

THE HUMAN RIGHT TO WATER AND SANITATION: CONTEXT, CONTOURS, AND ENFORCEMENT PROSPECTS

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ABSTRACT

The roots of the human right to water and sanitation date back to ancient times when concepts of community governed water use. Since then, the right has evolved alongside cultural and religious traditions, evolving social norms, and the law. The right to water and sanitation has been brought increasingly to the forefront of international human rights discourse in recent years, culminating in the United Nations General Assembly 2010 official recognition that the human right to water and sanitation imputes legally binding duties. Even with this recognition of a legally enforceable right to water and sanitation, questions remain: What are the contours of the right? Who bears the duty of realization of the right, and by what means may citizens, communities, and other interested parties seek enforcement of the right? The proceeding paper, *The Human Right to Water and Sanitation: Context, Contours, and Enforcement Prospects*, seeks to address these questions. This paper analyzes the human right to water and sanitation in order to determine its contours and prospects for enforcement. The introductory section provides a general discussion of the issue, highlighting the severity of the problem.

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Part I outlines the foundations and import of human rights to give context to the human right to water and sanitation. Part II highlights the foundations particular to the human right to water and sanitation, while Part III discusses recent developments affecting the right. Part IV discusses and attempts to delineate the contours of the human right to water and sanitation. Finally, Part V assesses the prospects for enforcement of the right to water and sanitation.

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INTRODUCTION

New data suggests that about 80 percent of the global population lives in areas where the freshwater supply is not secure because of water threats such as scarcity and pollution.¹ While this may be something of an extreme estimate, problems of water scarcity coupled with rapid population growth has led to a dire water situation characterized by unsustainable water use and inequitable access.²

Water scarcity has to do not only with the availability of water resources, but also with issues of timing and location.³ Viable water resources are of limited supply; only about 2.5 percent of the world's water is freshwater, and less than half of that is available for

¹ Richard Black, *Water Map Shows Billions at Risk of 'Water Insecurity'*, BBC NEWS (Sept. 29, 2010), <http://www.bbc.co.uk/news/science-environment-11435522>.

² UN-WATER, FOOD AGRIC. ORG., *COPING WITH WATER SCARCITY: CHALLENGE OF THE TWENTY-FIRST CENTURY* 8–10 (2007), available at http://waterwiki.net/index.php/Coping_with_Water_Scarcity:Challenge_of_the_21st_Century.

³ *Id.* at 4.

consumption.⁴ Complicating the problem is the fact that water supply renewal proceeds at a static rate, while global population has steadily increased.⁵ This population growth has led to unsustainable water use, where the depletion of water resources outpaces their renewal. It has also exacerbated a lack of basic sanitation and caused rampant water pollution, rendering existing sources unsafe.⁶

In the twentieth century, global population skyrocketed from 1.65 billion in 1900 to 6 billion in 1999.⁷ Perhaps more astonishing is that between 1960 and 2000, global population more than doubled, increasing by over 3 billion people in a mere forty years.⁸ While the overall rate of population growth has been declining since 1970,⁹ the global population nevertheless grew to an estimated 7 billion in 2010.¹⁰

Access to sufficient safe water and basic sanitation is a prerequisite for human health and well-being.¹¹ People need water to drink, to cook, to bathe, to clean, and to live. Indeed, the United Nations suggests that each person needs 20–50 liters per day to satisfy basic needs and 50–100 liters per day to meet all health concerns.¹² While there

⁴ Maj Fiil, Director, The Water for All Campaign at Food & Water Watch, *The Global Crisis: Reaching the Poor* (Nov. 2007); *Priceless*, THE ECONOMIST, July 17, 2003, available at http://www.economist.com/node/1906846?story_id=E1_TJDGRQG&CFID=169141692&CFTOKEN=24317663 (noting that “97% of the total [water] is seawater, unfit for human use. Of the 3% that is fresh, two-thirds is locked up in glaciers or ice and snow around the poles. Only 1% of all the world’s water is available for human consumption.”); *Where Is Earth’s Water Located?*, U.S. GEOLOGICAL SURV., <http://ga.water.usgs.gov/edu/earthwherewater.html> (last modified Jan. 10, 2013).

⁵ MALIN FALKENMARK & CARL WIDSTRAND, POPULATION REFERENCE BUREAU, POPULATION BULLETIN, POPULATION AND WATER RESOURCES: A DELICATE BALANCE (1992).

⁶ UN-WATER, FOOD AGRIC. ORG., *supra* note 2, at 20.

⁷ U.N. Dep’t. of Econ. & Soc. Affairs, Population Div., *The World at Six Billion*, U.N. Doc. ESA/P/WP.154 (Oct. 12, 1999), 1, available at <http://www.un.org/esa/population/publications/sixbillion/sixbillion.htm>.

⁸ *Id.* at 5.

⁹ *World Population Prospectus: The 2008 Revision*, U.N. Dep’t. of Econ. & Soc. Affairs Population Div., U.N. Doc. ESA/P/WP.210 (2009), 3 fig.2, available at http://www.un.org/esa/population/publications/wpp2008/wpp2008_highlights.pdf.

¹⁰ *Id.* at 31.

¹¹ U.N. Econ. & Soc. Council [hereinafter ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 15 (2002): *The Right to Water* (Arts. 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights), 29th Sess., Nov. 11–29, 2002, ¶¶ 2, 6, U.N. Doc. E/C.12/2002/11 (Jan 20, 2003), available at http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf [hereinafter General Comment No. 15].

¹² *World Water Assessment Programme, Meeting Basic Needs*, U.N. EDUC. SCI. & CULTURAL ORG., http://webworld.unesco.org/water/wwap/facts_figures/basic_needs.shtml (last visited Nov. 3, 2012); GUY HOWARD & JAMIE BARTRAM, WORLD HEALTH ORG., DOMESTIC WATER

is an international legal framework in place guaranteeing the human right to access safe water and basic sanitation, roughly one in six people lacks access to sufficient safe water, while more than a third of the world's population lacks access to basic sanitation.¹³ This systemic lack of access to sufficient safe water and basic sanitation causes millions of deaths each year. Diarrheal disease alone accounts for 1.8 million deaths per year, with 88 percent of diarrheal disease cases attributable to insufficient safe water and sanitation.¹⁴ This situation is especially dire in "less developed" nations:

Many of the world's poorest countries lie in the global zones most subject to drought [and many] of these countries also have rapidly growing populations that must compete for limited water resources The world's population lives at the mercy of the water cycle.¹⁵

International human rights law requires States to act as the primary guarantor of human rights and to respect, protect, and fulfill the human right to water and sanitation for all.¹⁶ While the international community first enshrined human rights in the Universal Declaration of Human Rights in 1948,¹⁷ the human right to water and sanitation remained primarily implied¹⁸ and amorphous until the United Nations Committee on Economic, Social and Cultural Rights adopted General

QUANTITY, SERVICE, LEVEL AND HEALTH 22 (2003), available at http://www.who.int/water_sanitation_health/diseases/en/WSH0302.pdf; Peter H. Gleick, *Basic Water Requirements for Human Activities: Meeting Basic Needs*, 21 WATER INT'L 83, 99 (1996), available at http://www.pacinst.org/reports/basic_water_needs/basic_water_needs.pdf.

¹³ *Statistics: Graphs & Maps, Drinking Water and Sanitation*, U.N. WATER, http://www.unwater.org/statistics_san.html (last visited Nov. 3, 2012).

¹⁴ *Burden of Disease and Cost-Effectiveness Estimates*, U.N. WORLD HEALTH ORG., http://www.unwater.org/statistics_san.html (last visited Nov. 3, 2012).

¹⁵ FALKENMARK & WIDSTRAND, *supra* note 5, at abstract, 2.

¹⁶ Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water As a Human Right and the Duties and Obligations It Creates*, 4 NW. J. INT'L HUM. RTS. 331, 349 (2005); U.N. Human Rights Council, Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque, ¶ 81, U.N. Doc. A/HRC/12/24 (July 1, 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-24_E.pdf [hereinafter de Albuquerque Report 12/24].

¹⁷ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>.

¹⁸ Some international legal instruments did recognize the right in specific situations. These include the Geneva Conventions (recognizing a right to water and sanitation for detainees and prisoners of war), the Convention on Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and others.

Comment No. 15 in 2002.¹⁹ Since then, the United Nations has brought this right increasingly to the forefront of international human rights law by establishing UN-Water, appointing an independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, adopting a General Assembly resolution recognizing the human right to water and sanitation, and passing a Human Rights Council resolution affirming the legally binding nature of the right.²⁰ This international legal recognition of the right to water and sanitation is integral to the realization of the right for all.²¹ Nevertheless, while increasing recognition of the right has indeed led to some improvement in the percentage of people lacking access to water and sanitation,²² problems of enforcement have left rights-holders without effective means to assert the right.²³

Indeed, the human right to water has remained largely theoretical for much of the world's population. Problems of implementation and enforcement have left more than 884 million people lacking access to the sufficient safe water and roughly 2.6 billion lacking access to basic sanitation.²⁴ Rural populations often lack access because of financial and practical difficulties in providing service to remote areas,²⁵ while urban populations face problems of rapid urbanization where demand exceeds service capacity.²⁶ Many States lacking the capacity to meet their obligations under the right to water and sanitation have sought to remedy their water and sanitation problems by taking out World Bank or other

¹⁹ General Comment No. 15, *supra* note 11.

²⁰ See *infra* notes 142–143, 150–153, 163–166, 187–198 and accompanying discussions.

²¹ See KEVIN WATKINS ET AL., U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2006, BEYOND SCARCITY: POWER, POVERTY, AND THE GLOBAL WATER CRISIS 60 (2006), available at <http://hdr.undp.org/en/reports/global/hdr2006/>.

²² World Health Org. [hereinafter WHO], Domestic Water Quality, Service Level and Health Executive Summary, at tbl. S2, WHO/SDE/WSH/03.02 (2003), available at http://www.who.int/water_sanitation_health/diseases/WSH0302exsum.pdf (prepared by Guy Howard & Jamie Bartram); see WHO & UNICEF, PROGRESS ON SANITATION AND DRINKING-WATER 2010 UPDATE 6 (2010), available at http://www.wssinfo.org/fileadmin/user_upload/resources/1278061137-JMP_report_2010_en.pdf.

²³ Note, *What Price for the Priceless?: Implementing the Justiciability of the Right to Water*, 120 HARV. L. REV. 1067, 1068 (2007) [hereinafter *What Price for the Priceless?*].

²⁴ WHO & UNICEF, *supra* note 22, at 6–7.

²⁵ See MEETING THE MDG DRINKING TARGET: WATER AND SANITATION, THE URBAN AND RURAL CHALLENGE OF THE DECADE, WHO & UNICEF 14–15, 19–21 (2006), available at http://www.who.int/water_sanitation_health/monitoring/jmpfinal.pdf.

²⁶ *Id.* at 16–19; *Urbanisation and Water*, WATERAID AM. INC., http://www.wateraid.org/documents/plugin_documents/microsoft_word__urbanisation_and_water.pdf (last visited Jan. 13, 2013).

international financial institution loans, many of which stipulate privatization of State water resources.²⁷ This privatization has often had perverse impacts when private corporations expand existing infrastructure while effectively decreasing access by increasing service rates beyond what is financially feasible for poor populations.²⁸ When States have tried to extricate themselves from such disastrous contracts, they have faced significant hardship because the International Centre for Settlement of Investment Disputes (“ICSID”) reviews disputes over this type of contract.²⁹ Such review can actually impede fulfillment of the human right to water and sanitation because the ICSID, an entity of the World Bank, is concerned with trade law and does not consider human rights in its analyses.³⁰

Involvement of non-State service providers also creates significant problems of accountability because the relative obligations of States and private entities have been somewhat unclear.³¹ This uncertainty is only now beginning to be resolved and has been complicated by disagreements in the international sphere as to the contours of the right and the proper role of privatization interests.³² The creation of the World Water Council (“WWC”), an international think tank composed of various stakeholders including government agencies, academic institutions, international organizations and numerous private enterprises, exemplifies this tension.³³ Many commentators criticize the World Water Council, some calling it “a major vehicle for the corporate

²⁷ See VANDANA SHIVA, *WATER WARS: PRIVATIZATION, POLLUTION AND PROFIT* 87 (2002).

