

Water as a Human Right?

John Scanlon, Angela Cassar
and Noémi Nemes



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Preface

The year 2003 was identified by the United Nations as the International Year of Freshwater with the aim, partly, of reaffirming the UN's Millennium Development Goal: "to halve, by the year 2015... the proportion of people who are unable to reach, or to afford, safe drinking water" and "to stop the unsustainable exploitation of water resources." This ambitious goal, endorsed by the World Summit on Sustainable Development (WSSD) held in Johannesburg in 2002, also set a new target of halving the proportion of people who do not have access to basic sanitation by 2015.

The WSSD recognised the key role of water in agriculture, energy, health, biodiversity and ecosystems as well as in combating poverty. The link between social well-being and environmental health is now well recognised and any attempts to secure social well-being that do not acknowledge the environmental realities will ultimately fail.

Formally acknowledging water as a human right, and giving content and effect to this right could be a good way of encouraging the international community and governments to enhance their efforts to satisfy basic human needs and to meet the Millennium Development Goals. It could serve to increase the pressure to translate such a right into concrete national and international legal obligations and responsibilities, and to focus attention on the need to resolve conflicts over the use of shared water.

But critical questions arise in relation to a right to water. Why do we need a right to water? What would be the benefits and content of such a right? What mechanisms would be required for its effective implementation? Should the duty to provide basic water and sanitation for all be placed on governments alone, or should the responsibility in this regard be borne also by private actors, both individual and corporate, national as well as international? Is another 'academic debate' on this subject warranted when action is really what is necessary?

This paper addresses these critical questions in detail. It not only raises the questions, it also provides the material and analysis necessary to address them seriously. Without claiming to prescribe the answers, the paper seeks to clearly and carefully articulate the issues and to set out the competing arguments and challenges as it explores the contribution that a human right to water could make to achieving the Millennium Development Goals. In doing so the paper has provided an excellent platform for critical thinking and informed debate.

This paper was produced through the collaborative efforts of staff and interns of the IUCN Environmental Law Centre and of the IUCN Commission on Environmental Law (CEL). It has benefited from the assistance of the former Chair of CEL and from peer review by experts in the UNDP and the FAO. It bears witness to the value of partnerships in our collective efforts to meet the challenge of achieving the Millennium Development Goals.

Achim Steiner
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I. Introduction

In the past century, the world's population tripled while global demand for water has increased six-fold.¹ Today, more than a billion people lack safe drinking water and almost two and a half billion live without access to sanitation systems.² An estimated 14 to 30 thousand people, mostly young and elderly, die every day from avoidable water-related diseases.³ If current trends persist, by 2025 two-thirds of the world's population will be living with serious water shortages or almost no water at all.⁴ The availability of adequate water supply is critical to every aspect of human life; a water crisis would have adverse impacts on health and welfare, the environment and economics world-wide.

The year 2003 was identified by the United Nations as the International Year of Freshwater with one of its aims to reassert the UN's Millennium Declaration Goal: "to halve, by the year 2015... the proportion of people who are unable to reach, or to afford, safe drinking water"⁵ and "to stop the unsustainable exploitation of water resources."⁶ The Goal, endorsed by the World Summit on Sustainable Development held in Johannesburg in 2002, also set a new target of halving the proportion of people who do not have access to basic sanitation by 2015. It recognised the key role of water in agriculture, energy, health, biodiversity and ecosystems as well as in combating poverty. These goals are timely given that "[t]he availability of clean, fresh water is one of the most important issues facing humanity today – and will be increasingly critical for the future, as growing demands outstrip supplies and pollution continues to contaminate rivers, lakes and streams."⁷ The link between social well-being and environmental health will become increasingly important and securing social well-being without acknowledging the environmental realities will ultimately fail.

The active participation of all sectors of national and international society is critical for ensuring better management and planning for meeting basic water needs. The outcome of our efforts will be vital to the health and well-being of billions of people. Formally acknowledging water as a human right, and expressing the willingness to give content and effect to this right, may be a way of encouraging the international community and governments to enhance their efforts to satisfy basic human needs and to meet the Millennium Development Goals. It could further serve to increase the pressure to translate such a right into specific national and international legal obligations and responsibilities, and to focus attention on the need to resolve

¹ UNFPA, *Population Issues* (1999) "Population and Sustainable Development", at www.unfpa.org/modules/6billion/populationissues/development.htm

² UNDP, Millennium Development Goals, at <http://www.undp.org/mdg/>

³ UN Press Release, *WaterYear2003: International Year Aims to Galvanize Action on Critical Water Problems*. Published by the United Nations Department of Public Information. DPI/2293A December 2002.

