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## Recognition of human right to water under international law regime

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### Abstract

Water is essential for the survival of mankind and a most basic need. Consequently, the enjoyment of the human right to water is a prerequisite for the enjoyment of life itself. As far as the recognition of the human right to water is concerned – many international law treaties have give given express or implied recognition to this right. The existing international treaties do not foresee enforcement mechanisms, but de facto mostly belong to international soft law and do not create ant binding obligations. The present paper explores the various international law instruments dealing with this valuable right and suggests improvements in the existing legal regime for better protection of the human right to water.

**Keywords:** *Human Right, Water, General Comment 15, International Law*

### 1. Introduction

#### 1.1 The importance of human right to water

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. Thus, the human right to life doesn't have any sense without the right to water and other vital human rights that are a pre-condition for human life. Consequently, the enjoyment of the human right to water is a prerequisite for the enjoyment of other basic human rights such as the right to the highest attainable standard of health and the rights to adequate housing and adequate food etc. Existing international treaties dealing with the right to water provide state obligations to protect and fulfill the right to water to the maximum of its available resources, with a view to achieving progressively the full realization of the right by all appropriate means, including particularly the adoption of legislative measures. These treaties however do not create any binding obligations on member states, which has weakened the status of the right to water generally. The existing international treaties do not foresee enforcement mechanisms, but de facto mostly belong to international soft law.

#### 2. Recognition of the Right to Water under International Conventions

There have been both express and implied references to a right to water in public international law. The following analysis includes instruments such as the traditional human rights instruments, instruments arising in the humanitarian law arena, as well as environmental legal instruments, where the importance of water for human need is emphasized.

#### 2.1 Global instruments

##### 1. UN Charter

Although no express mention of water is made in the UN Charter, the contemporary challenges that we face as a global community elevate the central role played by water in the achievement of the Charter's goals. Art. 55 of the Charter promotes:

- a. Higher standards of living, full employment, and conditions of economic and social progress and development;
- b. Solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Given an uncertain climatic future, population increases, and ultimately water shortages, a right to water may be a necessary avenue to uphold many of these undertakings.

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## 2. Universal Declaration of Human Rights

Since the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly in 1948, the right to water has been recognized, explicitly or implicitly, as an essential part of the human rights discourse, particularly under the right to life. Art. 25 proclaims “[e]very one 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...” One may wonder why ‘water’ was not incorporated in this formulation; perhaps water was considered to be implicitly included. The term ‘including’ shows that the component elements listed were not meant to form an all-inclusive list, but serve as an indication of certain factors essential for an adequate standard of living. Satisfying the standards of the Declaration cannot be done without water of sufficient quantity and quality to maintain human health and well-being.

## 3. Geneva Conventions and Protocols

The Geneva Conventions and their Additional Protocols explicitly recognize a right to water, but such a right focuses on drinking water. A right to drinking water is found in:

- Arts. 20, 26, 29 and 46, Geneva Convention III (1949);
- Arts. 85, 89 and 127, Geneva Convention IV (1949);
- Arts. 54 and 55, Additional Protocol I (1977);
- Arts. 5 and 14, Additional Protocol II (1977).

## 4. The 1966 Covenants

The legally binding human rights covenants of 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) implicitly recognise a right to water, although perhaps more strongly so in the ICESCR.

The ICCPR affirms the “right to life”<sup>[1]</sup>, which has conventionally been interpreted to mean that no person shall be deprived of his or her life in a civil and political sense. According to the Human Rights Committee (HRC) in adopting a General Comment on this issue, this should now be interpreted expansively to include measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics. “[HRC] 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.”<sup>[2]</sup> Disregarding this new development in the understanding of Art. 6, and assuming a narrow interpretation of such a right would nevertheless require the inclusion of the protection against arbitrary and intentional denial of access to sufficient water, because this is one of the most fundamental resources necessary to sustain life.

In the ICESCR, it may be argued that the right to water is already apparent in Arts. 11-12. The newly adopted General Comment<sup>[3]</sup> by the UN Committee on Economic, Social and Cultural Rights left little doubt as to its view of the correct legal position: “*The human right to water is indispensable for leading a life in human dignity. It is prerequisite for the realization of other human rights.*” There is no obligation on State parties to implement the Covenant’s provisions immediately. Hence, even though there is an implied right to water, such a right does not necessarily have to be given immediate effect. Member States do have certain immediate obligations, which include the obligation to take steps – Art.

2(1) – towards the full realization of Arts. 11(1) and 12. Therefore, because the above-mentioned General Comment (which amounts to an interpretative instrument for Arts. 11 and 12) specifically recognizes the human right to water, Member States “have a constant and continuing duty”<sup>[4]</sup> to progressively take active steps (including the development of policy, strategy and action plans) in order to ensure that everyone has access to safe and secure drinking water and sanitation facilities. This should be undertaken equitably and without discrimination of any kind, as Art. 2(2) requires.