²⁸ James Salzman, *Thirst: A Short History of Drinking Water*, 18 *YALE J.L. & HUMAN.* 94, 116 (2006); Violeta Petrova, *At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water*, 31 *BROOK. J. INT’L L.* 577, 588–93 (2006).

²⁹ Petrova, *supra* note 28, at 590 n.82; MAUDE BARLOW, *BLUE COVENANT: THE GLOBAL WATER CRISIS AND THE COMING BATTLE FOR THE RIGHT TO WATER* 40 (2007).

³⁰ BARLOW, *supra* note 29; see Press Release, Food & Water Watch, World Bank Court Undermines Argentina’s Citizens (Aug. 23, 2007), available at <http://www.foodandwaterwatch.org/pressreleases/world-bank-court-undermines-argentina%E2%80%99s-citizens/>.

³¹ Salzman, *supra* note 28, at 114–16.

³² *Id.*; see *Overview of the UN Global Water Compact*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/> (last updated Dec. 1, 2011); Edgar Chen & Sarah A. Altschuller, *Corporate Accountability and Human Rights in the Age of Global Water Scarcity*, *NAT. RESOURCES & ENV’T*, Winter 2010, at 9.

³³ *List of Members*, WORLD WATER COUNCIL (Apr. 2010), http://www.worldwatercouncil.org/fileadmin/wwc/Membership/List_Members_April2011.pdf.

takeover of the world's water."³⁴ The UN president has similarly questioned the legitimacy of the WWC-hosted World Water Forums:

The forum's orientation is profoundly influenced by private water companies. This is evident by the fact that both the president of the World Water Council and the alternate president are deeply involved with provision of private, for-profit, water services . . . [The World Water Council should] conduct their deliberations under the auspices of the United Nations.³⁵

For the right to water and sanitation to be truly realized, all private service providers should be bound to act transparently to respect human rights, and compliance monitoring procedures should be strengthened and publicized to allow for increased citizen ability to claim entitlement.³⁶ In addition, States should support regional human rights bodies and agree to be bound by their holdings and should incorporate international law into their domestic legal systems.³⁷ Finally, in all cases and at all levels, parties should emphasize public participation and nondiscrimination—especially to provide justice where full implementation of the right is not possible.

This article analyzes the human right to water and sanitation in order to determine its contours and prospects for enforcement. Part I outlines the foundations and import of human rights to give context to the human right to water and sanitation. Part II highlights the foundations particular to the human right to water and sanitation, while Part III discusses recent developments affecting the right. Part IV discusses and attempts to delineate the contours of the human right to water and

³⁴ BARLOW, *supra* note 29, at 50; *Activists Slam World Water Forum As a Corporate-Driven Fraud*, PROJECT CENSORED (May 8, 2010), <http://www.projectcensored.org/top-stories/articles/23-activists-slam-world-water-forum-as-a-corporate-driven-fraud/>; Mark Hays, *World Water Forum Starts with a Bang: Activists Challenge CEO Water Mandate*, GLOBAL COMPACT CRITICS (Mar. 17, 2009), <http://globalcompactcritics.blogspot.com/2009/03/world-water-forum-starts-with-bang.html>; Press Release, Transnational Inst., World Water Forum Attendance Reportedly Down As Activists Ramp Up Preparations for Alternative Forum (Feb. 14, 2012), available at <http://www.tni.org/pressrelease/world-water-forum-attendance-down-activists-ramp>.

³⁵ *Access to Water: A Human Right or a Human Need?*, ENV'T NEWS SERV. (Mar. 27, 2009), <http://www.ens-newswire.com/ens/mar2009/2009-03-27-03.asp>.

³⁶ See INT'L CONFERENCE ON WATER AND THE ENV'T, THE DUBLIN STATEMENT ON WATER AND SUSTAINABLE DEVELOPMENT (1992), available at <http://www.un-documents.net/h2o-dub.htm> [hereinafter THE DUBLIN STATEMENT]; see CHEN & ALTSCHULLER, *supra* note 32, at 9, 12.

³⁷ See *What Price for the Priceless?*, *supra* note 23; see also CHEN & ALTSCHULLER, *supra* note 32.

sanitation. Finally, Part V assesses the prospects for enforcement of the right to water and sanitation.

I. THE FOUNDATIONS AND IMPORT OF HUMAN RIGHTS

Human rights are founded in the notion of human dignity and natural law.³⁸ The concept of natural law provides that all persons are inherently entitled to certain rights and freedoms, and it holds that there are immutable laws of nature that are and ought to be binding upon human society, regardless of the applicability of any man-made law.³⁹ These immutable laws include at a minimum a right to life, a right to liberty, and a right to property.⁴⁰ This concept has had widespread impact, even having formed the basis for the phrase “Life, Liberty and the pursuit of Happiness” in the United States Declaration of Independence.⁴¹

The international community first enshrined these inalienable human rights in the wake of World War II, when the United Nations General Assembly adopted the Universal Declaration of Human Rights.⁴² The Universal Declaration of Human Rights (“UDHR”) consists of thirty Articles, recognizing such rights as equality, equal protection, participation in government, right to life, and “right to a standard of living adequate for . . . health.”⁴³ The Universal Declaration of Human Rights is not itself a binding treaty.⁴⁴ Rather, the General Assembly adopted the UDHR with the explicit purpose of defining the concepts of “fundamental freedoms” and “human rights” as discussed in the United Nations charter.⁴⁵ As such, the Universal Declaration of Human Rights has normative force is binding upon all UN member States as a constitutive document of the United Nations.⁴⁶ The UDHR Preamble’s affirmation that “Member States have pledged themselves to achieve, in

³⁸ PETER JONES, RIGHTS 72–76, (St. Martin’s Press 1994); Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL’Y 171, 172, 178 (2008).

³⁹ JONES, *supra* note 38, at 72 (noting that there is more than one conception of natural law rights, and that it is the Locke/Paine tradition that constitutes the basis of human rights).

⁴⁰ *Id.* at 75–76.

⁴¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. (3d series) 39, 58, 61–62 (2002).

⁴² Universal Declaration of Human Rights, *supra* note 17.

⁴³ *Id.* at arts. 1–3, 25.

⁴⁴ See Christoph Beat Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?*, 9 J. INT’L ECON. L. 553, 560 (2006).

⁴⁵ U.N. Charter art. 1, para. 3, available at <http://www.un.org/en/documents/charter/index.shtml>.

⁴⁶ *What Price for the Priceless?*, *supra* note 23, at 1073.

co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms” serves to strengthen that presumption of legal effect.⁴⁷ The precedential effect of the Universal Declaration of Human Rights is also noteworthy. The UDHR has served as a basis for several binding UN Conventions, including the International Covenant on Civil and Political Rights,⁴⁸ the International Covenant on Economic, Social and Cultural Rights,⁴⁹ the Convention on the Elimination of All Forms of Discrimination Against Women,⁵⁰ the Convention on the Rights of the Child,⁵¹ and many more.⁵²

Since the adoption of the Universal Declaration of Human Rights, human rights have come to constitute an international system of norms and values.⁵³ Under this emergent international human rights law, States that have signed and ratified binding conventions must protect certain enumerated rights.⁵⁴ The legal obligations of international human rights law is essentially a system of right-holders and duty-bearers, wherein States bear the duty of acting as the primary guarantor of citizens’ human rights and those citizens, in turn, have the right to claim entitlement to recognized human rights.⁵⁵ Under this conception of human rights, even nonbinding treaties can have significant import because of political “soft power” influence.⁵⁶ Soft power is political pressure placed on a State through means that do not involve military intervention or economic sanctions.⁵⁷ International bodies, States,

⁴⁷ See Universal Declaration of Human Rights, *supra* note 17, at pmb., cl. 6.

⁴⁸ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16 1966), *entered into force* Mar. 23, 1976.

⁴⁹ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, at 53 (Dec. 16 1966), *entered into force* Mar. 23, 1976.

⁵⁰ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), G.A. Res. 34/180, 34 U.N. GAOR, 34th Sess. Supp. No. 46, U.N. Doc. A/34/46, at 194 (Dec. 18, 1979), *entered into force* Sept. 3, 1981.

⁵¹ Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR, 44th Sess. Supp. No. 49, U.N. Doc. A/44/49 at 167 (Nov. 20, 1989) *entered into force* Sept. 2, 1990.

⁵² *The Universal Declaration of Human Rights*, UNITED NATIONS, http://www.un.org/en/documents/udhr/hr_law.shtml (last visited Feb. 22, 2013).

⁵³ See JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS xi (1987).

⁵⁴ *Id.* at 4–5.

⁵⁵ *Right Holders and Duty Bearers*, RIGHTS TO WATER AND SANITATION, <http://www.righttowater.info/rights-holders-and-duty-bearers/> (last visited Oct. 31, 2012).

⁵⁶ See JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 5–11 (2004).

⁵⁷ *Id.* at 5.

nongovernmental organizations, or even super empowered individuals can wield soft power to exact a desired outcome.⁵⁸ The potential of soft power should not be underestimated: it can be a powerful democratic force in international relations.⁵⁹ For example, soft power played a significant role in realizing such momentous change as ending apartheid in South Africa.⁶⁰

Compliance with human rights objectives is also significant with respect to the availability of international development financing.⁶¹ During the early stages of the evolution of human rights, international policy makers treated development and human rights as discrete and unrelated objectives.⁶² This disconnect largely resulted from the political implications of the Cold War, where “the ideological divide of the Cold War counterpoised civil and political rights against economic, social and cultural rights.”⁶³ However, the international community has since more often considered human rights and development in tandem after realizing that traditional development methods were failing to resolve problems of inequality and poverty.⁶⁴

In 1986, the United Nations formally recognized the interrelationship between development and human rights with the adoption of the Declaration on the Right to Development.⁶⁵ The United Nations has since reinforced this recognition through the implementation of the United Nations Development Assistance Framework⁶⁶ which employs a human rights-based approach to analyze state needs and

⁵⁸ *Id.* at 5–11, 17.

⁵⁹ *Id.* at 50–51, 89.

⁶⁰ *Id.* at 50–51, 89.

⁶¹ See *About the undg*, UNITED NATIONS DEV. GROUP, <http://www.undg.org/index.cfm?P=2> (last visited Jan. 14, 2013); *undg Strategic Priorities for 2010-2012*, UNITED NATIONS DEV. GROUP, www.undg.org/docs/12282/UNDG%20Strategic%20Priorities%20for%202010-2012.pdf, 2 (last visited Jan. 14, 2013).

⁶² Emilie Filmer-Wilson, *The Human Rights-Based Approach to Development: The Right to Water*, 23/2 NETH. Q. OF HUM. RTS. 213, 214 (2005), available at http://waterwiki.net/images/0/01/Emilie_Filmer-Wilson_Rights_based_approach_water.pdf.

⁶³ *Id.* at 214.

⁶⁴ *Id.* at 215.

⁶⁵ Declaration on the Right to Development, G.A. Res. 41/128, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, UN Doc. A/41/53, at 186 (Dec. 4, 1986).

⁶⁶ See *United Nations Development Assistance Framework (UNDAF)*, UNITED NATIONS DEV. GROUP, <http://www.undg.org/?P=232> (last visited Oct. 29, 2012).

awards development assistance to governments with the aim of achieving UN development objectives.⁶⁷

International human rights law represents the international community's normative values and a framework for identifying State violations.⁶⁸ States that do not act to satisfy their human rights obligations violate not only the relevant conventions but also principles of good faith performance embodied in the Vienna Convention on the Law of Treaties⁶⁹ and customary international law. The international human right to water, discussed in Part II, is now part of this international law framework.