⁴ UNESCO *Courier*, February 1999.

⁵ Para 19 of the Millennium Declaration (2000) Resolution referred by the General Assembly at its fifty-fourth session. (A/55/2) Adoption by fifty-fifth session.

⁶ *Ibid.* Para 23.

⁷ *Supra* note 3.

conflicts over the use of shared water.⁸ Water as a human right may be a useful tool for addressing one of the major failures of the 20th century.

The authors define a ‘right to water’ as the right to access sufficient water, with the term ‘access’ also including economic accessibility, i.e. affordability, and with the term ‘sufficient’ referring to both the quality and quantity of water necessary to meet basic human needs. This formulation is proposed to distinguish it from the ‘right to access to water’, which – as seen by the authors – is only one facet of the right analysed in this paper.⁹ To consider a ‘right to access to water’ in isolation may not touch upon fundamental issues such as quality and quantity.

The first part of this paper comprises a legal analysis of whether such a right is present in international legal instruments. The authors conclude that a right to water has not yet explicitly entered the human rights and environmental spheres. The next part of this paper then addresses the relevance of linking human rights and water. Why do we need such a right? What would be the benefits, if there were any? Why should we go into another academic debate when action is really what is necessary? These ‘whys’ will lead to another essential question: if there were to be such a right, what shape should it take? This issue is addressed in the third part of this paper. What do we mean exactly by a ‘right to water’? Would it be another fashionable piece in the shop-window of the human rights domain or are there mechanisms to ensure its implementation? Do we only want to create duties for governments, thus blinding ourselves from the controversial issues of private actors’ responsibilities or do we want to strive for the inclusion of all sectors with regards to ensuring basic water and sanitation supplies for all? The authors’ concluding remarks are set out in the final part of this paper.

⁸ For example by identifying environmental flow requirements and allocations for all basin parties.

⁹ The elimination of the term ‘access’ was proposed by Mr El Hadji Guisse, Special Rapporteur for the Sub-Commission on the Promotion and Protection of Human Rights who prepared a report on the right to drinking water, which was then accepted and further elaborated in General Comment No. 15.

II. Does international law recognise a human right to water?

There have been both express and implied references to a right to water in public international law. Some of the instruments included in the following analysis are traditional human rights instruments. Instruments arising in the humanitarian law arena, as well as more traditional environmental legal instruments, where the importance of water for human need is emphasised, are also considered.¹⁰

Art. 38(1) of the Statute of the International Court of Justice is relied upon in determining sources of international law for the purposes of the legal analysis set out below.

A. Conventions and declarations

Global instruments

1. UN Charter

Although no express mention of water is made in the UN Charter,¹¹ 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.

2. Universal Declaration of Human Rights

In 1948, the General Assembly adopted the text of the Universal Declaration on Human Rights; though not binding, many of its provisions are now considered to be customary international law, reasserted in many international legal instruments. Art. 25 proclaims “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family,

¹⁰ It is not the intention of this paper to categorize various legal instruments, but rather to find common ground between traditional human rights and other realms of international law, including environmental principles. The reader is referred to Appendix I for a comprehensive compilation of relevant legal instruments.

¹¹ Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945, as amended by G.A. Res. 1991 (XVIII) 17 December 1963, entered into force 31 August 1965 (557 UNTS 143); 2101 of December 1965, entered into force 12 June 1968 (638 UNTS 308); and 2847 (CCVI) of 20 December 1971, entered into force 25 September 1973 (892 UNTS 119).

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.¹²

3. Geneva Conventions and Protocols

The Geneva Conventions and their Additional Protocols explicitly recognise 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).¹³

4. The 1966 Covenants

The legally binding human rights covenants of 1966, the International Covenant on Civil and Political Rights (ICCPR)¹⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁵ implicitly recognise a right to water, although perhaps more strongly so in the ICESCR.

The ICCPR affirms the “right to life”,¹⁶ 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.”¹⁷ 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.

¹² Peter H. Gleick, “The Human Right to Water” *Water Policy* 1(5) (1999) at 487–503.

¹³ See these articles in Appendix I.

¹⁴ International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, G.A. Res. 2200A (XXI), UN Doc A/6316 (1966), 99 UNTS 171, reprinted in 6 ILM 368 (1967).

¹⁵ International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966), 993 UNTS 2, reprinted in 6 ILM 360.

¹⁶ ICCPR Art. 6(1): “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

¹⁷ Human Rights Committee, General Comment No. 6 adopted at the Sixteenth session (1982) on Art. 6 of ICCPR.

