *Annual Report*, *supra* note 6, ¶ 24 n.43.

⁵⁹ World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, ¶ 3, U.N. Doc. A/CONF.199/20 (2002) (“We recognize that the implementation of the outcomes of the Summit should benefit all, particularly women, youth, children and vulnerable groups.”).

⁶⁰ Paquerot and Lesserre also pointed out that if we trust the content of bilateral or multilateral agreements in order to verify the states’ practice and to define the customary character of certain norms, we cannot deduce a customary priority supporting domestic use. PAQUEROT & LASSERRE, *supra* note 56, at 184.

⁶¹ See G.A. Res. 51/229, art. 10(2), U.N. Doc. A/RES/51/229 (May 21, 1997). The Resolution must be bearing in mind the assertion by the International Court of Justice in the 1997 *Gabcikovo-Nagymaros* case of the existence of a “basic right to an equitable and reasonable sharing of the resources of an international watercourse.” *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 1997 I.C.J. 7 (Sept. 25). See also Salman, *supra* note 31, at 5 (“Article 10 has been used, together with other similar provisions in other international legal instruments, by a number of authors in the field to support the notion of a human right to water.”). Cf. Cahill-Ripley, *supra* note 57, at 389.

to water.⁶² This idea is underpinned with references to some elements or contents of the right to water in human rights treaties, which establish by definition a priority for human beings.

2. INTERNATIONAL POLITICAL DECLARATIONS AND RESOLUTIONS

In comparison with conventional sources, the recognition of the right to water and sanitation has been more open, explicit, and broad in international declarations and resolutions. Levels of recognition of the human right to water and sanitation exist in the final documents or plans of actions agreed upon in international conferences as well as resolutions and declarations issued in the context of the United Nations system. There is also a relevant interaction between the political process of assertion of the right to water and sanitation and the development of a norm of customary law. Consequently, it is important to briefly discuss the legal value of such instruments.

2.1. International Conferences and Plans of Action Concerning the Right to Water

Since the early 1970s, there have been a number of international conferences, often organized by the United Nations, addressing safe drinking water, hygiene, and sanitation as a human right. Why are these international statements, final declarations, and plans of action important in international law? These instruments reflect states' political commitment and practice, which offers further evidence of the process towards an independent human right to water and sanitation through the emergence of a customary rule. Gleick and Fitzmaurice have emphasised that these sources deserve to be examined since "they offer strong evidence of international intent and policy"⁶³ and "pla[y] a more prominent role than binding" international instruments with respect to the right to water.⁶⁴

⁶² Fitzmaurice, *supra* note 30, at 544.

⁶³ Peter H. Gleick, *The Human Right to Water*, 1 WATER POL'Y 487, 493 (1998).

⁶⁴ Fitzmaurice, *supra* note 30, at 545.

The 1972 Stockholm Declaration elaborated a series of common principles to inspire the people of the world in the preservation and enhancement of the human environment. The Stockholm Declaration did not directly recognize the human right to water, but laid out the foundations of environmental rights, particularly the right to a healthy environment in water, air, and soil.⁶⁵ Likewise, the 1976 Vancouver Declaration on Human Settlements set down general principles, among them “social justice and a fair sharing of resources demand the discouragement of excessive consumption.”⁶⁶

In addition, while the Vancouver Declaration did not expressly recognize the right to water, it stipulated that basic needs and peoples’ aspirations must be fulfilled in a way consistent with principles of human dignity.⁶⁷ The 1977 United Nations Water Conference in Mar del Plata recognized for the first time, “[a]ll peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”⁶⁸

According to some commentators, the issue of water fell away in a sort of lethargy during the 1980s.⁶⁹ Nonetheless, the

⁶⁵ See United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14/Rev. 1 (June 26, 1972).

⁶⁶ See United Nations Conference on Human Settlements, Vancouver, Can., May 31–June 11, 1976, *The Vancouver Declaration on Human Settlements*, ¶ 6, U.N. Doc. A/CONF.70/15 (1976).

⁶⁷ See *id.* ¶ 10.

⁶⁸ See United Nations Water Conference, Mar del Plata, Arg., Mar. 14–25, 1977, *Report of the United Nations Water Conference*, U.N. Doc. E/CONF.70/29 (1977); see also Comm’n on Human Rights, Sub-Commission on Prevention of Discrimination & Prot. of Minorities, *The Realization of Economic, Social and Cultural Rights: The Right of Access of Everyone to Drinking Water Supply and Sanitation Services*, ¶ 3, U.N. Doc. U.N. E/CN.4/Sub.2/1998/7 (June 10, 1998) [hereinafter Comm’n on Human Rights, *The Right of Access of Everyone*] (“Since drinking water is a vital resource for humanity, it is also one of the basic human rights. This is why the General Assembly, in its resolution 3513 (XXX) of 15 December 1975, convened the United Nations Water Conference which was held at Mar del Plata (Argentina), from 7 to 18 March 1977.”).

⁶⁹ See Asit K. Biswas, *From Mar del Plata to Kyoto: An Analysis of Global Water Policy Dialogue*, 14 GLOBAL ENVTL. CHANGE 81 (2004). During 1990s,

topic reappears with determination in the international agenda in the 1990s.⁷⁰ One important step, although it was not a UN intergovernmental conference, was the First International Conference on Water and the Environment ("ICWE") in Dublin, Ireland, in January 1992.⁷¹ The Conference adopted the Dublin Statement on Water and Sustainable Development, which pointed out, among the guiding principles, that "it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price."⁷²

the United Nations System decided to convene similar mega-conferences on issues that it still considered to be important: Environment (Rio de Janeiro, 1992), Food Security (Rome, 1996: World Food Summit Plan of Action), Population (Cairo, 1994), Women (Beijing, 1995), and Human Settlements (Istanbul, 1996). In addition, in 1992, the United Nations Conference on Environment and Development in Rio de Janeiro called on the United Nations General Assembly to establish an Intergovernmental Negotiating Committee to prepare a convention on desertification. With the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa ("UNCCD," 1994), the international community recognized that desertification is a major economic, social, and environmental problem of concern to many countries in all regions of the world. This Convention, frequently named as one of the "Rio Conventions" alongside the United Nations Framework Convention on Climate Change ("UNFCCC," 1992), and the Convention on Biological Diversity ("CBD," 1992), was adopted in Paris in 1994, and entered into force in 1996. United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, adopted June 17, 1994, 33 I.L.M. 1328.

⁷⁰ See Third United Nations Conference on the Least Developed Countries, Brussels, Belg., May 14-20, 2001, *Report of the Third United Nations Conference on the Least Developed Countries*, ¶ 38, U.N. Doc. A/CONF.191/11 (Sept. 20, 2001); United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 19, U.N. Doc. A/55/L.2 (Sept. 8, 2000).

⁷¹ Participants in this Conference included government-appointed experts and representatives of NGOs. Tully *supra* note 56, at 46.

⁷² See International Conference on Water and the Environment, Dublin, Ir., Jan. 26-31, 1992, *The Dublin Statement on Water and Sustainable Development*, U.N. Doc. A/CONF.151/PC/112 (1992). See also Fitzmaurice, *supra* note 30, at 545 ("The First important document referring to the right to water was the 1992 Dublin Statement on Water and Sustainable Development ("Dublin Statement"), which resulted from the First International Conference on Water and the Environment."); Comm'n on Human Rights, Sub-Comm'n on the Promotion & Prot. of Human Rights, *Economic, Social and Cultural Rights: 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*, ¶ 25, U.N. Doc. U.N. E/CN.4/Sub.2/2002/10 (June 25,

The provision marked the second time that the right to water and sanitation had ever been recognized in an international conference. However, Biswas considered the results of the Dublin Conference a failure, saying, “[n]ot surprisingly, overall the results of the Dublin Conference were in sharp contrast in comparison with the achievements at Mar del Plata.”⁷³

In 1992, at the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil, states agreed on paragraph 18.47 of Agenda 21, which reiterated the principle affirmed at the Mar del Plata Conference: “all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”⁷⁴

One of the cornerstones of political commitments that link human dignity, development, the environment, and public policies with human rights is the 1994 Programme of Action of Cairo.⁷⁵ The principles of this Programme can also be viewed as evidence of the modern human-oriented international law.⁷⁶ At Cairo, states agreed that all individuals “have the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation.”⁷⁷

2002) (by El Hadji Guissé) [hereinafter Comm’n on Human Rights, *Relationship Between the Enjoyment and the Promotion*] (“The International Conference on Water and the Environment held in Dublin in 1992 declared that it was vital to recognize the basic right of all human beings to have access to clean water and sanitation at an affordable price.”).

⁷³ One of the critical points with Dublin was that the Conference was organized as a meeting of experts. Biswas, *supra* note 69, at 83 (“The distinction between a meeting of experts and an inter-governmental meeting is a critical one in the context of any UN World Conference, since such conferences can only consider recommendations from inter-governmental meetings and *not from an expert group meeting*.”).

⁷⁴ United Nations Water Conference, *supra* note 68.

⁷⁵ See United Nations International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Report of the International Conference on Population and Development*, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994).

⁷⁶ *Id.* at princ. 3 (“The right to development is a universal and inalienable right and an integral part of fundamental human rights, and the human person is the central subject of development.”).

⁷⁷ *Id.* at princ. 2.

Some years later, the 1996 Istanbul Declaration on Human Settlements reiterated the link between human dignity, the environment, development, and public policies. In the Istanbul Declaration, states committed themselves to healthy and sustainable development, especially regarding right to access to adequate safe water and sanitation.⁷⁸

Overall, after the 1972 Stockholm Declaration, the foundations of the environmental right to a healthy environment could be found, particularly the right to potable water. At the 2002 World Summit on Sustainable Development in Johannesburg, governments agreed to enhance corporate environmental and social responsibility and accountability⁷⁹ and recognized the private sector as a relevant actor in environmental and development issues.⁸⁰ The 2002 Johannesburg Declaration is one of the clearest international instruments to express and actively promote corporate responsibility and accountability.⁸¹

Moreover, the 2002 Johannesburg Plan of Implementation, like the 1994 Programme of Action of Cairo, implicitly recognized the human right to water and to adequate sanitation.⁸² The Johannesburg Declaration showed that environment and environmental protection, equitable and sustainable development, and human well-being are not only theoretical interlinked concepts, but are also practical notions that must be implemented in a way that is mutually reinforcing. The Plan of Implementation of the World Summit on Sustainable Development includes a State commitment to “halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water, as outlined in the Millennium Declaration, and the proportion of people who do not have access to

⁷⁸ United Nations Conference on Human Settlements (Habitat II), Istanbul, Turk., June 3-14, 1996, *Report of the United Nations Conference on Human Settlements (Habitat II)*, ¶ 10, U.N. Doc. A/CONF.165/14 (Aug. 7, 1996) (noting states “shall also promote healthy living environments, especially through the provision of adequate quantities of safe water and effective management of waste.”).

⁷⁹ See World Summit on Sustainable Development, *supra* note 59, ¶ 18.

⁸⁰ *Id.* ¶ 14.

⁸¹ *Id.* ¶ 49.

⁸² See *id.* ¶ 8.

basic sanitation.”⁸³

2.2. *International Soft Law*

The right to water and sanitation enjoys an increasing recognition in international soft law, particularly due to the work of the United Nations’ Human Rights Council and General Assembly.

2.2.1. United Nations Declarations

Since the 1980s, the United Nations has been very active in proclaiming international decades and international years related to freshwater and sanitation. This trend shows a growing concern about access to safe drinking water, hygiene, and sanitation.⁸⁴ The 1990 New Delhi Statement is the result of the Global Consultation on Safe Water and Sanitation for the 1990s, which assessed the International Drinking Water Supply and Sanitation Decade and gathered more than one hundred countries.⁸⁵ The New Delhi Statement recognized the uncontrolled pollution of the environment as well as the depletion and degradation of water resources and called for drastic new approaches in order to avoid an unmanageable crisis.⁸⁶

In addition, the Water Supply and Sanitation Collaborative Council (“WSSCC”) was formally created in 1990 through a United Nations General Assembly resolution to complete the

⁸³ See *id.* ¶ 25.