II. THE FOUNDATIONS OF THE HUMAN RIGHT TO WATER AND SANITATION

The human right to water, like many other human rights, is rooted in natural law concepts, community ethics and religious beliefs.⁷⁰ Some observers even suggest that the concept of a human right to water may date back as far as 6000 B.C.E.⁷¹; archeologists have uncovered evidence of community water storage sites dating back to as early as the fourth millennium B.C.E.⁷² Commentators discuss the evolution of a human right to water in terms of a "water ethic" that first appeared in ancient mythology and evolved alongside developing societal morals,⁷³ wherein many early societies were consumed by the focus on water management and most religions developed something of a water law philosophy.⁷⁴ Indeed, throughout history, civilizations have discussed water and justice in tandem:

⁶⁷ *Human Rights & the Human Rights-Based Approach*, UNITED NATIONS, <http://www.un.org.vn/en/what-we-do-mainmenu-203/cross-cutting-themes-human-rights.html> (last visited Oct. 29, 2012).

⁶⁸ See Ling-Yee Huang, *Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Human Right to Water*, 20 FLA. J. INT'L L. 353, 356 (2008).

⁶⁹ Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/Conf.39/27 (entered into force Jan. 27, 1980).

⁷⁰ See Chad A. West, *For Body, Soul, or Wealth: The Distinction, Evolution, and Policy Implications of a Water Ethic*, 26 STAN. ENVTL. L.J. 201, 203, 206–10 (2007); see also SHIVA, *supra* note 27, at 20–21.

⁷¹ See *id.* at 206.

⁷² Salzman, *supra* note 28, at 98.

⁷³ West, *supra* note 70, at 206.

⁷⁴ *Id.* at 206–10; Salzman, *supra* note 28, at 99.

Water has traditionally been treated as a natural right—a right arising out of human nature, historic conditions, basic needs, or notions of justice. Water rights as natural rights do not originate with the state; they evolve out of a given ecological context of human existence . . . People have a right to life and the resources that sustain it, such as water. The necessity of water to life is why, under customary laws, the right to water has been accepted as a natural, social fact.⁷⁵

Regardless of these early origins, early human rights discourse rarely mentioned the human right to water explicitly.⁷⁶ Nevertheless, human rights experts and the international community generally recognize that even the earliest human rights instruments imply a right to water because such a right to water is integral to the realization of other human rights.⁷⁷ Over time, the field of human rights has developed into a complex international system of rights and duties—a system that now recognizes numerous foundations for the human right to water, including the Universal Declaration of Human Rights,⁷⁸ the International Covenant on Civil and Political Rights,⁷⁹ the International Covenant on Economic, Social and Cultural Rights,⁸⁰ and the United Nations Committee on Economic, Social and Cultural Rights' General Comment No. 15,⁸¹ and others.⁸²

While the Universal Declaration of Human Rights failed to explicitly provide for the human right to water, its provisions recognizing the right to life and the “right to a standard of living adequate for the

⁷⁵ SHIVA, *supra* note 27, at 20–21.

⁷⁶ PETER GLEICK, PAC. INST. FOR STUDIES IN DEV., ENV'T, AND SEC. 4 (1999), available at http://www.pacinst.org/reports/basic_water_needs/human_right_to_water.pdf.

⁷⁷ General Comment No. 15, *supra* note 11; G.A. Res. 64/292, U.N. GAOR, 64th Sess., U.N. Doc. A/RES/64/292 (July 2010), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292.

⁷⁸ Universal Declaration of Human Rights, *supra* note 17; see also *supra* notes 17–23 and accompanying discussion.

⁷⁹ International Covenant on Civil and Political Rights, *supra* note 48, at art. 6; see also *infra* notes 89–96 and accompanying discussion.

⁸⁰ International Covenant on Economic, Social and Cultural Rights, *supra* note 49, at arts. 1, 11, 12; see also *supra* notes 17–23 and accompanying discussion.

⁸¹ General Comment No. 15, *supra* note 11; see also *supra* notes 17–23 and accompanying discussion.

⁸² See THE HUMAN RIGHT TO WATER AND SANITATION MILESTONES, UN-WATER DECADE PROGRAMME ON ADVOCACY AND COMMUN, available at http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_milestones.pdf.

health and well-being of himself and of his family”⁸³ implicitly include a right to water.⁸⁴ Indeed, observers widely consider the Universal Declaration of Human Rights to encompass the derivative right to water, deeming water necessary for the realization of many UDHR enumerated rights such as the right to life and the Article 25 right to an adequate standard of living.⁸⁵ Peter Gleick of the Pacific Foundation explains:

The notes from the original debate show that the provisions for food, clothing, housing, and so on were not meant to be all-inclusive, but representative or indicative of the “component elements of an adequate standard of living.” Thus, the framers of the UDHR didn’t explicitly exclude water, they considered water too obvious to include as one of the “component elements.”⁸⁶

A multitude of other commentators have endorsed Gleick’s assertion and extended the logic to point out that the two covenants that legally bind parties to the rights enshrined in the UDHR (namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) similarly provide an implicit basis for the human right to water by declaring that “in no case may a people be deprived of its own means of subsistence.”⁸⁷ As commonly interpreted, this right to means of subsistence includes a right to water because a person needs sufficient water to enjoy the right to means of subsistence.⁸⁸ For example, a farmer cannot enjoy his right to means of subsistence if he cannot access water for his crops.

The International Covenant on Civil and Political Rights’ recognition of the right to life likewise provides an implicit basis for the

⁸³ Universal Declaration of Human Rights, *supra* note 17, at art. 25. “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . .”). *Id.*

⁸⁴ *What Price for the Priceless?*, *supra* note 23, at 1073.

⁸⁵ PETER GLEICK, PAC. INST. FOR STUDIES IN DEV., ENV. AND SECURITY, *THE HUMAN RIGHT TO WATER 2* (May 2007), available at http://www.pacinst.org/reports/human_right_may_07.pdf.

⁸⁶ *Id.*

⁸⁷ International Covenant on Civil and Political Rights, *supra* note 48, at art. 1, cl. 2; International Covenant on Economic, Social and Cultural Rights, *supra* note 49, at art. 1, cl. 2; GEORGE S. MCGRAW, UNITED NATIONS U. FOR PEACE, *DEFINING AND DEFENDING THE RIGHT TO WATER AND ITS MINIMUM CORE: LEGAL CONSTRUCTION AND THE ROLE OF NATIONAL JURISPRUDENCE 22*, available at <http://waterwiki.net/images/c/cf/DefiningAndDefendingRightToWater.pdf>; Thorsten Kiefer & Catherine Brölmann, *Beyond State Sovereignty: The Human Right to Water*, 5 NON-ST. ACTORS & INT’L L. 183, 185 (2005) (Neth.).

⁸⁸ MCGRAW, *supra* note 87, at 22.

human right to water.⁸⁹ This Covenant is a legally binding multilateral treaty that commits ratifying States to respect the civil and political rights of individuals, including the “inherent right to life.”⁹⁰ Initially, States interpreted this right to life narrowly to mean that individuals have the right to be free from an unjust deprivation of life in the capital sense.⁹¹ This conception of the right to life has since expanded, with the Human Rights Committee’s adoption of General Comment No. 6,⁹² which provides in pertinent part:

[The Human Rights Committee] has noted that the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.⁹³

This broadened view of “right to life” encompasses elements of health, enjoyment, respect, and dignity; the right to life includes the right to water and sanitation as a derivative right integral to the realization of the right to life.

Some national legal systems have similarly interpreted the right to life to supply an implicit basis for the right to water. For example, the Kerala High Court (India) found that the right to life guarantee in India’s Constitution⁹⁴ includes a right to water.⁹⁵ In announcing its holding, the Court said, “[t]he right to sweet water and the right to free air, are attributes of the right to life, for, these are the basic elements which sustain life itself.”⁹⁶

The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) also implies a right to water.⁹⁷ In fact, the ICESCR,⁹⁸

⁸⁹ Kiefer & Brölmann, *supra* note 87, at 185. “[I]t is clear that access to adequate qualitative and quantitative water supplies is a fundamental precondition for the full realisation of several of the rights explicitly guaranteed under the ICCPR and the ICESCR.” *Id.*

⁹⁰ International Covenant on Civil and Political Rights, *supra* note 48, at pmb1., art. 6, cl. 1.

⁹¹ See *What Price for the Priceless?*, *supra* note 23, at 1085.

⁹² U.N. Human Rights Committee [HRC], CCPR General Comment No. 6: Article 6 (Right to Life) (Apr. 30, 1982).

⁹³ *Id.* ¶ 5.

⁹⁴ INDIA CONST. art. 21.

⁹⁵ F.K. Hussain v. Union of India, (1990) A.I.R. 321 (Ker.), available at <http://www.elaw.org/node/2497> (decided together with Attakoya Thangal v. Union of India, (1990) A.I.R. 321 (Ker.), available at <http://www.elaw.org/node/2537>).

⁹⁶ F.K. Hussain, (1990) A.I.R. 321 ¶ 7.

⁹⁷ Kiefer & Brölmann, *supra* note 89.

⁹⁸ International Covenant on Economic, Social and Cultural Rights, *supra* note 49.

together with the United Nations Committee on Economic, Social and Cultural Rights General Comment No. 15,⁹⁹ provides one of the strongest legal foundations for the right to water. The ICESCR, which the United Nations General Assembly adopted in 1966, most relevantly recognizes the right to “an adequate standard of living . . . *including* adequate food, clothing and housing, and to the continuous improvement of living conditions,”¹⁰⁰ (emphasis added) and “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁰¹ Article 11’s guarantee of the right to an adequate standard of living includes a right to water because water is necessary to the realization of the right to standard of living and adequate food.¹⁰² In fact, virtually all ICESCR-ratifying States have issued political declarations recognizing that the right to an adequate standard of living necessarily includes the right to water and basic sanitation.¹⁰³ Article 12’s guarantee of the right to the highest attainable standard of health likewise seems to imply a right to water, as sufficient water is vital to human health.¹⁰⁴

In 2002, the United Nations Committee on Economic, Social and Cultural Rights explicitly confirmed the existence of this implied right to water via General Comment No. 15.¹⁰⁵ General Comment No. 15, an official interpretation of Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights,¹⁰⁶ states that water is “indispensable for leading a life in human dignity”¹⁰⁷ and “a prerequisite for the realization of other human rights.”¹⁰⁸ More specifically, in General Comment No. 15, the Human Rights Council asserted that the word “including” in Article 11, paragraph 1 of the ICESCR suggests that the listed derivative rights of “adequate food, clothing and housing” is not an exhaustive list.¹⁰⁹ On the contrary, the list is merely representative of adequate standard of living derivative rights, such that the list was

⁹⁹ General Comment No. 15, *supra* note 11.

¹⁰⁰ International Covenant on Economic, Social and Cultural Rights, *supra* note 49, at art. 11, cl. 1.

¹⁰¹ *Id.* at art. 12, cl. 1.

¹⁰² GLEICK, *supra* note 85, at 2.

¹⁰³ *The Legal Basis to the Right to Sanitation*, RIGHTS TO WATER AND SANITATION, <http://www.righttowater.info/the-legal-basis-to-the-right-to-sanitation/> (last visited Oct. 30, 2012).

¹⁰⁴ David R. Boyd, *No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada*, 57 MCGILL L.J. 81, 124 (2011) (Can.); General Comment No. 15, *supra* note 11.

¹⁰⁵ General Comment No. 15, *supra* note 11.

¹⁰⁶ International Covenant on Economic, Social and Cultural Rights, *supra* note 49.

¹⁰⁷ General Comment No. 15, *supra* note 11, ¶ 1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ¶ 3.

actually inclusive of the additional implied right to water.¹¹⁰ In so finding, the Human Rights Council said:

The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival . . . [and] is also inextricably related to the right to the highest attainable standard of health . . .¹¹¹

General Comment No. 15 further provides that “[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”¹¹² and mandates that governments “adopt effective measures to realize, without discrimination, the right to water.”¹¹³

While General Comment No. 15, like all general comments, is not *per se* legally binding, it is an official interpretation of a binding convention by the authorized monitoring body.¹¹⁴ General Comment No. 15 is also of great legal import because it outlines state obligations under the human right to water and defines what constitutes a violation of that right.¹¹⁵

Other international legal sources recognizing the human right to water include the Geneva Conventions,¹¹⁶ the Mar del Plata Action Plan,¹¹⁷ the Convention on Elimination of All Forms of Discrimination

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* ¶ 2.