In the ICESCR, it may be argued that the right to water is already apparent in Arts. 11–12. The newly adopted General Comment¹⁸ 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 recognises the human right to water, Member States “have a constant and continuing duty”¹⁹ 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

Several international documents, among them the Vienna Declaration, state that the right to development is a “universal and inalienable right and an integral part of fundamental human rights”.²⁰ 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.”²¹

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, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),²² and the Convention on the Rights of the Child.²³

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.”²⁴ The express

¹⁸ 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.

¹⁹ *Ibid.* at 8.

²⁰ 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.

²¹ GA/RES/54/175, 15 February 2000.

²² 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).

²³ Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

²⁴ *Supra* note 22 Art. 14(2)(h).

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.²⁵

A different emphasis is made in the Convention on the Rights of the Child. It recognises 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..."²⁶ 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 emphasised.

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.²⁷

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"²⁸ and also that "[t]he natural resources of the earth including ... water ... must be safeguarded for the benefit of present and future generations..."²⁹

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, recognised 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.³⁰ 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'.

²⁵ Research shows that households in rural Africa spend 26% of their time fetching water, and it is generally women who perform this duty. (DFID, 2001a).

²⁶ *Supra* note 23 Art. 24(2)(c).

²⁷ For a fuller list, the reader is referred to Appendix I.

²⁸ 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..."

²⁹ 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."

³⁰ Preamble, United Nations. (1977). Report of the United Nations Water Conference, Mar Del Plata. March 14–25, 1997. No E 77 II A 12, United Nations Publications, New York.

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"³¹, 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."³² 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."³³

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..."³⁴

Regional arrangements

Regionally too, there are numerous legal instruments which explicitly or implicitly recognise a right to water and again, the reader is referred to Appendix I for a more comprehensive list.

1. ECEL Resolution

The European Council of Environmental Law (ECEL) Resolution on the right to water,³⁵ forms yet another definitive link between human rights and water and "consider[s] that access to water is part of a sustainable development policy and cannot be regulated by market forces alone", and "consider[s] that the right to water cannot be dissociated from the right to food and

³¹ Agenda 21, Para 18.2.

³² *Ibid.* Para 18.47.

³³ *Ibid.* Para 18.18.

³⁴ 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).

³⁵ ECEL Resolution, adopted 28 April 2000, published in *Environmental Policy and Law*, 30/5 (2000).

the right to housing which are recognized as human rights and that the right to water is also closely linked to the right to health.”³⁶ Art. 1 of the Resolution states “[e]ach person has the right to water in sufficient quantity and quality for his life and health.”

2. ECE Protocol

The European Commission of the United Nations for Europe (ECE) Protocol on Water and Health to the 1992 Convention on the Use of Transboundary Watercourses and International Lakes specifically states that “[p]arties shall, in particular, take all appropriate measures for the purpose of ensuring: (a) adequate supplies of wholesome drinking water ... ; (b) adequate sanitation ...”.³⁷ It mentions the three central aspects of a human right to water, stating that “...equitable access to water, adequate in terms of both quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion.”³⁸ Access to water and sanitation services are reinforced in Art. 6(1), which provides that “the Parties shall pursue the aims of: (a) access to drinking water for everyone; (b) provision of sanitation for everyone”.

3. African Charters

There are a few instruments specific to the African region, such as the African Charter on Human and People’s Rights, which notes broadly that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development”,³⁹ and the African Charter on the Rights and Welfare of the Child, which states that “every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health”⁴⁰ and States Parties are required to take measures “to ensure the provision of adequate nutrition and safe drinking water...”⁴¹

4. Protocol of San Salvador

Art. 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights provides that “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services.” It is undoubtable that basic public services include water supply and sanitation: a report made by the Inter-American Commission on the human rights situation of Brazil clearly proves this by claiming that “there was inequality in the access to basic public services: 20.3% of the population have no access to potable water and 26.6% lack access to sanitary services...”⁴²

³⁶ *Ibid.* Preamble.

³⁷ Art. 4(1) of the ECE Protocol, adopted on 17 June 1999 at the Third Ministerial Conference on Environment and Health.

³⁸ *Ibid.* Art. 5(1).

³⁹ Art. 24 of the African [Banjul] Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

⁴⁰ Art. 14(1) of the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

⁴¹ *Ibid.* Art. 14(2)(c).