⁸⁴ In November 1980, the United Nations proclaimed the period 1981-1990 as the International Drinking Water Supply and Sanitation Decade. G.A. Res. 35/18, U.N. GAOR, 35th Sess., U.N. Doc. A/RES/35/18 (Nov. 10, 1980); G.A. Res. 45/181, U.N. Doc. A/RES/45/181 (Dec. 21, 1990). In 2003, the General Assembly proclaimed the period from 2005 to 2015 the International Decade for Action, “Water for Life.” G. A. Res. 58/217, ¶ 1, U.N. Doc. A/RES/58/217 (Feb. 9, 2004). The General Assembly declared the year 2003 as the International Year of Freshwater. G.A. Res. 55/196, ¶ 4, U.N. Doc. A/RES/55/196 (Dec. 20, 2000). In December 2006, the General Assembly declared 2008 the International Year of Sanitation. G.A. Res. 61/192, U.N. Doc. A/RES/61/192 (Dec. 20, 2006).

⁸⁵ See Martin G. Beyer, *The Global Consultation on Safe Water and Sanitation for the 1990s*, 15 NAT. RESOURCES F. 118 (1991).

⁸⁶ See *id.*

work left unfinished at the close of the International Drinking Water Supply and Sanitation Decade (1981-1990).⁸⁷ Its mandate was to accelerate progress towards safe water, sanitation, and hygiene for all. As the Water Supply and Sanitation Collaborative Council has explained, “[p]overty cannot be eradicated without ensuring the right of people to water and their own management of it.”⁸⁸

The 1986 Declaration on the Right to Development does not contain an explicit recognition of the right to water. However, this right may be derived from the Declaration, since it provides that States shall ensure “equality of opportunity for all in their access to basic resources.”⁸⁹

In the 2000 United Nations Millennium Declaration, member States of the United Nations resolved to halve, by the year 2015, the proportion of the world’s people whose income is less than one dollar a day and the proportion of people who suffer from hunger and, by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water.⁹⁰ The Millennium Declaration shows that poverty, hunger, and thirst are interconnected issues.⁹¹ Some scholars hold that

⁸⁷ The Water Supply and Sanitation Collaborative Council’s members meet periodically, usually every two to three years, at global fora. Members use these meetings to discuss important sector priorities, coordinate activities, and set the Collaborative Council’s operating agenda and goals. Fora have been held in Oslo, Norway (1991); Rabat, Morocco (1993); Bridgetown, Barbados (1995); Manila, The Philippines (1997); Iguaçu, Brazil (2000), and Dakar, Senegal (2004). *See* G.A. Res. 45/181, U.N. Doc. A/RES/45/181 (Dec. 21, 1990).

⁸⁸ WATER SUPPLY & SANITATION COLLABORATIVE COUNCIL, IGUAÇU ACTION PROGRAMME 5 (2000).

⁸⁹ Declaration on the Right to Development, G.A. Res. 41/128, art. 8(1), U.N. Doc. A/RES/41/128 (Dec. 4, 1986); UNITED NATIONS MILLENNIUM PROJECT, INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS 118 (2005) (“Human rights are both a central practical objective of good governance and a normative standard agreed to by all signatories to the UN Millennium Declaration. The declaration reaffirmed the commitment of all signatory nations to respect and uphold the principles identified in the Universal Declaration of Human Rights and to fully protect social, cultural, economic, and political rights for all, including the right to development.”).

⁹⁰ *See* United Nations Millennium Declaration, *supra* note 70, ¶ 19.

⁹¹ Riedel, *supra* note 57, at 598 (“The Millennium Declaration of Decem-

the 2005 Millennium Project focuses on water accessibility rather than on the human right to water.⁹² However, water accessibility is one of the crucial components of the human right to water and sanitation. Therefore, it can be argued that the Millennium Declaration contains an implicit reference to this human right.

The 2007 United Nations Declaration on the Rights of Indigenous Peoples is another very important international instrument that addresses water from a human rights perspective. Article 25 states that “[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”⁹³

ber 2001 for this reason calls for a “Blue Revolution” which would increase agricultural productivity per unit of water, while improving management of watersheds and flood plains.”); UNITED NATIONS MILLENNIUM PROJECT, *supra* note 89, at 118 (“To ensure the Goals are applied in a manner consistent with human rights, governments need to recognize the relevance of their human rights obligations, encourage community participation, and develop human rights-based accountability mechanisms.”).

⁹² Fitzmaurice, *supra* note 30, at 548.

⁹³ United Nations Declaration on the Rights of Indigenous Peoples art. 15, U.N. G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (Sep. 13, 2007); *see also* G.A. Res. 61/295, art. 32(2), U.N. Doc. A/RES/61/295 (Oct. 7, 2007) (“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”). The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly by a majority of 144 states in favor, 4 votes against (Australia, Canada, New Zealand, and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine). U.N. GAOR, 61st Sess., 107th plen. mtg. U.N. Doc. A/61/PV.107 (Sept. 13, 2007). Since its adoption, Australia, Canada, Colombia, New Zealand, Samoa and the United States have reversed their positions and now endorse the Declaration. *Declaration on the Rights of Indigenous Peoples*, U.N. PERMANENT F. ON INDIGENOUS ISSUES, <http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx> (last visited Apr. 20, 2012).

2.2.2. Human Rights Principles and Guidelines

The 1977 United Nations Standard Minimum Rules for the Treatment of Prisoners guarantees access to drinking water to prisoners.⁹⁴ The 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty also provides for accessible clean drinking water at any time.⁹⁵ The 1991 United Nations Principles of Older Persons⁹⁶ and the 1998 United Nations Guiding Principles on Internal Displacement both establish the human rights obligation to ensure safe access to potable water and sanitation.⁹⁷

⁹⁴ Standard Minimum Rules for the Treatment of Prisoners ¶ 15, *adopted* Aug. 30, 1955, U.N. Doc. A/CONF/611, Annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957) (“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.”); *id.* ¶ 20(2) (“Drinking water shall be available to every prisoner whenever he needs it.”).

⁹⁵ G.A. Res. 45/113, ¶ 34, U.N. Doc. A/RES/45/113 (Dec. 14, 1990) (“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.”); *id.* ¶ 37 (“Every detention facility shall ensure . . . [c]lean drinking water should be available to every juvenile at any time.”).

⁹⁶ G.A. Res. 46/91, Annex ¶ 1, U.N. Doc. A/RES/46/91 (Dec. 16, 1991) (“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.”). Governments were encouraged to incorporate them into their national programs whenever possible.

⁹⁷ Representative of the Secretary-General, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme Methods of Work of the Commission Human Rights, Mass Exoduses and Displaced Persons: Addendum, Guiding Principles on Internal Displacement*, Comm’n on Human Rights, princ. 18, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (by Francis M. Deng) (“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.”). Concern over the vulnerability of IDPs led the UN Commission on Human Rights to ask the Representative on IDPs, Francis Deng, to examine the extent to which existing international law provides adequate coverage for IDPs and to develop an appropriate framework for IDPs. Accordingly, the Representative, with the support of a team of international legal

The International Labour Organization Recommendation No. 115 of 1961 on Workers' Housing⁹⁸ and the FAO Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security both describe the human rights obligations to provide an adequate supply of safe water and sanitation and to ensure access to clean drinking water.⁹⁹

2.2.3. United Nations Resolutions and Expert Reports

In 1997, the former UN Sub-Commission on the Protection and Promotion of Human Rights requested El-Hadji Guissé—Special Rapporteur 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—to investigate a “right of access” to drinking water and sanitation services for everyone.¹⁰⁰

experts, formulated the Guiding Principles on Internal Displacement, which were presented to the Commission in 1998. *Id.*

⁹⁸ Int'l Labour Organization, *R115 Workers' Housing Recommendation, 1961*, ¶ 7 (June 28, 1961) (“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.”); *id.* ¶ 8 (“Where housing accommodation for single workers or workers separated from their families is collective, the competent authority should establish housing standards providing, as a minimum, for: . . . (c) adequate supply of safe water; (d) adequate drainage and sanitary conveniences.”).

⁹⁹ Food & Agric. Org. of the United Nations, Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, ¶ 3.6 (Nov. 2004) (“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 primary education for all, basic health care, capacity building in good practices, clean drinking-water, adequate sanitation.”); *id.* ¶ 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.”).

¹⁰⁰ Tully, *supra* note 56, at 36; Comm'n on Human Rights, *The Right of Access of Everyone*, *supra* note 68. Mr Guissé was ultimately entrusted with promoting the realization of the right to drinking water and sanitation at the

In 1998, Guissé affirmed that “[s]ince drinking water is a vital resource for humanity, it is also one of the basic human rights.”¹⁰¹ In 2002, Guissé defined the right to drinking water as “the right of every individual to have access to the amount of water required to meet his or her basic needs. This right covers access by households to drinking water supplies and waste-water treatment services managed by public or private bodies.”¹⁰² In this sense, Falkenmark made an interesting point in highlighting that much stress is presently being put on the human right to water and what is tacitly being referred to as not water as such, but “the provision of safe household water.”¹⁰³ In his 2004 final report, Guissé pointed out that “[t]he right to drinking water and sanitation is a part of internationally recognized human rights and may be considered as a basic requirement for the implementation of several other human rights.”¹⁰⁴

The United Nations General Assembly affirmed in 1999 that “[t]he rights to food and clean water are fundamental human rights.”¹⁰⁵ Moreover, in 2000, the former Sub-Commission on the Promotion and Protection of Human Rights recognized the right to drinking water and sanitation.¹⁰⁶ The latter chal-

national and international levels taking into account the right to development and defining the content of a right to water in relation to other human rights. See Comm’n on Human Rights, *Relationship Between the Enjoyment and the Promotion*, *supra* note 72.

¹⁰¹ Comm’n on Human Rights, *The Right of Access of Everyone*, *supra* note 68, ¶ 3.

¹⁰² Comm’n on Human Rights, *Relationship Between the Enjoyment and the Promotion*, *supra* note 72, ¶ 19.

¹⁰³ Malin Falkenmark, *Forward to the Future: A Conceptual Framework for Water Dependence*, 28 *AMBIO* 356, 361 (1999).

¹⁰⁴ Special Rapporteur to the Sub-Comm’n on the Promotion & Prot. of Human Rights, *Economic, Social and Cultural Rights: Relationship Between the Enjoyment of Economic, Social and Cultural Right and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation*, Comm’n on Human Rights, ¶ 23, U.N. Doc. E/CN.4/Sub.2/2004/20 (July 14, 2004) (by El Hadji Guissé).

¹⁰⁵ G.A. Res. 54/175, ¶ 12, U.N. Doc. A/RES/54/175 (Dec. 17, 1999).

¹⁰⁶ Sub-Commission on Human Rights Res. 2000/8, *supra* note 54 (reaffirming “the fundamental principles of equality, human dignity and social justice, and the right to drinking water supply and sanitation for every woman, man and child” and stressed its conviction “of the urgent and persistent

lenges Ramakant's assertion that the right to water has never been labeled as such before November 2002.¹⁰⁷

In November 2002, the Committee on Economic, Social and Cultural Rights issued General Comment No. 15, which affirmed and further developed the right to water. The Committee recognized that,

[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. 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.¹⁰⁸

It has been affirmed that "[n]otwithstanding their non-binding character, the General Comments can be helpful tools to support the Member States and the United Nations in implementing the rights enshrined in the International Covenants on human rights."¹⁰⁹

After the issuance of General Comment No. 15, the relevance of the human right to water has progressively increased both at the international and national levels. In 2005, Guissé drafted Guidelines relating to the right to water and sanitation. These Guidelines set out that "[e]veryone has the right to a sufficient quantity of clean water for personal and domestic uses"¹¹⁰ and that "[e]veryone has the right to have access to adequate and safe sanitation that is conducive to the protection

need for increased attention and commitment by all decision-makers to the right of everyone to drinking water supply and sanitation.").

¹⁰⁷ Bobby Ramakant, *Water Is a Fundamental Human Right*, THE DAILY STAR, Sept. 22, 2006.

¹⁰⁸ Econ. & Soc. Council, Comm. on Econ, Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant of Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

¹⁰⁹ U.N. GAOR, 64th Sess., 65th plen. mtg. at 12, U.N. Doc. A/64/PV.65 (Dec. 18, 2010).