¹¹³ *Id.* ¶ 1.

¹¹⁴ *General Comments, RIGHTS TO WATER AND SANITATION*, <http://www.righttowater.info/general-comments/> (last visited Oct. 30, 2012).

¹¹⁵ General Comment No. 15, *supra* note 11. For an outline of right to water obligations and violations, see *Obligations and Violations to the Right to Water*, *RIGHTS TO WATER AND SANITATION*, <http://www.righttowater.info/obligations-and-violations-to-the-right-to-water/> (last visited Nov. 1, 2012).

¹¹⁶ Geneva Convention III mandates provision of sufficient water for health and sanitation of prisoners of war. Geneva Convention Relative to the Treatment of Prisoners of War, art. 29, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Geneva Convention IV mandates provision of sufficient water for health and sanitation of detainees. Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, art. 127, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹¹⁷ *The Human Right to Water and Sanitation Milestones*, UNITED NATIONS, http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_milestones.pdf (last visited Jan. 15, 2013) (indicating that the Mar del Plata Action plan declared that all people “have the right to have access to drinking water in quantities and of a quality equal to their basic needs”).

Against Women,¹¹⁸ the Convention on the Rights of the Child,¹¹⁹ the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and Lakes,¹²⁰ the United Nations Principles for Older Persons,¹²¹ the Dublin Statement on Water and Sustainable Development¹²² (adopted at the International Conference on Water and the Environment¹²³), the United Nations Millennium Development Goals,¹²⁴ the Convention on Persons with Disabilities,¹²⁵ and the United Nations Committee on Economic, Social and Cultural

¹¹⁸ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), *supra* note 50, at art. 14(2)(h) (obligating States to “take all appropriate measures to ensure women the right to . . . adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”).

¹¹⁹ Convention on the Rights of the Child, *supra* note 51, at arts. 24, 27. Article 24 obligates the state to provide adequate food and drinking water to satisfy children’s right to health; a right to an adequate standard of living, such as that found under Article 27, has repeatedly been interpreted to include access to clean drinking water and latrines. *See supra* notes 83–88 and accompanying discussion; THE HUMAN RIGHT TO WATER AND SANITATION: LEGAL BASIS, PRACTICAL RATIONALE AND DEFINITION, ASHFAQ KHALFAN & THORSTEN KIEFER, RIGHT TO WATER PROGRAMME, CTR. ON HOUSING RIGHTS AND EVICTIONS 1 (2008), *available at* http://www.wsscc.org/sites/default/files/publications/cohre_legal_basis_for_right_to_water_and_sanitation_2008.pdf; Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Human Rights Standards Related to Sanitation at the International, Regional and Domestic Levels 11 (Apr. 29, 2009), <http://www2.ohchr.org/english/issues/water/iexpert/docs/backgroundpaperIE.doc>.

¹²⁰ Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and Lakes, art 5(l), June 17, 1999, 2331 U.N.T.S. 202. “Equitable 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”. *Id.* The Convention was the first international agreement adopted to protect water sources and promote efficient management with the aim of ensuring adequate safe drinking water and sanitation for all peoples. *See The UNECE Water Convention*, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, <http://www.unece.org/env/water/> (last visited Feb. 23, 2013).

¹²¹ Implementation of the International Plan of Action on Ageing and Related Activities, G.A. Res 46/91, Annex, U.N. GAOR, 46th Sess. Supp. No. 49, U.N. Doc A/RES/46/91, ¶ 1 (Dec. 18, 1991) *available at* <http://www.un.org/documents/ga/res/46/a46r091.htm>. “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.” *Id.*

¹²² THE DUBLIN STATEMENT, *supra* note 36. “[I]t is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.” *Id.* at princ. 4.

¹²³ *Id.*

¹²⁴ United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess. Supp. No. 49, U.N. Doc. A/RES/55/2, ¶ 19 (Sept. 18, 2000); Amanda J. Harvey, *The UN Millennium Development Goals with Respect to Water: Prospects for Achieving Them*, 7–8 (Ctr. For Macro Projects and Diplomacy, Working Paper No. 26, 2006), *available at* http://docs.rwu.edu/cmpd_working_papers/26.

¹²⁵ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess. Supp. No. 49, U.N. Doc. A/RES/61/106, at art. 28 (Jan. 24, 2007) (legally binding States to provide persons with disabilities an adequate standard of living that includes equal access to clean water services).

Rights General Comment No. 14.¹²⁶ States have also recognized the human right to water and sanitation in a number of multilateral agreements¹²⁷ and domestic national legal systems.¹²⁸

This multitude of sources constitute an emergent international recognition that the right to water is essential to the realization of other human rights and that it is imperative that the international community guarantee all peoples access to adequate safe water. Moreover, as Part III discusses, the international community has continued on the development and implementation of that human right to water and sanitation.

III. THE EVOLVING RIGHT TO WATER AND SANITATION: RECENT DEVELOPMENTS

Until recently, it was the United Nations Committee on Economic, Social and Cultural Rights' General Comment No. 15 that provided the strongest legal foundation for the human right to water because it explicitly declared that "[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses"¹²⁹ and mandated that States adopt positive measures to implement the right.¹³⁰ More recent developments, however, suggest that General Comment No. 15 was only a milestone, a herald of the dawning recognition of the human right to water and sanitation.

¹²⁶ ECOSOC, Comm. on Econ., Soc., and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 22nd Sess., Apr. 25–May 12 2000, ¶¶ 4, 11, U.N. Doc E/C.12/2000/4 (Aug. 11 2000) (interpreting ICESCR Article 12 right to health to encompass "access to safe and potable water.").

¹²⁷ For example, the right to water has been recognized at the fourteenth summit of the Non-Aligned Movement, the first Asia-Pacific Water Summit, the African Charter on the Rights and Welfare of the Child, the third South Asian Conference on Sanitation, and the European Charter on Water Resources. *International Declarations and Recommendations on Water and Sanitation*, THE BLUE PLANET PROJECT, <http://www.blueplanetproject.net/RightToWater/Declarations.pdf> (last visited Feb. 23, 2013); *The Right to Water*, WORLD WATER COUNCIL, http://www.worldwatercouncil.org/fileadmin/world_water_council/documents_old/Library/Publications_and_reports/Right_to_Water__UK_final.pdf (last visited Feb. 23, 2013).

¹²⁸ For example, the right to water has been recognized in Belgium, Ecuador, and India. *See infra* note 284 and accompanying text.

¹²⁹ General Comment No. 15, *supra* note 11, ¶ 2.

¹³⁰ *Id.* ¶ 25.

Indeed, in 2002, the United Nations hosted the World Summit on Sustainable Development (also known as the Johannesburg Summit¹³¹), adopting the Johannesburg Declaration on Sustainable Development¹³² and the Johannesburg Plan of Implementation.¹³³ Most notably, these documents detailed aspirations of international cooperation, international sharing of “technologies for safe water, sanitation and waste management,”¹³⁴ and, by 2015, decreasing the percentage of people lacking access to basic sanitation by half.¹³⁵ The next year, the United Nations declared 2003 the “International Year of Freshwater”¹³⁶ in an effort to raise awareness about the global need for water.

A few months later, in 2003, the United Nations High Level Committee on Programmes established UN-Water¹³⁷ to aid in the realization of water-related Johannesburg Declaration objectives and UN Millennium Development Goals.¹³⁸ The Millennium Development Goals, developed to operationalize the ideals embodied in the 2000 United Nations Millennium Declaration,¹³⁹ set specific poverty reduction targets focused primarily on bolstering human capital, improving infrastructure, and increasing social, economic and political rights.¹⁴⁰ Most relevantly, these goals include halting unsustainable exploitation of water resources in favor of developing efficient water management plans by 2005 and halving the percentage of people lacking access to water and basic sanitation by 2015.¹⁴¹ UN-Water is a cooperative, interagency mechanism

¹³¹ Press Release, Johannesburg Summit, Sustainable Development Summit Concludes in Johannesburg: UN Secretary-General Kofi Annan Says It’s Just the Beginning (Sept. 4, 2002), available at www.un.org/events/wssd/pressreleases/finalrelease.pdf.

¹³² World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, at 1, U.N. Doc A/CONF/199/20 (Sept. 4, 2002).

¹³³ *Id.* at 5.

¹³⁴ *Id.* ¶ 54(1).

¹³⁵ *Id.* ¶ 8.

¹³⁶ Hardberger, *supra* note 16, at 346.

¹³⁷ *A Guide to UN Water*, UN WATER, http://www.unwater.org/downloads/brochure_EN_Web_2012.pdf (last updated Feb. 2012).

¹³⁸ United Nations Millennium Declaration, *supra* note 124.

¹³⁹ Dep’t of Econ. and Soc. Affairs of the United Nations Secretariat, *The Millennium Development Goals Report 2006*, at 26 (2006), available at <http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2006/MDGReport2006.pdf>.

¹⁴⁰ NAILA KABEER, INST. OF DEV. STUDIES, CAN THE MDGS PROVIDE A PATHWAY TO SOCIAL JUSTICE? THE CHALLENGE OF INTERSECTING INEQUALITIES 5, 50, 51 (2010), available at <http://www.undp.org.tr/publicationsDocuments/MDGs%20and%20Inequalities%20Final%20Report.pdf>.

¹⁴¹ United Nations Millennium Declaration, *supra* note 124, ¶ 19 (resolving “[t]o halve, by the year 2015 . . . the proportion of people who are unable to reach or to afford safe drinking water.”).

designed to coordinate the water-related efforts of UN agencies and international water organizations¹⁴² “so as to maximize systemwide coordinated action and coherence as well as effectiveness of the support provided to Member States”¹⁴³

UN Water coordinates the United Nations World Water Development Reports,¹⁴⁴ which it publishes every three years in conjunction with the World Water Forum.¹⁴⁵ These reports serve as a guide for the implementation of water-related policies. Specifically, the reports monitor the status of global water resources, track international progress in meeting Johannesburg Declaration objectives and UN Millennium Development Goals, and establish best practices for water management.¹⁴⁶ Also of interest is UN-Water’s coordination of the Water for Life Decade, 2005–2015,¹⁴⁷ a project that seeks “to promote efforts to fulfill international commitments made on water and water-related issues by 2015”¹⁴⁸ Through the Water for Life Decade project, UN-Water Programmes have assessed States’ water problems around the world and recommended remedial measures, and have awarded the most successful programs the “Water for Life Best Practices Award.”¹⁴⁹

Because of the efforts of UN-Water agencies, intergovernmental and nongovernmental organizations, and citizen movements, water has come to be increasingly at the forefront of global politics and international human rights discourse. In 2006, the United Nations Human Rights Council passed Decision 2/104 Human Rights and Access to

¹⁴² *UN-Water Members and Partners*, UN-WATER, <http://www.unwater.org/members.html> (last visited Nov. 9, 2012).

¹⁴³ *Terms of Reference*, UN-WATER, II, <http://www.unwater.org/downloads/UNW-terms-of-reference.PDF> (last visited Nov. 9, 2012).

¹⁴⁴ *The United Nations World Water Development Report, WWDR*, UNITED NATIONS EDUC. SCIENTIFIC AND CULTURAL ORG. [hereinafter UNESCO], <http://www.unesco.org/water/wwap/wwdr/> (last visited Jan. 15, 2013).

¹⁴⁵ *See World Water Assessment Programme (WWAP)*, UNESCO, <http://www.unesco.org/new/en/natural-sciences/environment/water/wwap/about/> (last visited Feb. 23, 2013).

¹⁴⁶ UNESCO, *supra* note 144.

¹⁴⁷ *International Decade for Action ‘Water for Life’ 2005–2015*, UNITED NATIONS, <http://www.un.org/waterforlifedecade/index.html> (last visited Nov. 9, 2012).

¹⁴⁸ *International Decade for Action ‘Water for Life’ 2005–2015: Frequently Asked Questions*, UNITED NATIONS, <http://www.un.org/waterforlifedecade/faqs.html#2> (last visited Nov. 9, 2012).