⁴² Report on the Human Rights Situation in Brazil by the Inter-American Commission on Human Rights, at <http://www.cidh.oas.org/countryrep/brazil-eng/chaper%202%20.htm>

B. Customary international law

The development of environmental law as a recognised body of law has created an additional source of law for analysis of the existence of a right to water. This is because uniform State practice may provide evidence of *opinio juris*. It is appropriate to consider national constitutions as a source of an emerging right to water and court interpretations of fundamental rights contained in those constitutions. Whilst over 60 constitutions refer to environmental obligations, less than one-half expressly refer to the right of its citizens to a healthy environment.⁴³ Only the South African Bill of Rights enshrines an explicit right of access to sufficient water.⁴⁴ In view of the foregoing, a position that a uniform constitutional practice has emerged is rather doubtful, especially considering the fact that despite the increasing prevalence of constitutional environmental norms, most countries have yet to interpret or apply such norms.⁴⁵

In many countries, particularly those with a civil law tradition, traditionally constitutional rights were not regarded as being self-executing; legislation was required to implement a constitutional provision and to empower a person to invoke protections. However, with the rise of constitutionalism globally, courts increasingly view the constitution as an independent source of rights, enforceable even in the absence of implementing legislation.⁴⁶ Thus, courts could and do rely on the environmental provisions of their constitutions when protecting water from pollution or ensuring access to water to meet basic human needs. Where constitutions lack environmental provisions, reliance has been placed on the right to life, a provision contained in most constitutions worldwide. Constitutions many times incorporate ‘penumbral rights’, rights that are not explicitly mentioned in the constitution, but are consistent with its principles and existing rights.⁴⁷ These rights could easily adopt emerging fundamental human rights.

Both civil and common-law countries have incorporated the ‘Public Trust Doctrine’ in their constitutions.⁴⁸ The doctrine dates back to the Institutes of Justinian (530 A.D.) and requires governments to protect certain resources, like water, that the government holds in trust for the public.⁴⁹ Many of the US state constitutions have incorporated this doctrine, and courts in at least five states have used them to review state action.⁵⁰ Similarly, Indian and Sri Lankan courts have relied on the doctrine to protect the environment. In the *M.C. Mehta v. Kamal Nath Case*⁵¹ (1977), which concerned the diversion of a river’s flow, the Supreme Court held that the

⁴³ Paula M. Pevato, “A Right to Environment in International Law: Current Status and Future Outlook”, in *RECIEL*, vol. 8 issue 3 (1999) at 315.

⁴⁴ See Appendix I.

⁴⁵ Environmental Law Institute Research Report, “Constitutional Environmental Law: Giving Force to Fundamental principles in Africa”, (May 2000) at 6.

⁴⁶ *Ibid.* at 7.

⁴⁷ *Ibid.* at 8. e.g. Art. 29 of Eritrea’s Const.: “The right in this Chapter shall not preclude other rights which ensue from the spirit of the Constitution and the principles of a society based on social justice, democracy and the rule of law”; Art. 32 of Algeria’s Const.: “The fundamental liberties and the Rights of Man and of citizen are guaranteed.”

⁴⁸ The public trust doctrine also exists by operation of the common law.

⁴⁹ *Ibid.* at 23.

⁵⁰ *Ibid.* at 24.

⁵¹ *M.C.Mehta v. Kamal Nath*, 1 S.C.C. 388 (Supreme Court of India, 1977).

government violated the public trust by leasing the environmentally sensitive riparian forest land to a company. In a landmark decision concerning the Eppawela Phosphate Mining Project, the Sri Lankan Supreme Court said that the ‘Public Trust Doctrine’ on which the petitioners depended was “comparatively restrictive in scope”. The court instead put forward a broader doctrine revolving around “Public Guardianship” to protect the site of an ancient kingdom and agricultural lands, and prevent the forced relocation of residents in Sri Lanka’s North Central Province. The Court said that “[t]he organs of the State are guardians to whom the people have committed the care and preservation of the resources of the people.”⁵²

In many cases, courts have applied the provisions of the right to life, environment, etc. where an environmentally destructive activity directly threatened people’s health and life. The cases set out in Appendix II show that while there might not be a constitutional right to water, courts have been prepared to liberally interpret existing constitutional provisions.

C. Judicial decisions

Recent decisions show that recognition of a human right to water, though not recognised within the law of nations *per se*, is an emerging trend. In the *Gabcikovo-Nagymaros Case*⁵³ (1997), Judge Weeramantry wrote that “[t]he protection of the environment is...a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself...damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.”⁵⁴ While there is no express recognition, human rights courts have been prepared to be creative and liberally interpret existing provisions in their decisions. The following shows how water has been recognised as an integral part of several fundamental human rights.

Right to life, liberty and personal security

In the *Port Hope Case*⁵⁵ (1980), the complainant alleged that dumping of nuclear wastes within Port Hope, Ontario, was causing large-scale pollution of residences thus threatening the lives of people. Though the UN Human Rights Committee ultimately declared the complaint inadmissible due to failure to exhaust local remedies, it observed that the case “raises serious issues under Art. 6(1)” of the ICCPR, with regard to a State’s obligation to protect human life.