¹¹⁰ Special Rapporteur to the Sub-Comm'n on the Promotion & Prot. of Human Rights, *Economic, Social and Cultural Rights: Realization of the Right to Drinking Water and Sanitation*, Comm'n on Human Rights, ¶ 1.1, U.N. Doc. E/CN.4/Sub.2/2005/25 (July 11, 2005) (by El Hadji Guissé).

of public health and the environment.”¹¹¹

In 2007, the United Nations High Commissioner for Human Rights released a report with respect to the human rights obligations arising out of safe drinking water and sanitation. The term “safe drinking water” covered a limited amount of water needed—along with sanitation requirements—to provide for personal and domestic uses, which comprise water for drinking, washing clothes, food preparation and for personal and household hygiene. These personal and domestic uses represent a tiny fraction of the total use of water, usually less than 5 per cent.”¹¹²

It seems that the Office of the High Commissioner for Human Rights and the Human Rights Council spoke about relevant human rights obligations related to equitable access to safe drinking water and sanitation, rather than about a human right to water. This semantic preference may be motivated by the legislative policy at the UN rather than a meaningful choice. Arguably, the UN legislative policy indicates that in the law-making process, UN bodies can help fill the content and obligations of a determined human right, but the ultimate decision about the expressed recognition of such a right concerns the states themselves.

In 2008, the Human Rights Council appointed an Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation.¹¹³ The appointment of an Independent Expert on the human right to water and sanitation clearly contributed to deepening the process started by the Committee on Economic, Social and Cultural Rights through its General Comment No. 15.¹¹⁴ In 2009, the Independent Expert, Catarina de Albuquerque, established a working definition of the human right to sanitation, which derives from existing international human rights law obligations.

¹¹¹ *Id.* ¶ 1.2.

¹¹² Human Rights Council, *supra* note 6, ¶ 4.

¹¹³ *Id.* ¶ 2.

¹¹⁴ Alejandro Jiménez & Agusti Pérez-Foguet, *Building the Role of Local Government Authorities Towards the Achievement of the Human Right to Water in Rural Tanzania*, 34 NAT. RESOURCES F. 93, 94 (2010).

According to Albuquerque,

sanitation can be defined as a system for the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene. States must ensure without discrimination that everyone has physical and economic access to sanitation, in all spheres of life, which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity.¹¹⁵

In June 2010, the Independent Expert submitted her report on access to safe drinking water and sanitation in relation to non-state actors.¹¹⁶ Likewise, the Independent Expert submitted a compendium on best practices related to access to safe drinking water and sanitation.¹¹⁷

Finally, in the 2010 Resolution 64/292, the UN General Assembly expressly recognized, without any member states opposition, “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”¹¹⁸ One hundred twenty-two

¹¹⁵ Independent Expert on the on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, Human Rights Council, ¶ 63, U.N. Doc. A/HRC/12/24, (July 1, 2009) (by Catarina de Albuquerque).

¹¹⁶ *Promotion and Protection of all Human Rights*, *supra* note 39.

¹¹⁷ Independent Expert on the on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Addendum, Progress Report on the Compilation of Good Practices*, Human Rights Council, UN. Doc. A/HRC/15/31/Add.1 (July 1, 2010) (by Catarina de Albuquerque).

¹¹⁸ See *The Human Right to Water and Sanitation*, *supra* note 3, ¶ 1; *UN macht Trinkwasser zum Menschenrecht* [UN Makes Drinking Water a Human Right], DEUTSCHE WELLE WORLD [GERMAN WORLD WAVE], July 28, 2010; *L'ONU reconnaît l'accès à l'eau potable comme un droit* [The UN Recognizes Access to Safe Drinking Water as a Right], 24 HEURES [24 HOURS], July 28, 2010; *UN declares clean water a 'fundamental human right'*, BBC NEWS (July 28, 2010), <http://www.bbc.co.uk/news/world-us-canada-10797988>. The text in French, “déclare que le droit à une eau potable propre et de qualité et à des installations sanitaires est un droit de l'homme, indispensable à la pleine jouissance du droit à la vie.” *L'eau, un droit humain* [Water, a Human Right], RADIO-CANADA (June 28, 2010), <http://www.radio-canada.ca/nouvelles/International/2010/07/28/012-ONU-droit-eau.shtml>. See also *ONU incluye el acceso al agua potable en los derechos humanos* [The UN Includes Access to Drinking Water in Human Rights], EL MOSTRADOR [THE COUNTER], July 28, 2010;

states voted in favor of this landmark Resolution,¹¹⁹ none against, and forty-one abstained.¹²⁰ China, Russia, Germany, France, Spain, and Brazil were among those supporting the Resolution. Canada, the United States, the United Kingdom, Australia, and Botswana were among the countries that abstained from voting.

Various states gave explanations of their vote, illustrating a number of interesting common features. All states invariably recognized the current importance of access to water and sanitation. All states also supported the Geneva process and the work of the Independent Expert on human rights obligations related to access to safe drinking water and sanitation in the Human Rights Council in Geneva. The large majority of states also regretted that the Resolution could not be adopted by con-

ONU: accesso all'acqua diritto umano fondamentale [UN: Access to Water a Fundamental Right], LIBEROREPORTER [FREEREPORTER], July 29, 2010.

¹¹⁹ The following countries were in favor: Afghanistan, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Brazil, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Cuba, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Finland, France, Gabon, Georgia, Germany, Ghana, Grenada, Guatemala, Haiti, Honduras, Hungary, India, Indonesia, Iran, Iraq, Italy, Jamaica, Jordan, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Lebanon, Liberia, Libya, Liechtenstein, Madagascar, Malaysia, Maldives, Mali, Mauritius, Mexico, Monaco, Mongolia, Montenegro, Morocco, Myanmar, Nepal, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Philippines, Peru, Portugal, Qatar, Russian Federation, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Singapore, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Switzerland, Syria, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tunisia, Tuvalu, United Arab Emirates, Uruguay, Vanuatu, Venezuela, Viet Nam, Yemen, Zimbabwe. U.N. GAOR, 64th Sess., 108th plen. mtg. at 9, U.N. Doc. A/64/PV.108 (July 28, 2010).

¹²⁰ The following countries abstained: Armenia, Australia, Austria, Bosnia and Herzegovina, Botswana, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Ethiopia, Greece, Guyana, Iceland, Ireland, Israel, Japan, Kazakhstan, Kenya, Latvia, Lesotho, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Poland, Republic of Korea, Republic of Moldova, Romania, Slovakia, Sweden, Trinidad and Tobago, Turkey, Ukraine, United Kingdom, United Republic of Tanzania, United States, Zambia. *Id.* at 9.

sensus and had to be submitted to vote.¹²¹

A main argument preventing states from voting on the Resolution was the belief that it could interfere somehow with the UN process in Geneva concerning the right to water and sanitation. The US delegate pointed out that the Resolution “falls far short of enjoying the unanimous support of member states and may even undermine the work underway in Geneva.”¹²² The positive aspect of this argument lies in the fact that the US representative acknowledged the work in Geneva and its impetus to strengthen the recognition of the human right to water as reflected by General Comment No. 15 and the work of the Independent Expert.¹²³

Furthermore, as previously sustained and also stated by the aforementioned Independent Expert, the Resolution could not but uphold the Geneva UN process regarding the right to water and sanitation.¹²⁴ The Resolution constituted a confirmation of the current development concerning the human right to water and sanitation, and stimulated its legal consolidation. In this line, France welcomed “the progress made through the

¹²¹ *Id.* at 10.

¹²² *Id.* at 8.

¹²³ The Human Rights Council, by its Resolution 7/22, decided in March 2008, to appoint an Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation. Human Rights Council Res. 7/22, *supra* note 6, ¶ 2. At its September 2008 Session, the Human Rights Council appointed Ms. Catarina de Albuquerque as this Independent Expert for a period of three years. Office of the High Comm’r for Human Rights, *Sanitation Consultation*, UNITED NATIONS HUM. RTS, <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SanitationConsultation.aspx> (last visited Feb. 19, 2012).

¹²⁴ U.N. GAOR, 64th Sess., 108th plen. mtg. at 6, U.N. Doc. A/64/PV.108 (July 28, 2010) (“Some Member States have also voiced concern about the possible effect of the draft resolution on the Geneva process. We do not share this assessment, but see the draft resolution rather as a complement to the ongoing important process on water and sanitation in Geneva.”); *id.* at 14 (“We believe that this document raises important problems, in particular in light of the summit on the Millennium Development Goals to be held in September. We view it as a complement to the discussions under way in Geneva.”) (Russian Statement); *id.* at 19 (“The resolution does not contradict or prejudice in any way, but rather complements and strengthens the discussion on the issue of water and sanitation that is currently under way in the Human Rights Council.”) (Cuban Statement).

adoption of this text, with its recognition that the right to access to drinking water and sanitation is a universal right.”¹²⁵ Additionally, France hoped “that the work under way in the Human Rights Council in Geneva will continue so that this right can be fully implemented.”¹²⁶

Within the American continent, those that voted in favor of the Resolution included all Central American and South American States as well as most of the Caribbean States.¹²⁷ Abstentions came from Canada, Guyana, Trinidad and Tobago, and the United States. The United States, Canada, and the United Kingdom were some of the few countries that explicitly manifested against the existence of a right to water and sanitation in international law.¹²⁸ Nevertheless, and rather curiously, none of these states voted against the Resolution, instead preferring to abstain.

Clearly, the state members were aware of the legal challenge at stake. This sensitiveness is explicitly reflected in Australia’s position during the debate:

Australia has reservations about the process of declaring new human rights through a General Assembly [R]esolution. In particular, we are concerned that the precise status and nature of such rights will be uncertain, and uncertainty makes consensus difficult. Of course, when we recognize new human rights, con-

¹²⁵ *Id.* at 14.

¹²⁶ *Id.*

¹²⁷ *See id.* (noting countries voting in favor: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Uruguay, Venezuela (Bolivarian Republic of)).

¹²⁸ *Id.* at 8 (“This draft resolution describes a right to water and sanitation in a way that is not reflective of existing international law, as there is no right to water and sanitation in an international legal sense as described by the draft resolution.”) (United States Statement); *id.* at 17 (“The Government of Canada is of the view that a general right to safe and clean drinking water and sanitation is not explicitly codified under international human rights law, and there is currently no international consensus among States regarding the basis, scope and content of a possible right to water.”) (Canadian Statement).

sensus is very important.¹²⁹

Such an argument may explain that most states in favor of the Resolution tried to anchor their vote in existing international legal instruments, particularly the International Covenant on Economic, Social and Cultural Rights.

Several states, such as Chile, Peru, and Mexico, voted in favor of the Resolution with the understanding that the recognition of the right to water and sanitation was subject to the extent and content of domestic legislation.¹³⁰ Quite interestingly, some states abstained because the Resolution “pu[t] insufficient emphasis on the responsibility of Governments towards their own citizens to move progressively and as quickly as possible towards the full realization of the right to water and sanitation for everyone, with special attention to individuals and groups who have traditionally faced difficulties.”¹³¹

Most of the countries in favor of the Resolution, including Germany, Spain, Hungary, Norway, Switzerland, Brazil, and Mexico, explicitly mentioned that the legal fundament of the right to water and sanitation was the right to an adequate standard of living enshrined in Article 11 of International Covenant on Economic, Social and Cultural Rights.¹³² Other states, like Spain, firmly rooted their vote in a clear recognition

¹²⁹ *Id.* at 11.

¹³⁰ *Id.* (showing Chile asserted the vote in favor of the resolution with the following statement: “we interpret the recognition of the right to drinking water and sanitation strictly in the context of efforts to promote access to those vital resources, again subject to the domestic legislation of every State.”); *id.* at 15 (“Peru voted in favour of the resolution in the understanding that the guaranteed enjoyment of this right is subject to existing domestic legislation, spatial planning and the allocation of resources allowing for the exercise of this right.”); *id.* at 16 (“In Mexico, article 27 of our Constitution establishes the modalities for ownership of the land and water within the boundaries of our national territory. Mexico will continue to make every effort necessary to adopt progressive measures and, within the limits of our resources, to provide water and sanitation to that part of our population that does not have such services, as established in our national legislation in compliance with our applicable international obligations and in line with the Millennium Development Goals.”).