¹⁴⁹ *UN-Water Activities*, UN-WATER, <http://www.unwater.org/programmes.html> (last visited Jan. 15, 2013); *‘Water for Life’ UN-Water Best Practices Award*, UNITED NATIONS, <http://www.un.org/waterforlifedecade/waterforlifeaward.shtml> (last visited Jan. 15, 2013).

Water.¹⁵⁰ In this resolution, the United Nations Human Rights Council noted the various foundations for the human right to water¹⁵¹ and formally requested that the United Nations High Commissioner for Human Rights conduct “a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.”¹⁵² In response, the United Nations High Commissioner for Human Rights released a 2007 report declaring that “it is now time to consider access to safe drinking water and sanitation as a human right, defined as the right to equal and non-discriminatory access to a sufficient amount of safe drinking water for personal and domestic uses . . . to sustain life and health.”¹⁵³ This report also sought to define the contours of the human right to water, highlighting unresolved issues of implementation and monitoring that were in need of further study.¹⁵⁴

To address some of the issues the United Nations High Commissioner for Human Rights raised in his 2007 report, the Human Rights Council passed Resolution 7/22 in March 2008.¹⁵⁵ This resolution acknowledged the need for further study and mandated the appointment of an independent expert on the issue of human rights obligations related

¹⁵⁰ Human Rights Council Decision 2/104, Human Rights and Access to Water, 31st meeting (Nov. 27, 2006), available at http://www2.ohchr.org/english/issues/water/docs/HRC_decision2-104.pdf.

¹⁵¹ *Id.* Decision 2/104 specifically references the Universal Declaration of Human Rights, the ICESR, the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, General Comment No. 15 (2002), the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights draft guidelines on the right to water and sanitation (E/CN.4/Sub.2/2005/25), the Mar del Plata Action Plan, Agenda 21 of the United Nations Conference on Environment and Development of 1992, the Programme of Action of the International Conference on Population and Development of 1994, the International Decade for Action “Water for Life” 2005-2015, General Assembly Resolution 54/175 (1999) on the right to development, and the Millennium Development Goals.

¹⁵² *Id.*

¹⁵³ United Nations High Commissioner for Human Rights and the Secretary-General, *Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation Under International Human Rights Instruments*, ¶ 66, U.N. Doc. A/HRC/6/3 (Aug. 16 2007, available at <http://www2.ohchr.org/english/bodies/hrcouncil/6session/reports.htm> [hereinafter OHCHR Report 6/3].

¹⁵⁴ *Id.* ¶¶ 13–17, 43, ¶¶ 44–64.

¹⁵⁵ Human Rights Council, Res. 7/22, Human Rights and Access to Safe Drinking Water and Sanitation, 41st meeting (Mar. 28, 2008), available at http://ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf.

to access to safe drinking water and sanitation.¹⁵⁶ Specifically, this expert was “to identify, promote and exchange views on best practices related to access to safe drinking water and sanitation,”¹⁵⁷ to undertake a study for “further clarification of the content of human rights obligations, including non-discrimination obligations, in relation to access to safe drinking water and sanitation,”¹⁵⁸ to make recommendations that may aid in the “realization of the Millennium Development Goals, in particular of Goal 7,”¹⁵⁹ to identify “gender-specific vulnerabilities,”¹⁶⁰ to coordinate efforts with other UN bodies and take into account various stakeholders’ views,¹⁶¹ and to submit a report to the Human Rights Council at its tenth session.¹⁶² In September 2008, six months after the passage of Human Rights Council Resolution 7/22,¹⁶³ the United Nations Human Rights Council appointed Catarina de Albuquerque to the position of Independent Expert.¹⁶⁴

Catarina de Albuquerque began her mandate as Independent Expert in November 2008, taking the issues identified in the 2007 UN High Commissioner for Human Rights Report as her starting mandate.¹⁶⁵ These issues include:

- 1.. the normative content of human rights obligations in relation to access to sanitation;
- 2.. the human rights obligations attached to the elaboration of a national strategy on water and sanitation;
- 3.. the regulation of the private sector in the context of private provision of safe drinking water and sanitation;
- 4.. criteria to protect the right to safe drinking water

¹⁵⁶ *Id.* ¶ 2.

¹⁵⁷ *Id.* ¶ 2(a).

¹⁵⁸ *Id.* ¶ 2(b).

¹⁵⁹ *Id.* ¶ 2(c); *Millennium Development Goals, Eight Goals for 2015*, UNITED NATIONS DEV. PROGRAMME, <http://www.undp.org/mdg/goal7.shtml> (last visited Nov. 9, 2012).

¹⁶⁰ H.R.C. Res. 7/22, *supra* note 155, ¶ 2(d).

¹⁶¹ *Id.* ¶ 2(e).

¹⁶² *Id.* ¶ 2(f). See <http://www2.ohchr.org/english/bodies/hrcouncil/10session/> for more information about the tenth session of the Human Rights Council, which ran from March 2–27, 2009.

¹⁶³ H.R.C. Res. 7/22, *supra* note 155.

¹⁶⁴ *Ms. Catarina de Albuquerque, Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/CatarinaDeAlbuquerque.aspx> (last visited Jan. 16, 2013).

¹⁶⁵ *Id.*; *UN Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation Overview of the Mandate*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <http://www2.ohchr.org/english/issues/water/lexpert/overview.htm>, available at http://listserv.nethelps.com/main/wa.exe?A2=ind1004a&L=wunrn_listserve&F=PP&P=2480 (last visited Jan. 16, 2013).

and sanitation in case of disconnection; and 5.. the specific obligations of local authorities.¹⁶⁶

Pursuant to Human Rights Council Resolution 7/22,¹⁶⁷ de Albuquerque submitted her first report in February 2009, affirming the conviction that clarification of the content of the human right to water and sanitation demands substantial focused research.¹⁶⁸ To facilitate this research, de Albuquerque elected to adopt a different focus of study each year.¹⁶⁹

The Independent Expert chose access to sanitation as the 2009 focus, noting that “lack of access to sanitation is at the origin of the non-realization of basic human rights”¹⁷⁰ but “[yet] it remains the most neglected and most off-track of the Millennium Development Goal (MDG) targets.”¹⁷¹ De Albuquerque proceeded to host consultations with experts and the public¹⁷² and made site visits to Costa Rica¹⁷³ and Egypt¹⁷⁴ to inform her work regarding access to sanitation. In July 2009, she released a second official statement, detailing the interrelationship between the right to sanitation and other rights and advocating for the

¹⁶⁶ *Id.*

¹⁶⁷ H.R.C. Res. 7/22, *supra* note 155, ¶ 2(f).

¹⁶⁸ Independent Expert 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*, ¶ 7(b), Gen. Assembly, U.N. Doc. A/HRC/10/6 (Feb. 25, 2009) (by Catarina de Albuquerque), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.6.pdf>.

¹⁶⁹ *Id.* ¶ 21.

¹⁷⁰ *Id.* ¶¶ 30–31.

¹⁷¹ *Id.* ¶ 26.

¹⁷² *See Good Practices*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/GoodPractices.aspx> (last visited Dec. 31, 2012).

¹⁷³ Independent Expert 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 Mission to Costa Rica*, Gen. Assembly, U.N. Doc. A/HRC/12/24/Add.1 (June 23, 2009) (by Catarina de Albuquerque), *available at* <http://www.unhcr.org/refworld/country,,,MISSION,CRI,,4a9d1be90,0.html>.

¹⁷⁴ Independent Expert 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 Draft Preliminary Note on the Mission to Egypt*, Gen. Assembly, U.N. Doc. A/HRC/12/24/Add.2 (Aug. 19, 2009) (by Catarina de Albuquerque), *available at* <http://www.arabhumanrights.org/publications/countries/egypt/rapporteurs/a-hrc-12-24-add2-2009e.pdf>.

recognition of the right to sanitation as a distinct, stand-alone human right.¹⁷⁵

In 2010, de Albuquerque shifted her focus to a study of the role and obligations of non-State providers of water and sanitation service.¹⁷⁶ In her 2010 report to the UN Human Rights Council, she elucidated the three primary challenges to States and non-State providers regarding the human right to water and sanitation: decision-making, operation of services, and accountability and enforcement.¹⁷⁷ The report emphasizes that a State is bound to respect, protect, and fulfill the human right to water and sanitation and “cannot exempt itself from its human rights obligations by involving non-State actors in service provision. . . . [T]he State remains the primary duty-bearer for the realization of human rights.”¹⁷⁸ The report goes on to note that, while primary responsibility rests with the State, international human rights law obliges non-State service providers to respect the human right to water and sanitation.¹⁷⁹ The report drew upon the 2009 report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to assert that non-State service providers have a positive duty to exercise due diligence to identify and prevent negative human rights impacts that their actions may cause.¹⁸⁰

One month after the release of the Independent Expert’s 2010 Report, on July 28, 2010, the United Nations General Assembly voted to adopt a resolution recognizing the human right to access water and sanitation services.¹⁸¹ Resolution 64/292 formally acknowledges that the realization of all human rights is dependent upon “equitable access to safe and clean drinking water and sanitation”¹⁸² The resolution, calling for “States and international organizations to provide financial resources, capacity-building and technology transfer, through

¹⁷⁵ See generally H.R.C. U.N. Doc. A/HRC/12/24, *supra* note 16.

¹⁷⁶ Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, 1, Gen. Assembly, U.N. Doc. A/HRC/15/31 (June 29, 2010) (by Catarina de Albuquerque), available at <http://www2.ohchr.org/english/issues/water/ixpert/docs/A-HRC-15-31-AEV.pdf> [hereinafter de Albuquerque Report 15/31].

¹⁷⁷ *Id.* at 1.

¹⁷⁸ *Id.* ¶¶ 18, 19.

¹⁷⁹ *Id.* ¶¶ 22, 23.

¹⁸⁰ *Id.* ¶ 26 (quoting U.N. Doc. A/HRC/11/13 ¶ 59).

¹⁸¹ G.A. Res. 64/292, *supra* note 77, ¶ 1.

¹⁸² *Id.* at pmb. para. 5.

international assistance and cooperation . . . [in order] to provide safe, clean, accessible and affordable drinking water and sanitation for all,” passed with a vote of 122 in favor, none against, and 41 abstentions.¹⁸³

The United States was among the abstaining parties and argued that the resolution was premature and potentially detrimental to the work already underway to clarify the contours of the right to water and sanitation.¹⁸⁴ The United States delegate instead advocated for a vote that would simply uphold the work of the Human Rights Council and Independent Expert, arguing that the international community had not yet fully considered the legal implications of a declared right to water and sanitation and that the resolution framed the right in a way that existing international law did not support.¹⁸⁵ Despite these concerns, de Albuquerque “[heralds Resolution 64/292] as a powerful symbolic gesture.”¹⁸⁶ Following suit in September 2010, the United Nations Human Rights Council affirmed the decision of the General Assembly by adopting Resolution 15/9.¹⁸⁷ The resolution confirmed that the human right to water and sanitation is part of existing international human rights law as a derivative right of “the right to an adequate standard of living and . . . the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”¹⁸⁸ Of the resolution, de Albuquerque said “this means that for the UN, the right to water and sanitation is contained in existing human rights treaties and is therefore legally binding.”¹⁸⁹

The Human Rights Council reinforced the human right to water and sanitation by calling upon States “to achieve progressively the full realization of human rights obligations related to access to safe drinking

¹⁸³ *Id.* ¶ 2; Press Release, United Nations Gen. Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None Against, 41 Abstentions, GA/10967 (July 28, 2010), available at <http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>.

¹⁸⁴ Press Release, United Nations Gen. Assembly, *supra* note 183, para. 4.

¹⁸⁵ *Id.*

¹⁸⁶ Kate Steger, UN Resolution Declares Water a Human Right but Leaves Implications Vague, PULITZER CTR. ON CRISIS REPORTING (Aug. 5, 2010), <http://pulitzercenter.org/blog/news-points/un-resolution-declares-water-human-right-leaves-implications-vague>.

¹⁸⁷ Human Rights Council Resolution 15/9, Human Rights and Access to Safe Drinking Water and Sanitation, 15th Sess., Oct. 6, 2010, A/HRC/RES/15/9 (Sept. 30, 2010), available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/15/9.