## 5. Declaration on the Right to Development

The Vienna Declaration states that the right to development is a “universal and inalienable right and an integral part of fundamental human rights.”<sup>[5]</sup> Art. 8(1) of the Declaration on the Right to Development says that “[s]tates should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources...” In interpreting this article, the General Assembly clarified and reaffirmed in its Resolution 54/175 that “[t]he rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community.”<sup>[6]</sup>

## 6. CEDAW and the Convention on the Rights of the Child

To date, only two human rights treaties have referred directly to a right to water namely, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>[7]</sup> and the Convention on the Rights of the Child.<sup>[8]</sup>

CEDAW obliges States Parties to eliminate discrimination against women, particularly in rural areas to ensure that women “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”<sup>[9]</sup> The express recognition of water may be viewed as a testament to the uneven burden traditionally placed on women in developing countries to collect water over long distances and represents an attempt to redress this burden. A different emphasis is made in the Convention on the Rights of the Child. It recognizes a child’s right to enjoy the highest attainable standard of health in order to “combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution...”<sup>[10]</sup> In contrast to CEDAW, the pressing water issue for children is related more to health, and hence water quality rather than any other issue is emphasized.

## 7. The human right to water and sanitation, Resolution adopted by the General Assembly on 28 July 2010

In July 2010, through Resolution 64/292, the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights. The Resolution calls upon States and international organizations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all.

## 2.2. Global environmental instruments

The right to water is more often expressed within non-legally binding resolutions and declarations. These instruments, both international and regional in scope, accept that fundamental human rights, such as life, health, and well-being are dependent upon the premise that people are guaranteed access to sufficient quality and quantity of water. The following takes note of some of these instruments, which recognise a right to water to varying degrees.

### 1. Stockholm Declaration

The Declaration is one of the earliest environmental instruments that recognises the fundamental right to “an environment of a quality that permits a life of dignity and well-being”<sup>[11]</sup> and also that “[t]he natural resources of the earth including ... water ... must be safeguarded for the benefit of present and future generations...”<sup>[12]</sup>

### 2. Mar del Plata Action Plan

Specific water instruments, such as the Action Plan from the United Nations Water Conference held in Mar del Plata in 1977, recognized water as a “right”, declaring that all people have the right to drinking water in quantities and of a quality equal to their basic needs.<sup>[13]</sup> The primary outcome of this conference was the launching of the International Drinking Water Supply and Sanitation Decade (1980–1990) with the slogan ‘Water and Sanitation for All’.

### 3. Dublin Statement

Principle 4 of the Dublin Conference on Water and Sustainable Development explicitly reaffirmed the human right to water: “... it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.”

### 4. Agenda 21

Agenda 21, the blueprint for sustainable development, is possibly the primary non-binding international environmental legal instrument. Chapter 18 on freshwater notes that a right to water entails three elements: access, quality and quantity, including not only a “general objective ...to make certain that adequate supplies of water of good quality are maintained for the entire population of this planet”<sup>[14]</sup>, but also to provide that “all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic human needs.”<sup>[15]</sup> Overall, an integrated approach is promoted throughout the chapter, which emphasises the three elements of sustainable development as equally important; water is to be viewed as “a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization.”<sup>[16]</sup>

### 5. Millennium Declaration and Political Declaration of Johannesburg

Both the Millennium Declaration and the discourse adopted at the recent World Summit on Sustainable Development (WSSD) enhance the possibility of linking environmental health with human development goals in the global effort to eliminate poverty. However, WSSD – together with the World Water Forums (Hague, Bonn, and Kyoto) – failed to expressly recognise a fundamental human right to water. The indivisibility of human dignity and a right to water has been included in the Political Declaration of the World

Summit on Sustainable Development through the commitment “to speedily increase access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity...”<sup>[17]</sup>

The debates in the conferences and the emerging declarations and principles were endorsed by the United Nations General Assembly in 2000, in a resolution on the right to development.<sup>[18]</sup> This resolution reaffirmed that, in the realisation of the right to development, ‘the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national governments and for the international community’.<sup>[19]</sup> This statement was considered at the time to be ‘the strongest and most unambiguous’ of its type in declaring a human right to water.