¹³¹ *Id.* at 15–16.

¹³² *Id.* at 8 (“Brazil recognizes the human right to water and sanitation as a right that is intrinsically connected to the realization of the rights to life, to physical integrity, to health, to food and to adequate housing.”).

of the content of the right to water and sanitation and the obligations that arises from them as stated in General Comment No. 15.¹³³ Hungary, for instance, believed that the Draft Resolution prejudged the outcome of the Geneva process,¹³⁴ yet voted in favor of the Resolution because it

attache[d] great importance to access to safe drinking water and sanitation, which is closely connected to the realization of such fundamental rights as the right to life and human dignity. We

¹³³ *Id.* at 7 (“For Spain, as for Germany, water and sanitation are two components of the right to an adequate standard of living, recognized in article 11 of the International Covenant on Economic, Social and Cultural Rights. In this respect, my delegation firmly supports the content of General Comment No. 15 of the Committee for Economic, Social and Cultural Rights and the report on this matter presented by the independent expert, Ms. De Albuquerque, to the Human Rights Council in September 2009 concerning the human rights obligations related to access to sanitation.”). *See also id.* at 10 (showing the vote of Norway was crystal-clear concerning its position with respect to international law. It did mention that “the International Covenant on Economic, Social and Cultural Rights explains that measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation, are part of the core obligations under the right to water. Norway regards the right to water and sanitation as being among the fundamental rights already recognized in existing human rights norms, such as the right to the possible highest standard of physical and mental health, the right to an adequate standard of living and the right to life.”); *id.* at 16 (“Switzerland supports the process aimed at promoting the right to water and access to sanitation for all, which we believe arises from the international instruments guaranteeing human rights.”); *id.* at 16 (“Mexico recognizes that access to safe drinking water and sanitation are part and parcel of the human right to an adequate standard of living and of the right to the enjoyment of the highest attainable standard of physical and mental health, as established, respectively, in article 25 of the Universal Declaration of Human Rights and articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. That is how we interpret the content of paragraph 1 of the resolution just adopted by the Assembly.”).

¹³⁴ *Id.* at 7 (“[W]e deem it unfortunate for the General Assembly to declare a human right to water and sanitation, since in our view the draft resolution before us prejudges the outcome of the Geneva process. We are convinced that the overall aims of the Geneva process would be better served if this draft resolution were adopted by consensus. We would also have appreciated it had proposals by interested delegations, including those of the European Union, been more positively considered. We regret that the text as it stands provokes division among Member States, in spite of the fact that we are all aware of the importance of access to safe drinking water and sanitation. We firmly believe that this text could have been further improved and that it could have been the object of consensus.”).

consider access to safe drinking water and sanitation to be a component of the right to an adequate standard of living.¹³⁵

Moreover, states in favor of the Resolution, such as Costa Rica, Colombia, the Netherlands, and Belgium, declared that the right to access to water and sanitation was already recognized in their internal and constitutional legal system.¹³⁶ In that sense, it is interesting to pay attention to the Costa Rica statement: “we understand that . . . the resolution represents recognition by the General Assembly of the legal developments concerning this fundamental right in various international and national forums.”¹³⁷

Some states, such as Argentina, Guatemala, and Egypt, also raised the issue of water and sanitation obligations vis-à-vis other states or inter-state obligations.¹³⁸ These states voted in

¹³⁵ *Id.* at 7.

¹³⁶ *Id.* at 11 (“As constitutional jurisprudence consistently indicates, [t]he Court recognizes, as a part of the Constitutional Law, a fundamental right to drinking water, derived from the fundamental rights to health, life, the environment, food and adequate housing, among others, as has been recognized as well in international instruments on human rights which are applicable to Costa Rica.”); *id.* at 13 (“Colombia’s political constitution does not explicitly refer to the right to drinking water and sanitation. But the jurisprudence applied by our constitutional court in particular cases indicates that the right to water is a fundamental right only as it the water is for human consumption in connection with the enjoyment of the right to life in conditions of dignity and the right to health. That court has indicated too that the right to water is not protected when the water is intended for other activities on which human life, health or welfare do not depend. In its decisions, the court specified instances in which protection must be required of public authorities and individuals as regards proper, efficient and timely delivery of public sanitation services.”); *id.* at 15 (“The Netherlands recognized access to clean, affordable drinking water and adequate sanitation as a human right in 2008.”); *id.* (“Belgium voted in favour of resolution 64/292 because we recognize the fundamental principle of the right of access to water, which is enshrined in our national and regional legislation.”).

¹³⁷ *Id.* at 12.

¹³⁸ *Id.* at 9 (“Argentina maintains that the right to water and sanitation is a human right that every State must ensure for the individuals within its jurisdiction and not with respect to other States.”); *id.* at 10 (“Guatemala understands that the adoption of resolution 64/292 will create no international or inter-State right or obligation.”); *id.* (“We acknowledge the need, highlighted by many delegations during the course of the negotiations, to set aside controversial questions of international watercourse law and trans-boundary water.”).

favor of the adoption of the Resolution, but with the understanding that the obligations arising from the right to water and sanitation were related to individuals under states' jurisdiction and with no regard to other states. Though Guatemala, Costa Rica, and Colombia were also deeply rooted their support in the access to water and sanitation in the principles of environmental equity and solidarity.¹³⁹

With regards to legal sources, the General Assembly Resolution 64/292 considers three sets of normative levels: first, UN resolutions and final documents of international conferences; second, universal and regional conventional human rights instruments; and third, resolutions of the Human Rights Council, General Comment No. 15 of the Committee on Economic, Social and Cultural Rights, and documents of UN human rights bodies and experts.

Undoubtedly, General Assembly Resolution 64/292 constitutes a potent political and social message. It also is one additional element that contributes to the configuration of the *opinio iuris* with regard to the right to water. State practice concerning the right to water and sanitation is steadily growing, though it is not uniform.¹⁴⁰ Following the above assertion made by the General Assembly, we can draw several legal conclusions. First, this resolution shows a very holistic and all-

¹³⁹ *Id.* at 12 ("For our country, every State has the primary responsibility to guarantee its inhabitants access to water pursuant to the principle of social and intergenerational equity and solidarity."); *id.* at 10 ("[O]ur recognition of the right to drinking water and sanitation is in accordance with our existing national legislation guaranteeing the effective management and governance of waters as goods and services in the aim of contributing to the maintenance of essential ecological processes, access to a safe and secure environment, economic growth, compliance with the Millennium Development Goals, and improved quality of life for the present and future generations of the people living on our national territory.").

¹⁴⁰ Fitzmaurice, *supra* note 30, at 554 ("It will be a simplification to assume that such a right has already emerged as there is no uniform practice of States, parties and non-parties to the ESC Covenant, which would corroborate such a view."); Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water As A Human Right and the Duties and Obligations It Creates*, 4 NW. U. J. INT'L HUM. RTS. 331, 354 (2005) ("Although water is not yet an individual right under customary international law, the amount of attention it has received indicates that it is moving in that direction.").

encompassing perspective that integrates the whole legal background on the right to access to water and sanitation. Second, this approach includes a wider concept of sources of international law than that embraced in Article 38 of the Statute of the International Court of Justice.¹⁴¹ Third, there is a remarkable endorsement of the General Comment No. 15, which develops the scope and content of the right to water and sanitation. Indeed, *inter alia*, Resolution 64/292 recalls the international obligation and cooperation stated in General Comment No. 15.¹⁴² Fourth, this demonstrates that the recognition of a fundamental human right to water is not spontaneous. It is quite the opposite in that it corresponds to a long development in international human rights law that has increased states' awareness of the necessity of recognizing access to water and sanitation as a positive human right. The Resolution clearly reflects a process of maturity, as it is clear that the right to water has been evolving for almost two decades.

2.3. *Evolution from International Policy to International Law*

In recent years, there has been an increasing number of international and regional commitments and initiatives aimed at promoting human rights obligations related to access to safe drinking water and sanitation. This trend strengthens the legal nature of the right to water and sanitation.¹⁴³ It could be interesting to examine political declarations related to the right to water in order to observe the influence of these political processes in the emergence and development of the human right to

¹⁴¹ Statute of the International Court of Justice art. 38, June 26, 1945, 33 U.N.T.S. 993.

¹⁴² The Human Right to Water and Sanitation, *supra* note 3, ¶ 3 ("Calls upon States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.").

¹⁴³ See Human Rights Council Res. 15/9, Human Rights and Access to Safe Drinking Water and Sanitation, 15th Sess., Sept. 13–Oct. 1, 2010, U.N. GAOR, 65th Sess., Supp. No. 53A, A/65/53/Add. 1, at 28 (Sept. 30, 2010).

water and sanitation.

Since 1997, there has been a series of World Water Forums, the largest international event on freshwater. The First,¹⁴⁴ Second,¹⁴⁵ and Third¹⁴⁶ World Water Forum failed to clearly recognize the right to access safe drinking water and sanitation as a human right, perhaps because of the multiplicity of actors—both public and private—involved. Yet, all these Fora recognized that sufficient water and sanitation are basic human needs and are essential to human health and well-being.

According to Fitzmaurice, the 2000 Ministerial Declaration of the Second Water Conference “stopped short of the acknowledgment of a human right to water, as it refers to the right of access to water.”¹⁴⁷ At the Second World Water Forum in 2000, in the Netherlands, Statement Vision 21 was adopted by major water and sanitation agencies, which acknowledged hygiene, water, and sanitation as a human right.¹⁴⁸ Yet, authors agree that the 2003 Third Water Forum in Kyoto was a disappointment.¹⁴⁹ Furthermore, the overall message of the 2000 Global Forum in Iguaçu was a “message of hope for reducing poverty and achieving sustainable human development, through people-centered approaches based on a basic human

¹⁴⁴ The Marrakech Declaration, *adopted* March 22, 1997.

¹⁴⁵ Ministerial Declaration of The Hague on Water Security in the 21st Century, *adopted* March 22, 2000.

¹⁴⁶ Ministerial Declaration: Message from the Lake Biwa and Yodo River Basin, *adopted* March 23, 2003. Third World Water Forum was held in Kyoto, Japan on 22-23 March 2003. The Fourth World Water Forum was held in Mexico City, Mexico from 16 to 22 March 2006 and its main theme was: “Local actions for a global challenge.” The Fifth World Water Forum was held in Istanbul from 16-22 March 2009 and its main theme was: “Bridging Divides for Water.” The Sixth World Water Forum will be held in Marseille, France, in March 2012 and it will work around the idea of “*Solutions for Water*” and seek to identify, promote, and develop concrete solutions for water. *World Water Forum*, WORLD WATER COUNCIL, <http://www.worldwatercouncil.org/index.php?id=6> (last visited Apr. 20, 2012)

¹⁴⁷ Fitzmaurice, *supra* note 30, at 546.

¹⁴⁸ WATER SUPPLY & SANITATION COLLABORATIVE COUNCIL, VISION 21: THE PEOPLE’S ROUTE TO WATER, SANITATION AND HYGIENE FOR ALL (2000); *see also* WEHAB WORKING GROUP, A FRAMEWORK FOR ACTION ON WATER AND SANITATION (2002).

¹⁴⁹ Fitzmaurice, *supra* note 30, at 547.

right of all people to affordable basic hygiene, sanitation and water services.”¹⁵⁰

One year later, in 2001, at the International Conference on Freshwater held in Bonn, participant States issued the Bonn Recommendations for Action (so-called Bonn Keys) and the Ministerial Declaration that only recognized water as a public good.¹⁵¹ The 2004 Dakar Statement amassed at the end of the First Global WASH Forum, which confirmed the unswerving commitment of the participants “to water, sanitation and hygiene as human rights and as vital components of sustainable human development.”¹⁵² One of the major steps reached in the development of a comprehensive discipline related to the field of water took place at the 2008 International Water Resources Association World Water Congress.¹⁵³

The participating states at the 14th Summit Conference of Heads of State or Government of the Non-Aligned Movement expressly acknowledged in 2006 the relevance of the right to

¹⁵⁰ WATER SUPPLY & SANITATION COLLABORATIVE COUNCIL, IGUAÇU ACTION PROGRAMME (2001). The Iguaçu Action Programme (IAP) represents the collective wisdom of water and sanitation experts from over 70 countries. *Id.*

¹⁵¹ Brian Appleton et al., *Innovative Strategies for Water and Sanitation for the Poor: Access and Affordability*, (Int’l Conference on Freshwater, Thematic Background Paper, 2001); see also Dushanbe Water Appeal, adopted Sept. 1, 2003.