The American Commission on Human Rights has the authority to study the human rights situations in the member states of the OAS. In its *Report on the Human Rights Situation in Ecuador*⁵⁶ (1997), it found that inhabitants were exposed to toxic by-products of oil exploita-

⁵² *Bulankulama v. The Secretary, Ministry of Industrial Development* (2000) Vol. 7 No. 2 South Asian Environmental Law Reporter 1. The judgment was delivered on 2 June 2000.

⁵³ Case Concerning the Gabcikovo-Nagymaros Project (Slovakia-Hungary) Judgment of 25 September 1997, B. ICJ/692 9210707575.

⁵⁴ Quote from: P.M.Pevato, “A Right to Environment in International Law: Current Status and Future Outlook”, *RECIEL*, vol. 8 issue 3 (1999), at 315.

⁵⁵ E. H. P. v. Canada, Communication No. 67/1980 (27 October 1982), U.N. Doc. CCPR/C/OP/1 at 20 (1984).

⁵⁶ Inter-Am. C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997).

tion in their drinking and bathing water, which jeopardised their lives and health.⁵⁷ The court stated that “where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights (right to life, to physical security and integrity) are implicated.”⁵⁸

Right to property

The *Zander v. Sweden Case*⁵⁹ (1993) concerned potential pollution of a drinking water well from a nearby dump. The applicants’ claim was directly concerned with their ability to use the water in their well for drinking purposes.⁶⁰ Such ability was one facet of their right of property, thus Art. 6(1) of the European Convention on Human Rights was applicable. The European Court held in this case that there had been a violation of Art. 6(1).

In 2001, the Inter-American Court on Human Rights explicitly recognised the link between human rights and the environment in the *Awas Tingni Case*.⁶¹ The court ruled that Nicaragua violated the indigenous community’s rights to its property (Art. 21 of the American Convention on Human Rights), natural resources and environment when it granted concessions to a Korean logging company to harvest timber on the community’s land without the latter’s consent.

Right to respect for one’s private life and home

In its judgement *Lopez Ostra v. Spain*⁶² (1994), the European Court of Human Rights recognised that certain environmental impairment with severe harmful consequences for individuals – though without the need to seriously endanger health – constitute a violation of other human rights, such as the right to respect for one’s private life and home. The case concerned a waste treatment plant, which caused health problems and nuisance to many local people, forcing them to relocate.

Right to culture

The UN Human Rights Committee issued a decision in the *Lubikon Lake Band Case*⁶³ (1990), that oil and gas exploration deprived the Band of its right to live its traditional way of life and culture and thus violated Art. 27 of the ICCPR.

Right to health

In the *Communications 25/89, 47/90, 56/91, 100/93 (Joined)* against Zaire, the African Commission argued that “the failure of the Government to provide basic services such as safe

⁵⁷ D. Shelton, “Human Rights and the Environment: Jurisprudence of Human Rights Bodies”, *Environmental Policy and Law*, 32/3–4 (2002), at 161.

⁵⁸ Inter-Am. C.H.R., *Report on the Human Rights Situation in Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 rev. 1 (1997) at 88.

⁵⁹ *Zander v. Sweden*, ECHR (1993), Series A, No. 279B.

⁶⁰ See more details at <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf>

⁶¹ *Case of the Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, Judgment of the Inter-Am. C.H.R., August 31, 2001. See at www.indianlaw.org

⁶² Judgment of December 9, 1994, Case No. 41/1993/436/515.

⁶³ Communication No. 167/1984, UN Doc. CCPR/C/38/D/1667/1984 (28 March 1990).

drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Art. 16” of the African Charter, which states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people.

D. Conclusion: The human right to water is not yet explicitly recognised

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.⁶⁴

Following both the Millennium Declaration and WSSD, the possibility has arisen for the creation of stronger linkages between all these instruments in recognition of their common objectives. The meaningful implementation of sustainable development can now be further advanced to help link social development and human rights aspects of sustainable development with the environment, as well as ensuring economic well-being through the benefits that adequate supplies of water can provide. This is important to ensure there is access to water of adequate quality and quantity to meet the needs of all societies, both now and in the future.

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.

⁶⁴ In the circle of highly qualified publicists, there has been a growing consensus of the urgent need to define a human right to water. Authors, like Stephen McCaffrey, Peter Gleick, Henri Smets, William James Smith Jr, etc, UN organizations like FAO, UNESCO, WHO and NGOs, e.g. the Friends of the Earth, have made prestigious work in order to enhance water as a human right.