¹⁸⁸ *Id.* ¶ 3.

¹⁸⁹ Press Release, Office of the High Commissioner on Human Rights, A Landmark Decision To Make the Right to Water and Sanitation Legally Binding (Oct. 6, 2010), available at <http://www.ohchr.org/EN/NewsEvents/Pages/RightToWaterAndSanitation.aspx>.

water and sanitation”¹⁹⁰ The resolution proceeds to list other State responsibilities regarding the human right to water and sanitation, which include ensuring transparency in the planning and implementation of water and sanitation services;¹⁹¹ respecting principles of equality and nondiscrimination;¹⁹² integrating human rights into service provision impact assessments;¹⁹³ adopting public regulatory frameworks to ensure that service provision satisfies State human rights obligations;¹⁹⁴ providing accountability mechanisms that may effectively remedy human rights violations;¹⁹⁵ and ensuring that non-State service providers likewise fulfill their human rights obligations.¹⁹⁶ This detailing of State responsibilities is significant because it adds context and force to Resolution 64/292 and the general recognition of the human right to water and sanitation. Indeed, Resolution 15/9 legally binds States to take specific positive actions to respect, protect, and fulfill the human right to water and sanitation.¹⁹⁷ “This landmark decision has the potential to change the lives of the billions of human beings who still lack access to water and sanitation,”¹⁹⁸ says de Albuquerque.

IV. THE CONTOURS OF THE HUMAN RIGHT TO WATER AND SANITATION

In passing Resolution 15/9, the international community has recognized that the human right to water and sanitation imputes a legally binding duty to protect and implement the right.¹⁹⁹ While the emergent international recognition of the right to water and sanitation is noteworthy, the question remains as to the precise contours and content of that right.

The first international legal instrument addressing this question, the Mar del Plata Action Plan, states that all people “have the right to

¹⁹⁰ H.R.C. Res. 15/9, *supra* note 187, ¶ 8(a).

¹⁹¹ *Id.* ¶ 8(b).

¹⁹² *Id.* ¶ 8(c).

¹⁹³ *Id.* ¶ 8(d).

¹⁹⁴ *Id.* ¶ 8(e).

¹⁹⁵ *Id.* ¶ 8(f).

¹⁹⁶ *Id.* § 9.

¹⁹⁷ See Press Release, United Nations News Ctr., *Right to Water and Sanitation Is Legally Binding, Affirms Key UN Body* (Oct. 1, 2010), available at <http://www.un.org/apps/news/story.asp?NewsID=36308&Cr=water&Cr1>.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

have access to drinking water in quantities and of a quality equal to their basic needs.”²⁰⁰ Other sources recognizing a similar right to water sufficient to satisfy basic needs include Agenda 21,²⁰¹ as adopted at the United Nations Conference on Environment and Development;²⁰² the New Delhi Statement;²⁰³ and the UN Convention on the Law of the Non-Navigational Uses of International Watercourses.²⁰⁴

In 2002, the United Nations Committee on Economic, Social and Cultural Rights sought to clarify the right to water in General Comment No. 15, which provides:

The 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.²⁰⁵

General Comment No. 15 further explains that water is necessary to the full satisfaction of a number of related ICESCR²⁰⁶ human rights, such as the right to adequate food, the right to health, the right to work, and the right to take part in cultural life.²⁰⁷ While General Comment No. 15 advocates for a broad concept of protected water rights, it treats the right to water for personal and domestic uses as of paramount importance.²⁰⁸ To clarify further the meaning of the human right to water, General Comment No. 15 briefly addresses issues of quantity, quality,

²⁰⁰ 1 UNITED NATIONS WATER CONFERENCE, WATER DEVELOPMENT, SUPPLY AND MANAGEMENT 319 (Asit K. Biswas ed., 1978).

²⁰¹ See generally United Nations Conference on Env’t & Dev., Earth Summit Agenda 21 the United Nations Programme of Action from Rio, U.N. Doc A/CONF.151/26/Rev.1 (VOL. II), U.N. Sales No. E.93.1.11 (1994).

²⁰² *Id.* at 3. The United Nations Conference on Environment and Development was held in Rio de Janeiro, Brazil in June 1992. *Rio Declaration on Environment and Development*, INFO. HABITAT, <http://habitat.igc.org/> (last visited Feb. 1, 2013). The Rio Declaration on Environment and Development was adopted at the same conference. *Id.*

²⁰³ ECOSOC, Letter Dated 10 October 1990 from the Permanent Representative of India to the United Nations Addressed to the Secretary-General, 45th Sess., 2, Annex, U.N. Doc A/C.2/45/3 (Oct. 11, 1990), available at <http://www.ielrc.org/content/e9005.pdf>.

²⁰⁴ Convention on the Law of the Non-Navigational Uses of International Watercourses, art. 10, May 21, 1997, 36 I.L.M. 700 (governing the use of international watercourses, Article 10 gives priority “to the requirements of vital human needs.”).

²⁰⁵ General Comment No. 15, *supra* note 11, ¶ 2.

²⁰⁶ G.A. Res. 2200A (XXI), *supra* note 49.

²⁰⁷ General Comment No. 15, *supra* note 11, ¶ 6.

²⁰⁸ *Id.* ¶¶ 6, 11.

and access.²⁰⁹ General Comment No. 15 advocates adherence to World Health Organization standards regarding quantity, while water quality should be that which does not pose a threat to human health and is of acceptable color, odor, and taste.²¹⁰ Finally, General Comment No. 15 takes a broad view of access, analyzing in terms of physical accessibility, economic accessibility, non-discrimination, and information accessibility.²¹¹

Nevertheless, General Comment No. 15 did not fully delineate the human right to water and sanitation. For example, commentators criticize General Comment No. 15 for failing to adequately define the specific requirements needed to discharge legal obligations under the human right to water and sanitation.²¹² In 2006, seeking resolution of this and other definitional issues regarding the right to water and sanitation, the Human Rights Council requested that the United Nations High Commissioner for Human Rights conduct “a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments”²¹³

In his 2007 report, the High Commissioner sought to clarify the scope and content of the human right to water and sanitation, discussing in turn the meaning and scope of safe drinking water, sanitation, and access.²¹⁴ The term “safe drinking water,” he found, has two primary components: sufficient quantity and water quality.²¹⁵ In regards to both water quantity and water quality, the High Commissioner suggested that the publications of the World Health Organization (“WHO”)²¹⁶ might serve as an international reference point.²¹⁷ Such adherence to WHO

²⁰⁹ *Id.* ¶ 12.

²¹⁰ *Id.* ¶¶ 12(a), (b).

²¹¹ *Id.* ¶ 12(c).

²¹² Erik B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 *ECOLOGY L.Q.* 957, 972 (2004); Vrinda Narain, *Water as a Fundamental Right: A Perspective from India*, 34 *VT. L. REV.* 917, 919–20 (2010).

²¹³ H.R.C. Decision 2/104, *supra* note 151.

²¹⁴ OHCHR Report 6/3, *supra* note 153, ¶¶ 13–29.

²¹⁵ *Id.* ¶¶ 5(c), (d).

²¹⁶ *See, e.g.*, WORLD HEALTH ORG. [hereinafter WHO], WHO GUIDELINES FOR DRINKING-WATER QUALITY (4th ed. 2011), available at http://whqlibdoc.who.int/publications/2011/9789241548151_eng.pdf; MARGRET VIDAR & MOHAMED ALI MEKOUAR, FOOD & AGRIC. ORG., WORLD HEALTH ORG., WATER, HEALTH AND HUMAN RIGHTS (2002), available at http://www.who.int/water_sanitation_health/humanrights/en/.

²¹⁷ OHCHR Report 6/3, *supra* note 153, ¶¶ 15, 17.

guidelines could indeed prove significant because WHO, a health-specialized United Nations agency, operates on a mandate that calls for “the attainment by all peoples of the highest possible level of health.”²¹⁸ Regarding sanitation, the High Commissioner noted that “the contour of the human rights framework for sanitation remains imprecise”²¹⁹ but suggested that sanitation facilities should be accessible, physically secure, of sufficient quality to protect human health, and mindful of related rights such as that to privacy, human dignity, and personal integrity.²²⁰

Finally, in seeking to determine the meaning and scope of access, the report discussed the three aspects of equitable access, physical access, and financial access. Satisfaction of equitable access demands that “no population group is excluded and that priority in allocating limited public resources is given to those who do not have access or who face discrimination in accessing safe drinking water and sanitation.”²²¹ Regarding physical access, the High Commissioner suggested that individuals must have secure access to sanitation facilities such that their physical security is not in jeopardy when accessing the facilities and also that a sufficient quantity of safe drinking water must be available in “reasonable distance” to satisfy the right to water.²²² Lastly, ensuring access requires that water be affordable for all: “[t]he human rights framework does not imply, therefore, a right to free water and sanitation but highlights the fact that nobody should be deprived of access because of an inability to pay.”²²³ Throughout the report, the High Commissioner also gave due deference to States, observing that States have the primary authority to determine what quantity is a reasonable minimum, how to ensure affordability of water, and the like.

Taking up her mandate, de Albuquerque has sought to “further clarif[y] . . . the content of human rights obligations, including non-discrimination obligations, in relation to access to safe drinking water and sanitation.”²²⁴ She has made site visits to numerous countries²²⁵ and

²¹⁸ CONSTITUTION OF THE WORLD HEALTH ORGANIZATION, Ch. 1, art. 1, *available at* http://whqlibdoc.who.int/hist/official_records/constitution.pdf.

²¹⁹ OHCHR Report 6/3, *supra* note 153, ¶ 19.

²²⁰ *Id.* ¶¶ 18, 20, 21.

²²¹ *Id.* ¶ 24.

²²² *Id.* ¶¶ 25, 26 (noting that WHO publications can provide useful guidance in the determination of what constitutes “reasonable distance”).

²²³ *Id.* ¶ 28.

²²⁴ H.R.C. Res. 7/22, *supra* note 155, ¶2(b).

released official reports that outline the human rights obligations related to access to sanitation.²²⁶ In her 2009 report on the human rights obligations related to access to sanitation,²²⁷ de Albuquerque declared:

[S]anitation 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 dignity²²⁸

More specifically, she outlined that States must refrain from acting to deny existing access; manage human excreta so that it does not negatively impact other human rights; establish a regulatory framework to “[e]nsure that non-State actors act in accordance with human rights obligations related to sanitation . . .”; use the maximum of available resources to expeditiously and effectively ensure access to sanitation; implement hygiene education and otherwise create “an enabling environment for people to realize their rights related to sanitation”; justify any retrogressive measures affecting access to sanitation; adopt “a national sanitation strategy and plan of action”; and provide effective legal remedies for victims of violations of the human right to sanitation.²²⁹ The report further mandates that States implement the right to sanitation non-discriminatorily²³⁰ and allow for full public awareness and participation.²³¹

The final and most recent international legal instrument that significantly adds dimension to the contours of the human right to water

²²⁵ Country Visits, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/CountryVisits.aspx> (last visited Nov. 6, 2012) (providing press releases and reports on each of the country visits, which thus far include Kiribati, Tuvalu, Senegal, Namibia, Uruguay, Costa Rica, Egypt, Bangladesh, Slovenia, Japan, and the United States of America).

²²⁶ de Albuquerque Report 12/24, *supra* note 16; de Albuquerque Report 15/31, *supra* note 176; Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, U.N. General Assembly, U.N. DOC. A/65/254 (Aug. 6, 2010) (by Catarina de Albuquerque).

²²⁷ de Albuquerque Report 12/24, *supra* note 16.

²²⁸ *Id.* ¶ 63 (footnotes omitted).

²²⁹ *Id.* ¶ 64 (footnote omitted).

²³⁰ *Id.* ¶ 65.