¹⁵² See GLOBAL WASH FORUM, WATER, SANITATION AND HYGIENE FOR ALL – SOLUTIONS AND ACTIONS; LOCAL AND NATIONAL 14 (2004). The first-ever “Global WASH Forum” entitled Water, Sanitation and Hygiene for All – Solutions and Actions; Local and National, took place in Dakar, Senegal, from 29 November to 3 December 2004. *Id.* Moreover, there is the Water, Energy, Health, Agriculture and Biodiversity (hereinafter WEHAB) initiative. It was proposed by UN Secretary- General Kofi Annan as a contribution to the preparations for the World Summit on Sustainable Development (hereinafter WSSD). See WEHAB WORKING GROUP, *supra* note 148; see also Ten-Year Review of Progress Achieved in the Implementation of the Outcome of the United Nations Conference on Environment and Development, G.A. Res. 55/199, U.N. Doc. A/RES/55/199 (Feb. 5, 2001).

¹⁵³ See INT’L WATER RESOURCES ASSOCIATION ET AL., FINAL REPORT OF THE XIIITH IWRA WORLD WATER CONGRESS (2008) (“Water as a basic human right and the importance of open and equitable information and public awareness have become hot topics. This tendency is equally clear whether discussing the implementation of European water policies or in improving the water supply of Vientiane or forging basin management policies for the Aral Sea or the Mekong River.”).

water according to international law, and also boosted the work of the Committee on Economic, Social and Cultural Rights.¹⁵⁴ The 118 participant States agreed on a Final Document, which pointed out that

[t]he Heads of State or Government recalled what was agreed by the UN Committee on Economic, Social and Cultural Rights in November 2002, recognized the importance of water as a vital and finite natural resource, which has an economic, social and environmental function, and acknowledged the right to water for all.¹⁵⁵

The participant states made an even stronger acknowledgment of the right to water for all at the 15th Summit of Heads of State and Government of the Non-Aligned Movement

¹⁵⁴ 14th Summit Conference of Heads of State or Government of the Non-Aligned Movement, Sept. 16, 2006, NAM 2006/doc.1/rev.3. The list of member countries of the Non-Aligned Movement: 1. Afghanistan; 2. Algeria; 3. Angola; 4. Antigua and Barbuda; 5. Bahamas; 6. Bahrain; 7. Bangladesh; 8. Barbados; 9. Belarus; 10. Belize; 11. Benin; 12. Bhutan; 13. Bolivia; 14. Botswana; 15. Brunei Darussalam; 16. Burkina Faso; 17. Burundi; 18. Cambodia; 19. Cameroon; 20. Cape Verde; 21. Central African Republic; 22. Chad; 23. Chile; 24. Colombia; 25. Comoros; 26. Congo; 27. Côte d'Ivoire; 28. Cuba; 29. Democratic People's Republic of Korea; 30. Democratic Republic of the Congo; 31. Djibouti; 32. Dominica, Commonwealth of; 33. Dominican Republic; 34. Ecuador; 35. Egypt; 36. Equatorial Guinea; 37. Eritrea; 38. Ethiopia; 39. Gabon; 40. Gambia; 41. Ghana; 42. Grenada; 43. Guatemala; 44. Guinea; 45. Guinea Bissau; 46. Guyana; 47. Haiti; 48. Honduras; 49. India; 50. Indonesia; 51. Iran; 52. Iraq; 53. Jamaica; 54. Jordan; 55. Kenya; 56. Kuwait; 57. Lao Peoples' Democratic Republic; 58. Lebanon; 59. Lesotho; 60. Liberia; 61. Libyan Arab Jamahiriya; 62. Madagascar; 63. Malawi; 64. Malaysia; 65. Maldives; 66. Mali; 67. Mauritania; 68. Mauritius; 69. Mongolia; 70. Morocco; 71. Mozambique; 72. Myanmar; 73. Namibia; 74. Nepal; 75. Nicaragua; 76. Niger; 77. Nigeria; 78. Oman; 79. Pakistan; 80. Palestine; 81. Panama; 82. Papua New Guinea; 83. Peru; 84. Philippines; 85. Qatar; 86. Rwanda; 87. Saint Kitts and Nevis; 88. Saint Lucia; 89. Saint Vincent and the Grenadines; 90. Sao Tome and Principe; 91. Saudi Arabia; 92. Senegal; 93. Seychelles; 94. Sierra Leone; 95. Singapore; 96. Somalia; 97. South Africa; 98. Sri Lanka; 99. Sudan; 100. Suriname; 101. Swaziland; 102. Syrian Arab Republic; 103. Thailand; 104. Timor Leste; 105. Togo; 106. Trinidad and Tobago; 107. Tunisia; 108. Turkmenistan; 109. Uganda; 110. United Arab Emirates; 111. United Republic of Tanzania; 112. Uzbekistan; 113. Vanuatu; 114. Venezuela; 115. Vietnam; 116. Yemen; 117. Zambia; 118. Zimbabwe. *Background – The Non-Aligned Movement: Member States*, NAM, <http://www.nam.gov.za/background/members.htm> (last visited Apr. 20, 2012).

¹⁵⁵ See 14th Summit Conference of Heads of State or Government of the Non-Aligned Movement, Sept. 16, 2006, ¶ 226, NAM 2006/doc.1/rev.3.

in Sharm el-Sheikh in 2009. Indeed, the Final Document stated,

[t]he Heads of State and Government recalled what was agreed by the 13th Session of the UN Commission on Sustainable Development in 2005 and the UN Committee on Economic, Social and Cultural Rights in November 2002, that recognised the importance of water as a vital and finite natural resource, which has an economic, social and environmental function, and acknowledged the right to water for all.¹⁵⁶

In the 2006 Abuja Declaration, adopted at the First Africa-South America Summit, the Heads of State/Governments also focused on access to clean and safe water and sanitation.¹⁵⁷ At the First Asia Pacific Water Summit, thirty-six leaders from the Asia-Pacific recognized, through the 2007 Beppu Declaration, “the people’s right to safe drinking water and basic sanitation as a basic human right and a fundamental aspect of human security.”¹⁵⁸ The member states of the Third South Asian Conference on Sanitation, comprised of India, Afghanistan, Bangladesh, Bhutan, Maldives, Nepal, Pakistan and Sri Lanka, recognized through the 2008 Delhi Declaration that “access to sanitation and safe drinking water is a basic right, and according national priority to sanitation is imperative.”¹⁵⁹

¹⁵⁶ See XV Nam Summit, Sharm el Sheikh, Egypt, July 11-16, 2009, *XV Summit of Heads of State and Government of the Non-Aligned Movement*, ¶ 393, NAM 2009/FD/Doc.1 (2009).

¹⁵⁷ See First Africa-South America Summit, Abuja, Nigeria, Nov. 26-30, 2006, *Abuja Declaration*, ASA/Summit/doc.01(I) (2006); see also WORLD WATER COUNCIL, *WATER AT A CROSSROADS: DIALOGUE & DEBATE AT THE 5TH WORLD WATER FORUM 56* (2009) (“We shall promote the right of our citizens to have access to clean and safe water and sanitation within our respective jurisdictions.”).

¹⁵⁸ UNITED NATIONS EDUC., SCIENTIFIC & CULTURAL ORG., *OUTCOME OF THE INTERNATIONAL EXPERTS’ MEETING ON THE RIGHT TO WATER 3* (2009). This Message from Beppu was unanimously endorsed by the participants of the 1st Asia-Pacific Water Summit, which was held in Beppu, Japan, on 3–4th December 2007, attended by ten Heads of State and Government, 31 Ministers, and representatives from over 36 Asia-Pacific countries and regions. See First Asia Pacific Water Summit, Beppu City, Japan, Dec. 3–4, 2007, *The Proceedings of the First Asia-Pacific Water Summit* (June 2008).

¹⁵⁹ See The Third South Asian Conference on Sanitation, New Delhi, India, Nov. 16–21, 2008, *The Delhi Declaration* (2008).

The Heads of State and Governments of the Americas have several times expressed and strengthened their commitments to equitable and efficient access to drinking water and sanitation services in the context of their wider efforts to reduce poverty and marginalization in society.¹⁶⁰ They have formalized their commitments in the First,¹⁶¹ Second,¹⁶² Third,¹⁶³ and Fifth¹⁶⁴ Summit of the Americas' Plans of Actions. Moreover, in 1995, the Ministers responsible for Health, Environment, and Development in the countries of the Americas adopted the Pan American Charter on Health and Environment in Sustainable Human Development and agreed on "providing adequate and safe water supplies and effective domestic and municipal sanitation systems."¹⁶⁵

Within the Council of Europe, on May 26, 1967, the European Charter of Water Resources was adopted, which was considered a major pioneering step.¹⁶⁶ Years later, the New European Charter of Water Resources, revised on October 17, 2001,¹⁶⁷ expressly recognized the human right to water, as it stated,

[e]veryone has the right to a sufficient quantity of water for his or her basic needs. International human rights instruments recognize the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory

¹⁶⁰ See Summit of the Americans on Sustainable Development, Santa Cruz de la Sierra, Bol., Dec. 7, 1996, *Declaration of Santa Cruz de la Sierra* (1996).

¹⁶¹ See First Summit of the Americas, Miami, U.S., Dec. 9–11, 1994, *Summit of the Americas Plan of Action* (1994).

¹⁶² Cf. Second Summit of the Americas, Santiago de Chile, Chile, Apr. 18–19, 1998, *Plan of Action of the Second Summit of the Americas* (1998).

¹⁶³ See Third Summit of the Americas, Quebec City, Can., Apr. 20–22, 2001, *Quebec City Plan of Action* (2001).

¹⁶⁴ See Fifth Summit of the Americas, Port of Spain, Trin. & Tobago, Apr. 19, 2009, *Declaration of Commitment of Port of Spain* (2009).

¹⁶⁵ See Pan American Charter on Health and Environment in Sustainable Human Development ¶ 3, *adopted* Oct. 3, 1995.

¹⁶⁶ PAQUEROT & LASSERRE, *supra* note 56, at 184.

¹⁶⁷ The Council of Europe had adopted a first instrument related to water in 1967. See *generally* The European Water Charter, *adopted* May 26, 1967.

quality from the point of view of health and hygiene. Social measures should be put in place to prevent the supply of water to destitute persons from being cut off.¹⁶⁸

In October 2009, the Parliamentary Assembly of the Council of Europe stressed that “access to water must be recognized as a fundamental human right because it is essential to life on earth and is a resource that must be shared by humankind.”¹⁶⁹

In the European context, it is worth mentioning the 2000 European Council on Environmental Law Resolution (“ECEL”) on the right to water, which established that “[e]ach person has the right to water in sufficient quantity and quality for his life and health.”¹⁷⁰ In his report on this Resolution, Henri Smets stated that this instrument “specifies the content of the right to water, states that the right to water cannot be dissociated from other human rights that have already been recognized and invites Governments to take action to guarantee the right to water for all.”¹⁷¹ Further, the European Parliament and the Council of the European Union established a framework for the Community action in the field of water policy through Directive 2000/60/EC of October 23, 2000, also called the Water Framework Directive.¹⁷² In this Directive, although the European institutions did not explicitly recognize clean and drinkable water as a human right, they clearly refused the idea of water as a commercial product.¹⁷³

¹⁶⁸ Council Recommendation Rec(2001)14 of the Committee of Ministers to Member States on the European Charter on Water Resources ¶ 5, *adopted* Oct. 17, 2001.

¹⁶⁹ *See Water: A Strategic Challenge for the Mediterranean Basin*, Doc. 12004 (Sept. 14, 2009).