III. Why link water and human rights?

What is the value of explicitly recognising water as a human right? Would there be any practical benefit to recognising a human right considering that despite the declaration of a human right to food, there are still nearly one billion people undernourished, and 25,000 people dying of hunger every day?⁶⁵ Why waste more time on academic debates on whether or not to acknowledge water as a human right when it is already considered to be an integral part of other fundamental human rights? Why tackle the issue when in the end it is up to the political will of each state whether to initiate effective implementation of a recognised human right to water?

More than ten years have passed since the Rio Earth Summit, but the international community has witnessed only limited implementation of the commitments made then. Achim Steiner, Director General of IUCN made the following observations when presenting to the Global Ministerial Environment Forum in the lead-up to the WSSD:

“The Earth Summit in Rio was a time of excitement and great hope and the adoption of Agenda 21 is a milestone that is unlikely to be repeated in the near future. What we have learnt over the past ten years is that while the adoption of Agenda 21 was a magnificent feat, it was a lot easier to draft than to implement. The reality is that the breadth of the challenge was not matched by:

- the levels of investment in sustainable development, including through overseas development assistance,
- the strengthening of governance arrangements, or
- the level of political commitment that was necessary to make substantial progress in implementing Agenda 21 in just ten years.”⁶⁶

It is thus time to consider new and more effective approaches that improve meaningful commitment to implementing sustainable development *on-the-ground*. Academics, human rights experts, NGOs worldwide, and the Commission on Human Rights have all promoted international recognition of a human right to water, their statements being based on the premise that the right to life and to development cannot be realized in the absence of the right to water.

Improving the implementation of sustainable development objectives, including securing adequate access and supply of good quality water to human populations requires us to move beyond academic consideration of the problem. The principles of sustainable development are widely accepted, but the practical application of these has not enjoyed much success.

In this part of the paper an emerging approach to sustainable development is analysed. That approach is essentially a rights-based approach founded on the principles of equity. The link between sustainable development and human rights is a basic one. The protection of human life, health, and living standards is a fundamental precondition of economic development based on social equity and respect for the environment. The WSSD Plan of Implementation ack-

⁶⁵ Only in developing countries there is some 777 million people undernourished – WHO (2003).

⁶⁶ Achim Steiner, “Intervention to the Global Ministerial Environment Forum”, Cartagena, Colombia 12–15 February 2002.

nowledges “[p]eace, security, stability and respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity, are essential for achieving sustainable development benefits for all.”⁶⁷

Strengthening universal human rights in the environmental and the social spheres will enable us to make significant changes towards the eradication of poverty which is critical to the successful realization of any programmes aiming at the achievement of sustainable development. That human rights, including realization of the right to development, are a prerequisite for effectively combating poverty is reflected in the Millennium Declaration,⁶⁸ the Copenhagen Declaration,⁶⁹ the Vienna Declaration⁷⁰ and the work of the General Assembly.⁷¹ The inextricable link between sustainable development, poverty, and environment was also recognised in the WSSD Plan of Implementation:

“The goals of *sustainable development* can only be achieved in the absence of a high prevalence of debilitating diseases, while obtaining health gains for the whole population requires *poverty eradication*. There is an urgent need to address the causes of ill health, including *environmental causes*, and their impact on development, with particular emphasis on women and children, as well as vulnerable groups in society, such as people with disabilities, elderly persons and indigenous people.”⁷² [Emphasis added]

Linking human rights and the environment appears *prima facie* straightforward – especially in view of the now well-accepted fundamental relationship between human rights and sustainable development, one key element of which is environmental protection. Human rights cannot be secured in a degraded or polluted environment. Many national constitutions support this basic premise by recognising a right to a clean/safe environment.⁷³ Nevertheless, acknowledging a human right to a safe/clean environment has proven to be anything but an easy task as is evident from debates over the last decade under the leadership of the Sub-Commission’s⁷⁴ Special Rapporteur, Mrs Fatma Zohra Ksentini, who explored the environmental dimension of human rights.⁷⁵ Klaus Toepfer, Executive Director of UNEP said, “it is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.”⁷⁶ The human rights aspect of the two pillars of sustainable development – i.e. the social and the environmental –

⁶⁷ Plan of Implementation of WSSD (4th Sept. 2002) Para 5.

⁶⁸ *Supra* note 5–6.

⁶⁹ Copenhagen Declaration on Social Development, World Summit for Social Development, Copenhagen, 6–12 March 1995.

⁷⁰ *Supra* note 20.

⁷¹ A/RES/46/121, 17 December 1991, General Assembly Resolution on ‘Human rights and extreme poverty’.

⁷² *Supra* note 66, Para 46.