This trend of recognising the human right to water in soft laws continued unabated after the adoption of *General Comment No 15*. Numerous fora have explicitly recognised that the human right to water is a fundamental right, the enjoyment of which states are obliged to ensure. The *Abuja Declaration*, adopted by 45 African and 12 South American states at the First Africa-South America Summit in 2006, contained a commitment by participating states to ‘promote the right of our citizens to have access to clean and safe water and sanitation within our respective jurisdictions’.<sup>[20]</sup> Similarly, the *Message from Beppu*, adopted by 37 states from the wider Asia-Pacific region at the First Asia-Pacific Water Summit held in Beppu, Japan, in December 2007, clearly recognised ‘the people’s right to safe drinking water and basic sanitation as a basic human right and a fundamental aspect of human security’.<sup>[21]</sup> Moreover, eight South Asian states adopted the *Delhi Declaration*, in which they recognised ‘that access to sanitation and safe drinking water is a basic right, and according national priority to sanitation is imperative’.<sup>[22]</sup> More recently, the right has been recognised by the UN General Assembly, acknowledging that access to drinking and sanitation water is a fundamental human right.<sup>n128</sup>

The biggest handicap of these declarations, principles, resolutions and action plans is the fact that they remain statements of policy that do not possess the quality of legal enforceability. While they indicate a gradually emerging trend of international opinion and state practice, and could also lead to the incremental evolution of these rules into binding treaties<sup>[23]</sup>, they do not immediately lead to binding entitlements for the beneficiaries nor to justiciable duties of the states.

However, with the passage of time, they could possibly undergo a process of hardening and evolve into binding rules<sup>[24]</sup>, and even play a catalytic role for the development of international custom<sup>[25]</sup>, which is binding *erga omnes*. The human right to water does exist, as water is the most essential element of life. However, as the overview of the present instruments indicated, this right has not been clearly defined in international law and has not been expressly recognised as a fundamental human right. Rather, a right to water is interpreted as being an implicit component of either existing fundamental human rights, or is expressly included in non-binding instruments that are designed to achieve specific ends. If we are to consider the possibility of formulating a human right to water as a separate notion, then consolidation and clear definition of scope will be necessary, particularly as it will potentially relate to present international environmental principles and conventions.

### 3. Conclusion

The foregoing analysis has shown that the right to water as a legal entitlement is neither novel nor newborn. The ambiguity surrounding its legal basis is in part characteristic of other socioeconomic rights of the *ICESCR*, albeit aggravated in the case of the right to water by the conspicuous absence of an explicit reference to the right in the *ICESCR*. The CESCR has thus appropriately read in the right to water into the rights that are explicitly guaranteed in the *ICESCR*.

A close examination of the legal basis of the human right to water in international environmental law norms and international water law, read in conjunction with the provisions of the *ICESCR*, suggests that the right has been a longstanding embodiment in the provisions of the various treaties. That is to say -- to borrow the terms of intellectual property law -- the human right to water is more a discovery than an invention. It was a latent entitlement that has been waiting to be uncovered.

What is more, academic debate needs to move beyond the prevailing controversy surrounding the existence or absence of the human right to water. The right to water has existed since the adoption of the *ICESCR* over half a century ago. It is incumbent upon states, therefore, to translate the right into reality. Effort must now shift to analysis of the normative content of the human right to water, its implications for states' duties and the particularities associated with its domestic implementation and enjoyment.

### 4. References

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2. Human Rights Committee, General Comment No. 6 adopted at the Sixteenth session (1982) on Art. 6 of ICCPR.
3. United Nations Economic and Social Council, Committee 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) Twenty-ninth session, Geneva, 11–29 November 2002. E/C.12/2002/11.
4. *Ibid.* at 8.
5. Art I (10) of the Vienna Declaration and Programme of Action, GA/CONF.157/23, adopted by the World Conference on Human Rights on 25 June 1993.
6. GA/RES/54/175, 15 February 2000.
7. Adopted 18 December 1979, entered into force 3 September 1981, G.A. Res. 34/180, 34 UN GAOR, Supp. (No. 46), UN Doc. A/34/46, at 193 (1979), reprinted in 19 ILM 33 (1980).
8. Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990.
9. Art. 14(2)(h) of CEDAW
10. Art. 24(2)(c) of the Convention on the Rights of the Child
11. Principle 1: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment..."
12. Principle 2: "The natural resources of the earth including the air, water, land, flora and fauna and

especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."

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15. *Ibid.* Para 18.47.
16. *Ibid.* Para 18.18.
17. Para 18, Johannesburg Declaration on Sustainable Development, agreed to at the World Summit on Sustainable Development, Johannesburg, South Africa 26 August–4 September 2002 (A/Conf.199/L.6/Rev.2).
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19. *Ibid.* sub-para 12(a).
20. Abuja Declaration' (Declaration adopted at the First Africa-South America Summit, Abuja, Nigeria, 30 November 2006) para 22.
21. 'Message from Beppu' (Declaration adopted at the First Asia-Pacific Water Summit, Beppu, Japan, 4 December 2007) para 2.
22. 'Delhi Declaration' (Declaration adopted at the Third South Asian Conference on Sanitation, Vighan Bawan, Delhi, 21 November 2008) para 1.
23. *Human Right to Water and Sanitation*, UN Doc A/RES/64/292.
24. Douglass Cassel, 'Inter-American Human Rights Law, Soft and Hard' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2003) 393, 395.
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