¹⁷⁰ European Council on Env'tl. Law Res., Apr. 28, 2000, *reprinted in* 30 ENVTL. POL'Y & L. 265, 265 (2000).

¹⁷¹ Henri Smets, *The Right to Water as a Human Right*, 30 ENVTL. POL'Y & L. 5, 248 (2000).

¹⁷² *See* Council Directive 2000/60, 2000 O.J. (L 327) (EC).

¹⁷³ *Id.* (“Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such.”). *See generally* W. Brack et al., *Toward a Holistic and Risk-Based Management of European River Basins*, 5 INTEGRATED ENVTL. ASSESSMENT & MGMT. 5, 5-10 (2009); Maria Fuerhacker, *EU Water Framework Directive and Stockholm Convention: Can We Reach the Targets for Priority Substances and Persistent Organic Pollutants?*, 16 ENVTL. SCI. & POLLUTION RES. 92, 92-97 (2009); Maria

The European Commission has also asserted that “[w]ater is indispensable for human survival and development.”¹⁷⁴ Moreover, in March 2009, the European Parliament declared that “water is a shared resource of mankind and that access to drinking water should constitute a fundamental and universal right” and “is considered as a public good and should be under public control, irrespective of whether it is managed partly or entirely by the private sector.”¹⁷⁵

On March 22, 2010, the High Representative of the Union for Foreign Affairs and Security Policy, Catherine Ashton, on behalf of the European Union countries at the occasion of the commemoration of the 13th World Water Day and celebration of the 1st European Water Day, solemnly stated that “the European Union reaffirms that all States bear human rights obligations regarding access to safe drinking water, which must be available, physically accessible, affordable and acceptable.”¹⁷⁶

Alongside the European Union, the candidate countries, Croatia and the former Yugoslav Republic of Macedonia, the countries of the stabilization and association process and potential candidates, Albania, Bosnia and Herzegovina, Montenegro, and Serbia, and the EFTA countries, Iceland, Liechtenstein, and Norway, members of the European Economic Area, as well as Ukraine, the Republic of Moldova, Armenia, Azerbaijan, and Georgia endorsed this political declaration.

Since 1990, throughout the world, civil society began to mobilize in order to collaborate in the elaboration of public policies and legal documents related to water and sanitation. It is clear that different legal perceptions of water have evolved at the same time, as new international law approaches have

Fuerhacker, *The Water Framework Directive: Can We Reach the Target?*, 57 *WATER SCI. & TECH.* 9, 9–17 (2008); R.L. Wilby et al., *Risks Posed by Climate Change to the Delivery of Water Framework Directive Objectives in the UK*, 32 *ENVTL. INT'L* 1043, 1043–55 (2006).

¹⁷⁴ *Towards Sustainable Water Management in the European Union: First Stage in the Implementation of the Water Framework Directive 2000/60/EC*, COM (2007) 128 final (Mar. 22, 2007).

¹⁷⁵ EUR. PARL. DOC. B6-0113 (2009).

¹⁷⁶ See Declaration by the High Representative, Catherine Ashton, on Behalf of the EY to Commemorate World Water Day, *adopted* Mar. 22, 2010.

emerged. The aforementioned documents and legal instruments show that the international community has moved towards an individual-based approach in respect to water supply, clean drinking water, hygiene, sanitation, and environmental protection.

These collective political commitments are greater in number than the aforementioned conventional international obligations. The declarations, resolutions, and guidelines are more precise in identifying the right to water than universal and regional instruments. In fact, as a general matter, they tend to recognize access to clean drinking water and sanitation as an independent human right. Political commitments come to fruition faster than conventional obligations since legal beliefs and convictions evolve more rapidly than conventional law-making processes.

2.4. *Relevance of Soft Law in International Law*

Do these Plans of Action, Declarations, Resolutions, and Guidelines have any legal value in international law?

First, as commonly agreed, such instruments are not legally binding *per se*; therefore, they are not proper sources of international law in the sense of Article 38 of the Statute of the International Court of Justice. For instance, it has been argued that codes of conduct are voluntary regulations.¹⁷⁷ In the same way, it has been affirmed that international guidelines do not possess a legally binding character.¹⁷⁸ UN Resolutions, Declarations, and Plans of Actions are not treaties; they do not legally bind States *per se*; however, at the very least, it can be argued that they are soft law instruments.¹⁷⁹ Alt-

¹⁷⁷ PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC [INTERNATIONAL PUBLIC LAW] 384-85 (6th ed. 2002).

¹⁷⁸ *Id.*

¹⁷⁹ INT'L COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 160 (2002) ("The [UN] principles offer the best chance to clarify, at least in a soft law instrument, that international law can impose direct obligations on companies.").

though at the moment of their adoption they are not legally binding, they might subsequently play an important role in international law and eventually acquire a binding character. On the other hand, these instruments also can reflect existing international customary norms.¹⁸⁰

Soft law, as a legal category, is used to refer to non-traditional sources of international law such as declarations, resolutions,¹⁸¹ guidelines, principles, and other high-level statements by groups of states.¹⁸²

Sometimes, international discourse uses the term “soft law” to downgrade the legal character of a particular norm. However, it is widely accepted that these international instruments can be of far-reaching legal significance.¹⁸³ Particular attention deserves to be given to the General Assembly resolutions, as this organ has emerged as a worldwide forum for international dialogue and consensus.¹⁸⁴

¹⁸⁰ See ANTONIO REMIRO BROTONS, DERECHO INTERNACIONAL [INTERNATIONAL LAW] 348–49 (1997); EMMANUEL DECAUX, DROIT INTERNATIONAL PUBLIC [PUBLIC INTERNATIONAL LAW] 48–50 (4th ed. 2004); NGUYEN QUOC DINH, DROIT INTERNATIONAL PUBLIC [PUBLIC INTERNATIONAL LAW] 318–29 (6th ed. 1999); MATTHIAS HERDEGEN, DERECHO INTERNACIONAL PÚBLICO [PUBLIC INTERNATIONAL LAW] 152–53 (2005).

¹⁸¹ Manfred Lachs, *Some Reflections on Substance and Form in International Law*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 106 (Wolfgang Friedman et al. eds., 1972) (“The form is of little importance, provided the intention is made clear. The will of the governments to be bound having been declared, they can be held to it. However, this is only one of the methods by which a resolution of a recommendatory character may be transformed into a binding international instrument.”).

¹⁸² See A. Robledo Gomez, *Le ius cogens international: sa genèse, sa nature, ses fonctions* [International jus cogens: its Genesis, its Nature, and its Functions], in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 178 (1981).

¹⁸³ Lachs, *supra* note 181, at 103 (“Then there are, of course, those documents which reflect agreements reached at international conferences: the *acte final* or even the communiqué which is sometimes the only written evidence of decisions of far-reaching significance, whose consequences range far beyond the interests of the participants.”).

¹⁸⁴ ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 28 (3d ed. 2005) (“There is often confusion in the approach by many writers to the question of whether GARs constitute a source of international law. Under the provisions of the Charter the majority of such resolutions have no direct legal effect (un-

Soft law is widely recognized to have a special position in public international law and plays a significant role in the development of international law, particularly international humanitarian law, international criminal law, international human rights law, and international environmental law.¹⁸⁵ Soft law is usually the first attempt and most immediate legal answer to the international community's requirements; therefore, it is perhaps the most transparent and authentic legal response.¹⁸⁶ Hence, the current value and importance of the so-called

like decisions of the Security Council which, under art. 25, are binding). However, it is clear that some resolutions embody a clear consensus of the international community. Other resolutions may be very significant in influencing the development of international law and practice.”); Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 880 (1983) (“Since 1945, the role of the United Nations has grown dramatically, and the General Assembly has emerged as a forum for international dialogue. The General Assembly has adopted many Resolutions concerning international legal principles that members of the Assembly hoped would serve as normative standards Resolutions thus address many sensitive areas in which custom, treaties, and other formal sources provide little guidance about what the international law is.”); T. Olawale Elias, *Modern Sources of International Law*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 52 (Wolfgang Friedman et al. eds., 1972) (“The General Assembly has now adopted nearly two thousand five hundred resolutions and the Security Council rather more than a tenth of that number. But the fact that, while certain decisions of the Security Council are mandatory for U.N. Members, all General Assembly resolutions are formal recommendations only, does not prevent a few resolutions from embodying directive principles or agreed standards, which may, by reason of their content, purpose and form of adoption, secure as great international observance as a treaty. That the provisions of such resolutions do not rank as legal obligations is then immaterial.”).

¹⁸⁵ David Weissbrodt, *UN Human Rights Norms for Business*, 7 INT’L L.F. D. INT’L 290, 297 (2005) (“[T]he UN Human Rights Norms for Business fill an important gap in the global protection of human rights.”).

¹⁸⁶ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 178, at 8 (Apr. 11) (“Throughout its history, the development of international law has been influenced by the requirements of international life.”); INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 179, at 74 (“The development of international law and the emergence of binding norms is a complex and living process. Its evolution is propelled by the actions and statements of states as well as international and domestic court decisions, the writings of commentators and, in this case, by the way the statements and conduct of companies themselves influence government policy.”).

soft law instruments in international law should not be neglected.¹⁸⁷

The soft law instruments cannot only be potential proof of an emergent customary rule, but they can also crystallize an emergent customary rule. According to Kaczorowska, “[t]o be regarded as evidencing customary law, a resolution must be seen to have gathered support from a broad cross-section of the international community.”¹⁸⁸ Therefore, careful attention must be paid to those instruments and their relationship with classical sources of international law, namely international conventions, international custom, and general principle of law. In this regard, Meron highlights the relationship between *opinio iuris* and the so-called new sources of international law: official statements, final acts, programs of action, resolutions, and declarations from international organizations, summits, and conferences.¹⁸⁹

¹⁸⁷ David M. Ong, *From ‘International’ to ‘Transnational’ Environmental Law? A Legal Assessment of the Contribution of the ‘Equator Principles’ to International Environmental Law*, 79 NORDIC J. INT’L L. 35, 45 (2010) (“International ‘soft’ law is widely accepted now as occupying a special and interesting place in the normative development of international law, and especially international environmental law.”). See also A. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L.Q. 901, 904 (1999) (“They may lack the supposedly harder edge of a ‘rule’ or an ‘obligation’, but they are certainly not legally irrelevant. As such they constitute a very important form of law, which may be ‘soft’, but which should not be confused with ‘non-binding’ law.”); INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 179, at 73 (“‘Soft law’ . . . was developed to describe declarations, resolutions, guidelines, principles and other high-level statements by groups of states such as the UN, ILO and OECD that are neither strictly binding norms nor ephemeral political promises.”).

¹⁸⁸ KACZOROWSKA, *supra* note 184, at 29.

¹⁸⁹ Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 244 (2000) (“Human Rights law has greatly influenced the formation of customary rules of humanitarian law, which is discernible in the jurisprudence of courts and tribunals and the work of international organizations. This trend began in Nuremberg and has continued through such cases before the International Court of Justice as *Nicaragua v. United States* and the Nuclear Weapons Advisory Opinion, the decisions of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda, and the as-yet-unpublished ICRC study on customary rules of international humanitarian law. *Opinio iuris* has proven influential in the form of verbal statements by governmental representatives to international organizations; the content of resolutions, dec-

Regarding the legal value of international resolutions or declarations of international conferences, the Restatement expresses that “[s]tates often pronounce their views on points of international law, sometimes jointly through resolutions of international organizations that undertake to declare what the law is on a particular question, usually as a matter of general customary law.”¹⁹⁰ Aside from these declaratory resolutions of international organizations, it can also be considered resolutions of a special character that are binding in conformity with the Constitution or Charter of a determined international organization.¹⁹¹ In this latter case, these resolutions can be seen, according to the Restatement, as a secondary source of in-

larations, and other normative instruments adopted by such organizations; and the consent of states to those instruments. This trend was a direct response to a social consensus that demanded efforts to humanize the behavior of states and fighting groups in armed conflicts.”); *see also* KACZOROWSKA, *supra* note 184, at 28 (“The compromise is to regard GARs –and resolutions of other international bodies– as evidence of customary law. The weight of the evidence would be determined by considering all the relevant factors surrounding the adoption of the resolution in question –the degree of support for the resolution; whether or not that support was widespread amongst ideologically or politically divided groups; the intention of states in voting for the resolution as illustrated by the debates; the form of words used, etc.”).