⁷³ See Appendix I.

⁷⁴ Sub-Commission on Prevention of Discrimination and Protection of Minorities.

⁷⁵ For a chronological view of the evolution of the debate on human rights and environment, see Appendix III.

⁷⁶ Statement to the 57th Session of the Commission on Human Rights in 2001, in ‘The Right to Water’ (WHO, 2003) at 21.

was made visible in the UN/ECE Aarhus Convention,⁷⁷ which states in its Preamble that “every person has the right to live in an environment adequate to his or her health and well-being.” This regional Convention may provide an important link to a new human rights-based approach to sustainable development as it ensures the right to information, justice and participation within the sustainable development context. Such an approach would also protect the most vulnerable in society. The elevation of the issue of safe water to the human rights sphere needs to be enhanced, as it is a fundamental precondition for working on both poverty and environment.

So what can explicit recognition of a right to water achieve? Non-binding agreements may prove inadequate tools to handle the present water crisis. Indirect environmental rights do not provide a sufficient basis for ensuring effective control of environmental protection and equity. An alternative can be the enactment of specific legislation and the associated institutional change in order to give effect to substantive and procedural aspects of a right to water. A right to a clean and healthy environment could not have been enshrined in a global human rights instrument to date owing partly to the complexity of the implications of defining such a right. On the other hand the issue of including access to water in the human rights debate raises fewer doubts, at least regarding the scope and definition of such a right. The following may offer some answers to the principal question considered here: what would be the benefits of explicitly recognising water as a human right?

Drastically changing environmental and social factors make the issue of water as a human right become more significant

The International Year of Freshwater comes at an important time, with world leaders agreeing on key targets to tackle water and sanitation problems for the 1.2 billion people without access to safe drinking water and the 2.4 billion people who lack proper sanitation.⁷⁸

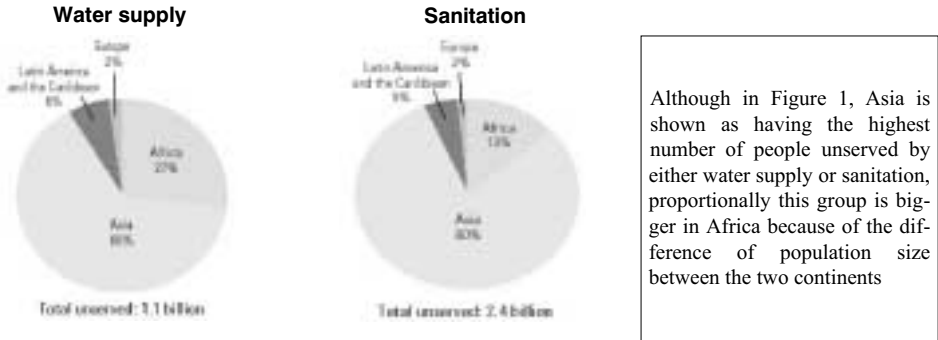
In the face of uncertainty regarding our climatic future and exponentially increasing populations, there is real cause for concern. Continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty. Over the past decade, the number of droughts and floods have increased dramatically as environmental conditions have deteriorated and the global climate has continued to change due to intensified greenhouse gas emissions.⁷⁹

⁷⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998.

⁷⁸ *Supra* note 3.

⁷⁹ UNESCO “People and the Planet”; information regarding World Water Day 2003 at www.wateryear2003.org

Fig. 1 Water supply and sanitation distribution of unserved population (2002)⁸⁰



These and other reasons point to the importance of considering the inclusion of water as a human right; though very much interrelated, some of the main factors adversely affecting water resources are listed in the following:

1. Increasing world populations

Population has grown at a significant rate, from 2.5 billion in 1950 to 6.1 billion today, yet the renewable water supply per person has fallen by 58%.⁸¹ A study released by the UN Population Division states that the number of people in the world is likely to jump to 9.3 billion over the next 50 years, with Africa and Asia seeing the greatest growth.⁸² As populations rise, water supplies will become more and more stressed, and the issue of adequate supplies more critical.