²³¹ *Id.* ¶ 66.

and sanitation is Resolution 15/9, which the United Nations Human Rights Council Resolution adopted in September 2010.²³² This resolution confirmed that the human right to water and sanitation is binding as part of existing international human rights law²³³ and called upon States to take specific actions “to achieve progressively the full realization of human rights obligations related to access to safe drinking water and sanitation.”²³⁴ Essentially, this resolution adopted and made legally binding the obligations outlined in de Albuquerque’s 2009 report on the human rights obligations related to access to sanitation.²³⁵ As a result, under Resolution 15/9, States must ensure transparency in the planning and implementation of water and sanitation services,²³⁶ respect principles of equality and nondiscrimination,²³⁷ integrate human rights into service provision impact assessments,²³⁸ adopt public regulatory frameworks to ensure that service provision satisfies State human rights obligations,²³⁹ provide accountability mechanisms that may effectively remedy human rights violations,²⁴⁰ and ensure that non-State service providers likewise fulfill their human rights obligations.²⁴¹

This body of international human rights law makes clear that all people are entitled to access sufficient safe water and sanitation²⁴² and that States failing to implement that right may be in violation of international law.²⁴³ Nevertheless, what this right and these international obligations mean in practice remains somewhat unclear because there has not yet been any international case law on the matter.²⁴⁴ What is certain is that “rights are not a magical source of supply Recognizing a right to a good will not by itself make that good

²³² H.R.C. Res. 15/9, *supra* note 187 at 4.

²³³ *Id.* ¶ 3.

²³⁴ *Id.* ¶8(a).

²³⁵ Compare de Albuquerque Report 12/24, *supra* note 16, ¶¶ 65–66 (stating obligations for States regarding human rights obligations related to water and sanitation), with H.R.C. Res. 15/9, *supra* note 187, ¶¶ 8–9 (requiring states to implement and maintain the rights to water and sanitation).

²³⁶ H.R.C. Res. 15/9, *supra* note 187, ¶ 8(b).

²³⁷ *Id.* ¶ 8(c).

²³⁸ *Id.* ¶ 8(d).

²³⁹ *Id.* ¶ 8(e).

²⁴⁰ *Id.* ¶ 8(f).

²⁴¹ *Id.* ¶ 9(a).

²⁴² See WHO, *supra* note 216, at xv; VIDAR & MEKOUAR, *supra* note 216.

²⁴³ MCGRAW, *supra* note 88, at 41.

²⁴⁴ See Kiefer & Brölmann, *supra* note 89, at 207–08.

available . . . to all the right-holders.”²⁴⁵ The question, then, is how to enforce the human right to water and sanitation.

V. THE HUMAN RIGHT TO WATER AND SANITATION: ENFORCEMENT PROSPECTS

The enforcement of international human rights faces obstacles absent from the enforcement of domestic law, largely because of the nature of States and the international system.²⁴⁶ The power of the international system to force States to act or refrain from acting is limited because sovereign States possess the inherent right of self-determination.²⁴⁷ In practice, this right of self-determination means that even if a State has bound itself to comply with a particular convention, the international legal framework nevertheless often lacks the ability to formally enforce compliance.²⁴⁸ If a State lacks the political will to implement human rights, the international system is somewhat ineffectual.²⁴⁹ While international courts such as the International Court of Justice (“ICJ”) and the International Criminal Court (“ICC”) do have fairly substantial power, they present relatively limited potential as mechanisms for the enforcement of economic and social rights because the ICJ hears only contentious cases between States and the ICC deals primarily with situations characterized by extreme violence and intentional deprivation of life.²⁵⁰

Still, while international human rights law has traditionally relegated economic and social rights to a nonjusticiable status,²⁵¹ such

²⁴⁵ NICKEL, *supra* note 53, at 127.

²⁴⁶ See Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1398, 1409 (1999), available at <http://www.law.indiana.edu/ilj/volumes/v74/no4/koh.pdf>.

²⁴⁷ See *id.* at 1402–03.

²⁴⁸ Professor Koh argues that unlike domestic laws, international laws are enforced through a transnational legal process. *Id.* at 1399. Under this process, global norms of international human rights law are debated on the international stage, interpreted, and ultimately internalized into domestic legal systems. *Id.* Professor Koh asserts that it is primarily this domestic internalization of international legal norms that leads to true compliance with international law rather than any external coercion. *Id.*

²⁴⁹ See *id.*

²⁵⁰ *How the Court Works*, INT’L CT. OF JUST., <http://www.icj-cij.org/court/index.php?p1=1&p2=6> (last visited Feb. 1, 2013); *Basis of the Court’s Jurisdiction*, INT’L CT. OF JUST., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2> (last visited Feb. 1, 2013); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, arts. 5–8, U.N. Doc A/CONF.183/9 (July 17, 1998), available at http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm.

²⁵¹ *What Price for the Priceless?*, *supra* note 23, at 1075.

rights are not entirely lacking enforcement mechanisms. Potential mechanisms for the enforcement of these economic and social rights, including the right to water and sanitation, include treaty bodies, the UN Human Rights Council review and complaint procedures, regional human rights mechanisms, National Human Rights Institutions, domestic law, and soft power. Each of these enforcement mechanisms has the potential to aid in the realization of the human right to water and sanitation for all, but each also has significant limitations.

Treaty bodies monitor several United Nations treaties, including the ICCPR,²⁵² the ICESCR,²⁵³ the Convention on the Rights of the Child,²⁵⁴ the Convention on the Elimination of All Forms of Discrimination Against Women,²⁵⁵ and the International Convention on the Rights of Persons with Disabilities.²⁵⁶ These treaty bodies issue General Comments interpreting the treaties they oversee and are empowered to review States' required periodic human rights reports and recommend State measures to implement human rights.²⁵⁷ Some treaty bodies have the additional power to hear individual and interstate complaints of human rights violations, or even to conduct independent inquiries.²⁵⁸ Nevertheless, treaty bodies are rarely effective as an accountability mechanism because States often submit superficial reports

²⁵² The International Covenant on Civil and Political Rights is monitored by the Human Rights Committee. *Human Rights Treaty Bodies: Monitoring the Core International Human Rights Treaties*, OFF. U.N. HIGH COMM'R FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/treaty/index.htm> (last visited Nov. 10, 2012).

²⁵³ The International Covenant on Economic, Social and Cultural Rights is monitored by the Committee on Economic, Social and Cultural Rights. *Id.*

²⁵⁴ The Convention on the Rights of the Child is monitored by the Committee on the Rights of the Child. *Id.*

²⁵⁵ The Convention on the Elimination of All Forms of Discrimination Against Women is monitored by the Committee on the Elimination of Discrimination Against Women. *Id.*

²⁵⁶ The International Convention on the Rights of Persons with Disabilities is monitored by the Committee on the Rights of Persons with Disabilities. *Id.* Other monitored treaties include the International Convention on All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the International Convention for the Protection of All Persons from Enforced Disappearance. *See id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*; *Human Rights Bodies - Complaints Procedures: Complaining About Human Rights Violations*, OFF. U.N. HIGH COMM'R FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/petitions/index.htm> (last visited Nov. 10, 2012).

or sometimes even fail to comply entirely, and the complaints procedures are severely backlogged.²⁵⁹

The treaty body most relevant to the right to water and sanitation is the Committee on Economic, Social and Cultural Rights (“CESCR”), which monitors State implementation of the International Covenant on Economic, Social and Cultural Rights.²⁶⁰ The CESCR has already significantly contributed to the realization of the human right to water and sanitation by issuing General Comment No. 15, affirming that the ICESCR rights to an adequate standard of living and health include the derivative right to water and sanitation.²⁶¹ As of 2008, the CESCR is also authorized to hear individual complaints.²⁶² While this CESCR complaint mechanism may prove promising for peoples seeking to assert their right to water and sanitation, there is currently no published data on the frequency of use or overall success of this mechanism.

Human Rights Council review and complaints procedures similarly present opportunity for the enforcement of human rights. The United Nations General Assembly created the Human Rights Council in 2006²⁶³ to replace the United Nations Commission on Human Rights, which was widely criticized for allowing States with poor human rights records to be members.²⁶⁴ Operating under stricter rules, forty-seven Human Rights Council Member States are elected to three-year terms by an absolute majority of the General Assembly and are subject to suspension if accused of systemic human rights violations.²⁶⁵ The Human Rights Council operates under a mandate to conduct universal periodic review of State human rights compliance, a program under which all UN member States’ records will eventually be reviewed.²⁶⁶ As of 2007, the Human Rights Council also provides a mechanism known as the 1503

²⁵⁹ See The Dublin Statement on the Process of Strengthening of the United Nations Human Rights Treaty Body System, OFF. U.N. HIGH COMM’R FOR HUM. RTS., ¶ 5 (Nov. 19, 2009), <http://www2.ohchr.org/english/bodies/HRTD/docs/DublinStatement.pdf>.

²⁶⁰ OFF. U.N. HIGH COMM’R FOR HUM. RTS., *supra* note 252.

²⁶¹ See General Comment No. 15, *supra* note 11, ¶ 1.

²⁶² *Committee on Economic, Social and Cultural Rights*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/cescr/index.htm> (last visited Nov. 10, 2012).

²⁶³ G.A. Res. 60/251, 2, U.S. Doc. A/RES/60/251 (Mar. 15, 2006).

²⁶⁴ *UN Creates New Human Rights Body*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/4810538.stm> (last updated Mar. 15, 2006).

²⁶⁵ *Id.*

²⁶⁶ G.A. Res. 60/251, *supra* note 263, ¶ 5(e).

Complaint Procedure.²⁶⁷ 1503 complaints must allege specific facts that “expose the existence of a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.”²⁶⁸ This mechanism can be a great tool for victims and nongovernmental organizations seeking to remedy human rights violations, as the Human Rights Council may decide to further investigate the human rights situation in accused States. However, no data is available on the frequency or success of use of this mechanism because “[the 1503 Complaint Procedure] retains its confidential nature, with a view to enhancing cooperation with the State concerned.”²⁶⁹ Also of note is the Human Rights Council’s Special Procedures, which include the establishment of thematic mandates, such as the 2008 mandate on access to safe drinking water and sanitation under which the position of Independent Expert on the issue of human rights obligations related to access to safe water and sanitation was established.²⁷⁰

There are also regional human rights mechanisms that operate to enforce regional human rights law, which generally overlaps with UN-proffered international human rights law. Examples of these regional human rights mechanisms include the Organization of American States (“OAS”),²⁷¹ the Asian Human Rights Commission,²⁷² and the European Court of Human Rights.²⁷³ The primary significance of regional monitoring and enforcement mechanisms is that States often consent to be bound by their holdings. For example, twenty-one Latin American States have agreed to the blanket jurisdiction of the OAS-based Inter-American Commission on Human Rights and Inter-American Court of

²⁶⁷ *United Nations Human Rights Council Complaint Procedure*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/chr/complaints.htm> (last visited Nov. 10, 2012) [hereinafter OHCHR Complaint Procedure].

²⁶⁸ *The Complaint Procedure*, CLAIMING HUM. RTS., http://www.claiminghumanrights.org/hrc_complaints.html (last visited Nov. 10, 2012).

²⁶⁹ OHCHR Complaint Procedure, *supra* note 267.

²⁷⁰ *Special Procedures of the Human Rights Council*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx> (last visited Nov. 10, 2012); *Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx> (last visited Nov. 10, 2012).

²⁷¹ *See Who We Are*, ORG. AM. STS., http://www.oas.org/en/about/who_we_are.asp (last visited Nov. 10, 2012).

²⁷² *See Campaigns List*, ASIAN HUM. RTS. COMM’N, <http://www.humanrights.asia/campaigns#section-0> (last visited Nov. 10, 2012).

²⁷³ *The Court in Brief*, EUR. CT. OF HUM. RTS., http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Court_in_brief_ENG.pdf (last visited Jan. 17, 2013).

Human Rights, while several more have agreed to accept jurisdiction on a case by case basis.²⁷⁴

Of note regarding the right to water and sanitation is the Latin American Water Tribunal's disposition of a multitude of water-related cases—ranging from disputes about groundwater over-extraction to pollution to hydroelectric dam siting²⁷⁵—and the European Council on Environmental Law's issuance of a 2000 resolution on the right to water and a 2004 resolution on the right to drinking water in EU member states.²⁷⁶ While there have not yet been many cases in this regional framework addressing the human right to water and sanitation, there is much potential here. In particular, where States have agreed to be bound, aggrieved individuals and communities can assert their rights via these regional human rights mechanisms.²⁷⁷ Perhaps the biggest problem with relying on regional entities as a means to enforce the human right to water is the piecemeal, potentially inconsistent application of the right, as resolution of a particular dispute in favor of one community may still fail to guarantee the right even for the neighboring community.