¹⁹⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103 cmt. c (1987) (“*Declaratory resolutions of international organizations.* States often pronounce their views on points of international law, sometimes jointly through resolutions of international organizations that undertake to declare what the law is on a particular question, usually as a matter of general customary law. International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the states voting for it regard the law to be. The evidentiary value of such resolutions is variable. Resolutions of universal international organizations, if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight. Such declaratory resolutions of international organizations are to be distinguished from those special ‘law-making resolutions’ that, under the constitution of an organization, are legally binding on its members.”).

¹⁹¹ *Id.* § 102 cmt. g (“For example, the International Monetary Fund may prescribe rules concerning maintenance or change of exchange rates or depreciation of currencies...the International Civil Aviation Organization may set binding standards for navigation or qualifications for flight crews in aviation over the high seas.”).

ternational law.¹⁹²

Furthermore, soft law instruments are often used by international jurisdictional bodies in order to ground and broaden their legal interpretations of classical sources of international law.¹⁹³ In this sense, the role played by soft law instruments in breaking new ground is most valuable, particularly in international human rights and environmental law.¹⁹⁴ Additionally, non-binding international instruments can be useful and powerful political tools to put pressure on other States or actors in the field of human rights, humanitarian law, and environmental law.¹⁹⁵ Self-regulatory regimes, international institutions' guidelines, and declarations are increasingly significant in international law and, therefore, they make tremendous gains in regards to the progress of international law.¹⁹⁶ According to the United Nations Office of the High Com-

¹⁹² Gleick, *supra* note 63, at 490 ("Strictly speaking, a declaration is a statement of basic principles of inalienable human rights and imposes only moral, not legal, weight on members. Such declarations, however, often either express already existing norms of customary international law (human rights or otherwise), or, as in the case of the UDHR, may over time crystallize into customary norms.").

¹⁹³ The virtuosity of these 'new sources of international law' has been highlighted, as evidenced by the 2008 Protocol on the Statute of the African Court of Justice and Human Rights, which merged the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into a single Court. Indeed, in this 2008 Protocol, considered as applicable law are "the regulations, directives and decisions of the Union, as subsidiary means for the determination of the rules of law." Protocol on the Statute of the African Court of Justice and Human Rights, *adopted* July 1, 2008.

¹⁹⁴ See *Sitaropoulos v. Greece*, App. No. 42202/07, 2010 HUDOC (Eur. Ct. H.R., July 8, 2010), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=11&portal=hbkm&action=html&highlight=&sessionId=86847588&skin=hudoc-en>.

¹⁹⁵ Shelton too notes the inherent paradox of such allegedly non-legally binding instruments in that they nevertheless allow conforming States to put political pressure on dissenting States into conforming to the soft law norms contained within these instruments. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 319 (2006).

¹⁹⁶ Ong, *supra* note 187, at 59; INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 178, at 159 ("In a world where business is increasingly global, only international law can provide this framework. International human rights law offers an objective and coherent benchmark by which to measure whether business conduct world-wide respects fundamental human rights.").

missioner for Human Rights, international human rights law sources

are understood as including international and regional treaties, as well as human rights-related declarations, resolutions, principles and guidelines. While these instruments do not have the same binding force as treaties, they may contain elements that already impose or may come to impose obligations on States under customary international law. They also highlight social expectations and commitments expressed by States and provide useful guidance for interpreting States' obligations under human rights treaties.¹⁹⁷

Final Declarations and Programmes of Action play special roles in international law in the sense that they might express legal beliefs. Through them, rules of international customary law may be identified. Customary status will depend upon many factors, meaning that the Declarations and Programmes of Action should be examined carefully to see if they meet the requirements. In connection with the legal force that a norm in international law can reach, the United States Supreme Court contended that one state or a group of states' practice can be extended in ways by which other states can take on such norms and comply with them so that these norms become universally recognized.¹⁹⁸

Yet, the continuity and reiteration of the acceptance of the rule and its practical application is one of the factors that influence the creation of customary law. Special attention should be given to the United Nations General Assembly Resolutions, since they have a worldwide scope and almost all states of the world participate in the General Assembly. Additionally, the Organization of United Nations is the universal institution that has been entrusted by the 1945 United Nations Charter with the main purpose, *inter alia*, "of promoting and encouraging respect for human rights and for fundamental freedoms for

¹⁹⁷ Human Rights Council, *Annual Report*, *supra* note 6, ¶ 4.

¹⁹⁸ *The Scotia*, 81 U.S. 170, 187 (1871) ("Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which, when generally accepted, became of universal obligation.").

all without distinction as to race, sex, language, or religion.”¹⁹⁹ In this context, Irujo has stressed that “[w]ithout any doubt, these documents are the intellectual heirs of a certain *opinion iuris* on the existence of a right to water; only thus can their content be understood.”²⁰⁰

Generally speaking, the UN resolutions are non-binding international instruments, but in many ways they can reflect the very existence of *opinio juris* of an international rule. UN resolutions can form international legal beliefs, or at least can be evidence of a new customary rule *in status nascendi*. General Assembly Resolution 64/292 of July 28, 2010, adopted without opposition, is a good example of a Resolution conveying a widespread legal belief on an individual entitlement to access to water. In the case of the human right to access water and sanitation, this argument turns out to be even more persuasive. It should be taken into account that the 2010 Declaration of the High Representative of the Union for Foreign Affairs and Security Policy, on behalf of the European Union countries in regards to the human right to water, was upheld by more than forty countries.

Along with these unprecedented political events, which undoubtedly mark an important international legal process, there also exists a dynamic case law that strengthens the aforementioned legal evolution.

3. CASE LAW AS SUBSIDIARY MEANS

According to Article 38 of the Statute of the International Court of Justice, “[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . judicial decisions . . . as subsidiary means for the determination of rules of law.”²⁰¹ Therefore, there are also judicial decisions that help to identify international rules

¹⁹⁹ U.N. Charter art. 1, para. 3.

²⁰⁰ Antonio Embid Irujo, *The Right to Water*, 23 INT'L J. WATER RESOURCES DEV. 267, 270 (2007).

²⁰¹ Statute of the International Court of Justice, *supra* note 141, art. 38(1),.

of law.²⁰² Concerning the right to water and sanitation, case law is a powerful subsidiary way to determine its existence, scope and contours, along with State practice and *opinion juris* that are essential elements of an international customary rule.²⁰³ There are a number of major judicial decisions that confirm the existence of the right to water and sanitation, including quasi-judicial decisions issued by international human rights supervisory bodies.

Concerning judicial decisions, the Inter-American Court of Human Rights recognized the existence of elements and aspects of the right to water and sanitation in the context of indigenous peoples' rights and their cultural way of life and survival. In the context of the right to access to their natural resources and investment projects, the Court recalled the obligation to carry out an environmental and social impact assessment. The Inter-American Court also defined the conditions under which this environmental and social impact assessment must be implemented. In the 2005 case of the *Yakye Axa Indigenous Community v. Paraguay*, the Inter-American Court of Human Rights expressly ordered the State to provide a remedy in the form of drinking water and sanitary infrastructure.²⁰⁴ Moreover, in the 2007 *Saramaka People v.*

²⁰² *Id* ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

²⁰³ There are also a number of judicial decisions at the national level that contribute to shape a customary rule. Tully, *supra* note 56, at 40 ("A revision of national legal systems and national jurisdictional decisions "evidences a range of legal foundations (including health, food, housing, life, adequate living conditions or explicit recognition of an individual right to water per se) whose sum enshrines the right to access water as 'a legally protected reality.'"); see also Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the United Nations High Commissioner for Human Rights and the Secretary General*, ¶ 5(g), U.N. Doc. A/HRC/6/3 (Aug. 16, 2007).

²⁰⁴ Case of the Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 201 (June 17, 2005). The Court considerations

Suriname case, the Inter-American Court referred expressly to the necessity to access water in order to preserve the cultural subsistence of the community by saying:

Clean natural water, for example, is a natural resource essential for the Saramakas to be able to carry out some of their subsistence economic activities, like fishing. The Court observes that this natural resource is likely to be affected by extraction activities related to other natural resources that are not traditionally used by or essential for the survival of the Saramaka people and, consequently, its members.²⁰⁵

proved that “The members of the Community have no access to clean water and the most reliable source of water is that collected during rainfall. The water they regularly use comes from deposits (‘tajamares’) located in the lands they claim; however, it is used both for human consumption and for personal hygiene and it is not protected from contact with animals.” *Id.* ¶ 50.95. Finally, the Court accepted as proved that “At this settlement, the members of the Community have no toilets or sanitary facilities of any sort (latrines or septic tanks), for which reason they use the open fields for their physiological needs, which makes the hygienic conditions of the settlement very deficient.” *Id.* ¶ 50.96. As to the reparations, one of the most dynamic Court’s fields of work, in the case the *Yakye Axa* case, the judges established that the State is to create a community development fund. *Id.* ¶ 196(c). The community program will consist of the supply of drinking water and sanitary infrastructure. *Id.* ¶ 201. Therefore, the reparations are another proper way to fulfill the right to water. The Inter-American Court has also acted according to the urgency of water for human survival. In fact, the State is under the obligation to provide water immediately. *See* Econ. & Social Council, Comm. on Econ., Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant of Economic, Social and Cultural Rights*, ¶ 11, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); U.N. Doc. HRI/GEN/1/Rev.7 (2002), at art. 11, ¶ 16. *See also* U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004).

²⁰⁵ *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 126 (Nov. 28, 2007). The Inter-American Court has also affirmed that “because any gold mining activity within Saramaka territory will necessarily affect other natural resources necessary for the survival of the Saramakas, such as waterways, the State has a duty to consult with them, in conformity with their traditions and customs, regarding any proposed mining concession within Saramaka territory, as well as allow the members of the community to reasonably participate in the benefits derived from any such possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project.” *Id.* ¶ 155. Lundberg and Zhou have connected the lack of participation with the prohibition of discrimination. They explain that “The plight of indigenous peoples, losing land

The *Saramaka* case shows that accessibility and availability of water as a human right must be culturally adequate. Its interpretation provides a remarkable opportunity to develop the idea of access to water and the environmental and social impact assessment. The Inter-American jurisdiction referred to “the Akwe Kon Guidelines for the conduct of cultural, environmental and social impact assessments prior to developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by ‘indigenous and local communities,’” which also require free, prior, and informed consent.²⁰⁶ Likewise, in its 2010 *Xákmok Kásek Indigenous Community v. Paraguay* case, the Inter-American Court of Human Rights expressly recognized the state obligation to supply clean drinking water and sanitation infrastructure through the right to a decent life.²⁰⁷

and natural resources to companies or state-owned enterprises, in economic development has been addressed as an issue which falls within the scope of discrimination prohibited under ICERD. According to the Committee on the Elimination of Racial Discrimination (CERD), in order to ensure that there is no racial discrimination of such peoples, states shall ‘provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics.’” Maria Lundberg & Yong Zhou, *Hunting-Prohibition in the Hunters’ Autonomous Area: Legal Rights of Oroqen People and the Implementation of Regional National Autonomy Law*, 16 INT’L J. ON MINORITY & GROUP RTS. 349, 386 (2009).

²⁰⁶ J. Cariño & M. Colchester, *From Dams to Developmental Justice: Progress with ‘Free, Prior and Informed Consent’ Since the World Commission on Dams*, 3 WATER ALTERNATIVES 423, 423-27 (2010); *Saramaka People*, (ser. C) No. 185, ¶¶ 40-41.

²⁰⁷ *Xákmok Kásek Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 194-196 (Aug. 24, 2010). See also Human Rights Council, *supra* note 203, ¶ 7 (“The Inter-American Court of Human Rights also interpreted the right to life as including access to conditions that guarantee a dignified life.”); “Street Children” (Villagrán-Morales, et al.) v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 144 (Nov. 19, 1999) (“The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to pre-

The right to water in the context of the right to natural resources of indigenous peoples has been also recognized by quasi-judicial bodies. In 2006, the Human Rights Committee indirectly recognized the right of access to water for indigenous peoples in the case of *Angela Poma Poma v. Peru*.²⁰⁸ Similar rights have been recognized by the Inter-American Commission on Human Rights in 2009, in the *Diaguita Agricultural Communities of the Huasco-Altinos v. Chile* case. In this case:

the petitioners argue that the Pascua Lama project is located in the middle of the ancestral territory of the Diaguita Indigenous Community and is being implemented at the headwaters of the River del Estrecho and the El Toro River and envisions the mining of a deposit located under glaciers, which feed into the Huasco Valley watershed. The original project included the removal of [thirteen] hectares of ice from Esperanza, Toro 1 and Toro 2 glaciers, and dumping it all at Guanaco glacier.²⁰⁹

vent its agents from violating it.”).

²⁰⁸ *Angela Poma Poma v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 1457 (Apr. 24, 2009). The case was filed by Ángela Poma Poma. *Id.* ¶ 2.1. The complainant and her children are the owners of the “Parco-Viluyo” alpaca farm, situated in the district of Palca, in the province and region of Tacna. *Id.* They raise alpacas, llamas and other smaller animals, and this activity is their only means of subsistence. The farm is situated on the Andean altiplano at 4,000 metres above sea level, where there are only grasslands for grazing and underground springs that bring water to the highland wetlands. *Id.* The farm covers over 350 hectares of pasture land, and part of it is a wetland area that runs along the former course of the river Uchusuma, which supports more than eight families. *Id.* In the 1950s, the Government of Peru diverted the course of the river Uchusuma, a measure which deprived the wetlands situated on the author’s farm of the surface water that sustained the pastures where her animals grazed. *Id.* ¶ 2.2. In the 1980s, the State party continued its project to divert water from the Andes to the Pacific coast in order to provide water for the city of Tacna. *Id.* ¶ 2.3. The complainant alleged that “the diversion of groundwater from her land has destroyed the ecosystem of the altiplano and caused the degradation of the land and the drying out of the wetlands. As a result, thousands of head of livestock have died and the community’s only means of survival - grazing and raising llamas and alpacas - has collapsed, leaving them in poverty. The community has therefore been deprived of its livelihood.” *Id.* ¶ 3.1. The complainant alleged that “the facts described constitute interference in the life and activities of her family, in violation of article 17 of the Covenant. The lack of water has seriously affected their only means of subsistence, that is, alpaca- and llama-grazing and raising.” *Id.* ¶ 3.3. See generally Lundberg & Zhou, *supra* note 206, at 349-97.

²⁰⁹ See *Diaguita Agric. Cmty. of the Huasco-Altinos v. Chile*, Inter-Am.

The claim was based on the disastrous consequences of mining activities for indigenous survival and territorial and cultural integrity.²¹⁰ In this context, it is noteworthy to say that the International Court of Justice, in the 2010 *Pulp Mills on the River Uruguay* case, affirmed as a customary rule the states' obligation, which involves private corporations, to undertake an environmental impact study or assessment before any proposed development or investment project is implemented.²¹¹

The African Commission on Human Rights also addressed the issue of oil companies' interferences with individuals' economic, social, and cultural rights due to water pollution. In the internationally known Ogoni case, *Social and Economic Rights*

Comm'n H.R., No. 141/09 (Dec. 30, 2009).

²¹⁰ Similar development pressures also undermine the right to water in India. Erik B. Bluemel, *The Implication of Formulating a Human Right to Water*, 31 *ECOLOGY L.Q.* 957, 982 (2004) ("For example, the Indian government, in need of investment within the country, actively pursues bauxite mountain-top mining, which has polluted downstream waters, forcing thousands of indigenous Adivisas to resettle and live without an adequate and safe water supply.").

²¹¹ *Pulp Mills on the River Uruguay* (Arg. v. Uru.), 2010 I.C.J. 60, ¶¶ 204–05 (Apr. 20). In this case, the International Court of Justice has affirmed that "the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, *due diligence*, and the *duty of vigilance and prevention* which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works." *Id.* ¶ 204 (emphasis added). Furthermore, the International Court of Justice has concluded that "[c]onsequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken." *Id.* ¶ 205.

Action Centre for Economic and Social Rights v. Nigeria, “the complainants brought an action against the Nigerian government for violations of an array of rights committed by the state-owned National Nigerian Petroleum Company (“NNPC”), the majority shareholder in a consortium with Shell Petroleum Development Corporation.”²¹² The African Commission utilized a remarkable paragraph that shows a jurisdictionally integral approach to human rights. It has developed from an international perspective the doctrine of indirect human rights obligations on corporations, which is perfectly linked with the doctrine of positive human rights obligations of states.²¹³ The Ogoni case shows the important role that corporations and private parties can play in the configuration of international human rights responsibility.²¹⁴ In this case, the state was the entity that was ultimately responsible for its non-compliance with the duty of due diligence.²¹⁵

²¹² Aoife Nolan, *Addressing Economic Social Rights Violations by Non-State Actors Through the Role of the State: A Comparison of Regional Approaches to the ‘Obligation to Protect,’* 9 HUM. RTS. L. REV. 225, 237 (2009).

²¹³ Soc. & Econ. Rights Action Ctr. for Econ. & Soc. Rights v. Nigeria, Comm’n No. 155/96, Afr. Comm’n H.P.R., ¶ 57 (2001) (“Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments.”); see also Comm’n National des Droits de L’Homme et des Libertés v. Chad, Comm’n No. 72/92, Afr. Comm’n H.P.R., ¶ 22 (1995) (“Even where it cannot be proved that violations were committed by government agents, the government has the responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.”); Velazquez Rodriguez Case, Inter-Am. Ct. H.R. (ser. C), No. 4 (July 19, 1988).

²¹⁴ Soc. & Econ. Rights Action Ctr. for Econ. & Soc. Rights, Comm’n No. 155/96, ¶ 61 (“Its obligations to protect obliges it to prevent the violation of any individual’s right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.”).

²¹⁵ Special Rapporteur of the Comm’n on Human Rights, *Situation of Human Rights in Nigeria*, Comm’n on Human Rights, ¶ 102, U.N. Doc. E/CN.4/1998/62 (Feb. 16, 1998) (by Soli Jehangir Sorabjee) (“The Nigerian Government is indifferent towards the right to development and to a satisfactory environment. Issues relating to environmental degradation in the River Delta region alleged to be caused by the operations of the Shell Petroleum

Yet, reality shows that the human rights violations perpetrator is indeed the non-state actor and this note should not be neglected by human rights theory.²¹⁶ Still, it should be acknowledged that non-state actors can be held responsible for human right violations *in foro domestico*.

In addition, the African Commission considered a communication concerning the Janajaweed militia in Sudan whose acts infringed upon economic and social rights. The Janajaweed poisoned water in wells, which violated the human right to water. The African Commission held that

the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks and amounts to a violation of Article 16 [the right to enjoy the best attainable state of physical and mental health] of the [African] Charter.²¹⁷

Moreover, in its decision on *Free Legal Assistance Group v. Zaire*, the Commission held that the failure of the Government “to provide basic services such as safe drinking water and electricity and the shortage of medicine . . . constitute[d] a violation of [African Charter] Article 16.”²¹⁸ Once again, the African Commission provided protection through jurisprudence on access to safe drinking water via the right to health, which acted in this case as a legal basis for the right to water.

In the *Centre for Minority Rights Development (Kenya) v. Kenaya* case, the African Commission on Human and People’s Rights decided that the eviction of Kenya’s Endorois people from their traditional land for tourism development and min-

Development Company have received insufficient attention.”).

²¹⁶ *Wiwa et al v. Royal Dutch Petroleum et al*, CTR. FOR CONST. RTS., <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum> (last visited Feb. 20, 2012) (“*Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company* are three lawsuits brought against the Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell), the head of its Nigerian operation, and Royal Dutch/Shell’s Nigerian subsidiary, charging them with complicity in human rights abuses against the Ogoni people in Nigeria.”).

²¹⁷ See *Sudan Human Rights Org. v. Sudan*, Commc’n No. 279/03, 296/05, Afr. Comm’n H.P.R., ¶ 212 (2009).

²¹⁸ *World Org. Against Torture v. Zaire*, Commc’n No. 25/89, 47/90, 56/91, 100/93, Afr. Comm’n H.P.R., ¶ 47 (1996).

ing concessions violated their human rights. The complainants alleged that the ruby mining concessions taking place on their lands poisoned the only remaining water source to which the Endorois had access.²¹⁹ Similar to the Ogoni and Janajaweed cases, the African Commission provided a rather indirect protection of the right to access water through the rights to health and an adequate standard of living.²²⁰

These are some of the cases involving recognition of critical elements of the right to water and sanitation that international tribunals or international supervisory bodies have settled. It is not a coincidence that these cases come from the African and American continents. In these continents, there are critical problems related to water supply, sanitation, and water pollution. It is common that problems concerning the human right to water occur on communal and indigenous lands. States in these regions that try to attract foreign investment and corporate activities are commonly associated with human rights abuses. Moreover, states often lack a strong governance structure or willingness to regulate and control such corporate activities. In this context, the aforementioned international tribunals and supervisory bodies have made an express recognition of the right to water and sanitation itself or of some crucial component of this right. This case law may serve as a vital guidance for future developments at both international and national levels.

CONCLUSION

Generally speaking, contemporary international law is developing a human rights-centered approach in addressing the needs of individuals and peoples. The Millennium Development Goals show that the international community is attempting to tackle the most pressing worldwide humanitarian concerns, including poverty, health, sanitation, and access to water. Today, there is no doubt that availability, affordability,

²¹⁹ *Ctr. for Minority Rights Dev. (Kenya) v. Kenya*, Commc'n No. 276/2003, Afr. Comm'n H.P.R., ¶ 262 (2010).

²²⁰ *See id.* ¶ 288.

and accessibility to drinking water and sanitation constitute true subjects of concern for the international community.

The current water crisis is, in reality, a human and social crisis affecting first and foremost those most vulnerable. The cholera outbreak in Haiti in October 2010, illustrates this sad and worrying reality. Perhaps the water crisis should be seen, above all, as a human crisis. If such is the case, the human rights approach should be strengthened and the concept of water as a human right should be promoted and guaranteed. Water as a fundamental human right should be the starting point to further elaborate on policies, take domestic measures, and develop legal standards.

Even though current international conventions do not contain any recognition of a human right to water and sanitation as such, they incorporate clear recognitions of contents or elements of the right to water, which could allow the international community to identify the components of an independent right to water and sanitation. At the very least, universal and regional instruments convey the idea that the accessibility and availability of clean drinking water forms a part of human rights and deserves protection. The international dynamic demonstrates that the issues surrounding the right to water are increasingly incorporated into conventional human rights instruments such as child rights, women rights, and rights of persons with disabilities.

There is not yet an explicit conventional recognition of the human right to water and sanitation, but there are clear steps in that direction. An explicit and full recognition of the human right to water and sanitation is required in order to entitle individuals and communities to claim their vital water needs and to impose on states the obligation to supply adequate amounts of clean water for all. The human right to water and sanitation is not the solution for the global water crisis. There are water problems that are far beyond the scope of human rights. Human rights protect only human dignity and human survival. Beyond that, international environmental law and international water law have an important role to play.

There is no explicit conventional recognition of the right to water and sanitation, but there is enough evidence to argue

that the first steps to establish a customary rule have already taken place. Indeed, the right to safe drinking water and sanitation has developed enough to reach the point where its status can be considered an international customary rule *in statu nascenti*. There is abundant, albeit scattered, international conventional law and international soft law that upholds this assertion. There are also relevant international judicial decisions that are considered to be subsidiary means to determine a rule of international law that recognizes the right to access to safe drinking water and sanitation. Additionally, international human rights quasi-judicial decisions support this conclusion.

There is also an increasing recognition of the right to safe drinking water and sanitation at the domestic level, especially from a constitutional perspective. The latter can boost the emergence of a customary norm in international law. Following this line, there appears to be a growing and reciprocal dialogue between domestic and international legal systems. Considering that the violation of the human right to water and sanitation is first and foremost suffered by individuals and communities at the domestic level, reactions from national courts can show states' convictions and accelerate the emergence of a customary norm in international law.