National Human Rights Institutions (“NHRIs”) similarly represent potential for human rights implementation because of their purpose and prevalence. The mandate of NHRIs, as set forth by the Paris Principles, is to monitor human rights violations, confer with regional and international organizations, and act as an authority to advise States and educate and inform in the field of human rights.²⁷⁸ There are 110 NHRIs globally, many of which investigate citizen complaints of violations of existing national human rights law.²⁷⁹ Notably, the NHRIs’ “role in promoting and monitoring the effective implementation of

²⁷⁴ B-32: *American Convention on Human Rights, “Pact of San Jose, Costa Rica”*, INTER-AM. COMM’N ON HUM. RTS., <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited Nov. 4, 2012); ORG. OF AM. STATES, PETITION AND CASE SYSTEM INFORMATIONAL BROCHURE, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ¶ 14 (2010), available at http://www.oas.org/es/cidh/docs/folleto/CIDHFolleto_eng.pdf.

²⁷⁵ *Quiénes Somos*, TRIBUNAL LATINOAMERICANO DEL AGUA, <http://tragua.com/quienes-somos/> (last visited Jan. 17, 2013) (scroll over AUDENCIAS for additional case information).

²⁷⁶ Eur. Council on Env’tl. L., *The Right to Water*, 30 ENVTL. POL’Y & L. 265, 265 (2000); Int’l Council of Env’tl. Law, Written Statement Submitted by the International Council of Environmental Law, a Non-Governmental Organization in General Consultative Status, 2, U.N. Doc E/CN.4.Sub.2/2003/NGO/2 (July 12, 2004).

²⁷⁷ See Petrova, *supra* note 28, at 611.

²⁷⁸ MORTEN KJÆRUM, DANISH INST. FOR HUMAN RIGHTS, NATIONAL HUMAN RIGHTS INSTITUTIONS: IMPLEMENTING HUMAN RIGHTS 6–7 (2003).

²⁷⁹ OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, NATIONAL HUMAN RIGHTS INSTITUTIONS, 8, 13 (2010), available at http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf.

international human rights standards at the national level... is increasingly recognized by the international community.”²⁸⁰

Nevertheless, while NHRIs could greatly help in making the right to water and sanitation real for all, their power has been limited because most affected individuals and communities are not aware of their existence.²⁸¹ NHRIs could be of greater value if the institutions themselves or the relevant States supported public education campaigns to educate people about human rights and the complaint procedures.²⁸²

Domestic incorporation of international human rights law is perhaps the best avenue for enforcement of human rights, as it commits States to compliance and provides opportunities for redress in case of violation.²⁸³ To date, there are essentially two methods for incorporating the international human right to water and sanitation into domestic law: the South African model of explicit constitutional recognition of the right, and the Indian model of implicit recognition of the right as drawn from the constitutional right to life.²⁸⁴

South Africa explicitly recognized the right to water in its 1996 Constitution,²⁸⁵ which states that “[e]veryone has the right to... sufficient food and water” and mandates that the State take reasonable measures “within its available resources to achieve the progressive realisation” of that right.²⁸⁶ This constitutional recognition of the right to water has been tested in South African courts, with communities often

²⁸⁰ *OHCHR and NHRIs*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx> (last visited Nov. 10, 2012).

²⁸¹ See INT’L COUNCIL ON HUMAN RIGHTS POL’Y, PERFORMANCE & LEGITIMACY: NATIONAL HUMAN RIGHTS INSTITUTIONS 18, 29, 83 (2nd ed. 2004), available at http://www.ichrp.org/files/reports/17/102_report_en.pdf.

²⁸² See *id.* at 79–81.

²⁸³ See *What Price for the Priceless?*, *supra* note 23, at 1072–73, 1077–78.

²⁸⁴ See *infra* notes 285–299 and accompanying discussion. Other States recognizing the right to water include: Algeria, Bangladesh, Belgium, Colombia, Democratic Republic of the Congo, Ecuador, Ethiopia, France, Gambia, India, Panama, South Africa, Uganda, Uruguay and others. *Right to Water*, FOOD & WATER WATCH, <http://www.foodandwaterwatch.org/water/world-water/right/> (last visited Feb. 1, 2013); *The Rights to Water and Sanitation in International Law*, RIGHTS TO WATER AND SANITATION, <http://www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/> (last visited Feb. 1, 2013). The Botswana case may be of particular interest as a test case for the right to water and sanitation after UN General Assembly Resolution 64/292 and Human Rights Council Resolution 15/9. For more information see *A Test Case for the Right to Water*, FOOD & WATER WATCH (Jan. 27, 2011), <http://www.foodandwaterwatch.org/blogs/testing-the-right-to-water>.

²⁸⁵ S. AFR. CONST., 1996.

²⁸⁶ *Id.* § 27.

securing favorable outcomes.²⁸⁷ For example, in 2002 the Constitutional Court of South Africa found that disconnection from an existing water supply for nonpayment could constitute a *prima facie* violation of the right to water.²⁸⁸ In that case, the Court held in favor of the rights-holders because the disconnection procedures were not fair and equitable, and found that water service could not be terminated for nonpayment “if the person proved to the satisfaction of the utility company that she was unable to pay.”²⁸⁹ Since South Africa constitutionally recognized the right to water, the country has seen great shifts in water policy and expansion of water infrastructure.²⁹⁰ Indeed, commentators credit this constitutional recognition for the extension of water access to roughly ten million South Africans in ten years.²⁹¹

On the other hand, Indian courts have implied the right to water and sanitation from the constitutional right to life. The India Constitution recognizes two categories of rights: “Fundamental Rights” such as the right to life and the right to equality, and “Directive Principles of State Policies” which include all economic, social, and cultural rights.²⁹² Of these two categories, only fundamental rights are directly justiciable.²⁹³ Indian courts have successfully circumvented the bar to justiciability of economic, social, and cultural rights (such as the right to water and sanitation) by broadly interpreting the Article 21 right to life.²⁹⁴ For example, in *F.K. Hussain v. Union of India*, the Kerala High Court held in favor of plaintiffs challenging a government plan to extract groundwater in amounts likely to cause long-term salinity increases, holding that:

²⁸⁷ Stephen C. McCaffrey & Kate J. Neville, *Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries*, 21 GEO. INT’L ENVTL. L. REV. 679, 679–80 (2009).

²⁸⁸ *Residents of Bon Vista Mansions v. S. Metro. Local Council* 2002 (6) BCLR 625 (W) at 631 (S. Afr.).

²⁸⁹ Hardberger, *supra* note 16, at 352.

²⁹⁰ Boyd, *supra* note 104.

²⁹¹ *Id.*

²⁹² See C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties*, 33 DENV. J. INT’L L. & POL’Y 195, 199, 214 (2005).

²⁹³ See *id.* at 214; see also *Justiciability of ESC Rights—the Indian Experience*, U. MINN. HUMAN RTS. RES. CTR., <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm> (last visited Feb. 01, 2013).

²⁹⁴ INDIA CONST. art. 21 (stating “No person shall be deprived of his life or personal liberty except according to procedure established by law.”); see *infra* notes 295–296 and accompanying discussion.

[T]he administrative agency cannot be permitted to function in such a manner as to make inroads, into the fundamental right under Art. 21. The right to life is much more than the right to animal existence and its attributes are many fold, as life itself. A prioritisation of human needs and a new value system has been recognised in these areas. The right to sweet water, and the right to free air, are attributes of the right to life, for, these are the basic elements which sustain life itself.²⁹⁵

Similarly, the Indian Supreme Court held in *A.P. Pollution Control Bd. II v. Prof. M.V. Nayudu* that Article 21 creates a state duty to provide for the right of access to drinking water.²⁹⁶

There are benefits and drawbacks to each of the two methods of incorporating the international human right to water into domestic law.²⁹⁷ Explicit constitutional recognition of the right to water can serve to better define the right, thereby providing a stronger basis for requiring positive government action to implement the right as opposed to merely respecting the right under a “negative rights” analysis that often corresponds with implicit recognition of the right.²⁹⁸ However, the South African explicit recognition model also has drawbacks. For one thing, the South African constitution does not explicitly mention a right to sanitation. This can be problematic in a system based on explicit rights wherein the courts have more limited power to interpret rights broadly to incorporate non-explicit derivative rights. Nevertheless, explicit recognition of the right to water is preferable because it provides for a more readily justiciable “positive, affirmative entitlement to water.”²⁹⁹

Really, the ideal manner of incorporating the international human right to water and sanitation into domestic law is explicit constitutional recognition of *both* the right to water and the right to sanitation, whether that be as independent rights or as one unified right. In making the right to water and sanitation part of domestic law, States can better manage their water resources, ensure that non-State actors respect the right, provide for distribution of water resources pursuant to principles of equality, and provide legal remedies for those lacking access. Additionally, this domestic recognition can provide a framework under which the international community and the United Nations in

²⁹⁵ F.K. Hussain v. Union of India, (1990) A.I.R. 321, 323 (Ker.).

²⁹⁶ A.P. Pollution Control Bd. II v. Prof. M.V. Nayudu, (2001) 2 S.C.C. 62, 69 (India).

²⁹⁷ *What Price for the Priceless?*, *supra* note 23, at 1084.

²⁹⁸ *See id.* at 1086–87.

²⁹⁹ *Id.* at 1085.

particular can better monitor the relative success of States' implementation of the right to water and sanitation.

Finally, soft power presents great potential as an informal mechanism for the enforcement of human rights obligations. States who fail to recognize or implement human rights can be motivated to do so where disapproving parties threaten widespread rebuke or even boycott.³⁰⁰ Soft power influence bears particularly strong potential in regard to the human right to water and sanitation because parties have access to not only the periodic State human rights reports but also the reports of the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation. This access to information arms interested parties with the power to “talk back” to States that fail to implement the right to water and sanitation. Communities that lack equitable access can organize to claim their right to sufficient safe water and basic sanitation and, with adequate information, the international community can act in solidarity to pressure the State to meet its obligations. In this way, soft power can serve as a means for developing inclusive national identities and policies, while also providing a framework for international support and technology sharing.

CONCLUSION

Lack of access to sufficient safe water and basic sanitation is a global crisis with no easy solution. The emergent human right to water and sanitation presents real potential for helping to remedy the problem, but the enforcement of human rights generally and the human right to water and sanitation in particular is problematic. The very nature of States and the international system limit the potential for formal enforcement of human rights, and the implementation of the right to water and sanitation can be further complicated by wanting financial and technological capacity, lacking political will, or ineffective domestic legal recognition. To achieve successful implementation of the human right to water and sanitation, the available enforcement mechanisms—treaty bodies, the UN Human Rights Council review and complaint procedures, regional human rights mechanisms, National Human Rights Institutions, domestic law, and soft power—must all be used to their full potential.

³⁰⁰ See NYE, *supra* note 56, at 5.

Treaty body review and complaint procedures should be streamlined and strengthened, supplemented by the UN Human Rights Council's universal periodic review and 1503 Complaint Procedure and increased National Human Rights Institution activity. To achieve this, the United Nations and nongovernmental organizations should endeavor to make the existence of these mechanisms more widely known to allow for improved citizen ability to claim entitlement.

States should support regional human rights mechanisms by actively participating in regional human rights discourse and committing to be bound by the decisions of said regional human rights mechanisms. Additionally, States should incorporate the international human right to water and sanitation into their domestic law—preferably by means of comprehensive and explicit constitutional recognition. In all cases, States should ensure that the implementation of the right to water and sanitation is undertaken in an equitable, inclusive, and community-oriented way. Finally, individuals, communities, nongovernmental organizations, and the international community generally should act to monitor implementation of human rights, coordinate efforts to transfer technology and other resources as necessary for the implementation of the human right to water and sanitation, and participate actively in the public sphere to “talk back” against States failing to satisfy their human rights obligations.