2. Rising per capita consumption of water

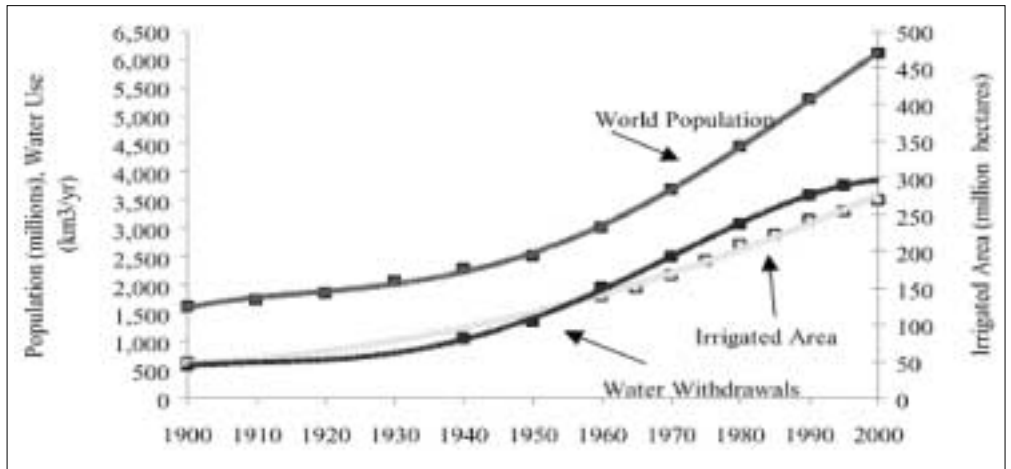
Irrigation has increased from around 50 million hectares at the turn of the century to over 267 million hectares today. These and other factors including industrialization have led to a nearly seven-fold increase in freshwater withdrawals (see Figure 2). Global annual water use by industry is expected to rise due to the rapid industrial development of developing countries. If per capita consumption of water resources continues to rise at its current rate, humankind could be using over 90% of all available freshwater within 25 years, leaving just 10% for all other living beings.⁸³ This alarming trend, in conjunction with overall rising world populations, foretells a potentially critical future situation.

⁸⁰ WHO/UNICEF Joint Monitoring Programme, 2002.

⁸¹ S. L. Postel and A. T. Wolf, "Dehydrating Conflict" *Foreign Policy Magazine*, (Sept/Oct. 2000).

⁸² UN Press release *UN Population Division issues 'World Population Prospects: the 2000 Revision'* DEV/2292 POP/791 27/02/2001. More detailed summary of the key findings of the 2000 Revision is available as *World Population Prospects: The 2000 Revision, Highlights* (United Nations, ESA/P/WP.165, February 2001).

⁸³ UNESCO World Water Assessment Programme, at www.usembassy.it/file2003_03/alia/a3030516.htm

Fig. 2 World population, water use, and irrigated area ⁸⁴

3. (Mis)management of water

“The water crisis is essentially a crisis of governance”.⁸⁵ Lack of adequate water institutions, fragmented institutional structures, excessive diversion of public resources for private gain, have impeded the effective management of water supplies. The effects of deforestation for example directly impact water supply by increasing runoff, and the lack of vegetative cover decreases water quality. Overgrazing also negatively impacts vegetation cover and contributes higher faecal quantities to water, which can dangerously affect its quality. Reclamation of wetlands deprives catchments of their natural flood mitigation system and filtration system adversely affecting quality. In many critical areas in Asia and Africa, these activities along with unsustainable agricultural practice, are rapidly accelerating desertification.

Riverine ecosystems are threatened worldwide by unsustainable development as well as the over-utilization of often limited freshwater resources. More than half of the world’s major rivers are polluted and/or drying up in their lower reaches because of over-use, according to the World Commission on Water for the 21st century. Of the world’s 500 major rivers, 250 are seriously polluted and depleted from overuse. Much of water pollution is the result of the two million tons of human waste disposed of in watercourses every day.⁸⁶ The human consequences of unsustainable water use are numerous, perhaps the most serious of these being displacement. Contamination and overuse of river basins displaced some 25 million environmental refugees in 1998/99.⁸⁷

⁸⁴ Peter H. Gleick, *The World’s Water 1998–1999: The Biennial Report on Freshwater Resources*. Island Press, Washington, DC (1998).

⁸⁵ The *World Water Development Report: “Water for People, Water for Life”*, Executive Summary, (launched 22-03-03 during World Water Forum) at 25. See at www.un.org/events/water/factsheet.pdf at 30.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

4. Global climate change

Recent estimates suggest that climate change will account for about 20% of the increase in global water scarcity.⁸⁸ Though exact impacts of climate change are uncertain, precipitation is expected to increase at some latitudes, but decrease in tropical and subtropical regions (where the population growth is at its highest levels). More extreme weather conditions are foreseen which will highly affect water quantity and quality, particularly the impacts of flooding and resultant sanitation problems. One obvious signal is the drastic increase of the frequency and severity of disasters over the past decade. Between 1991 and 2000, the number of people affected by natural disasters rose from 147 million to 211 million per year, of which 90% were water-related.⁸⁹ Floods and droughts have more than doubled since 1996, and 97% of all natural disaster deaths occurred in developing countries.

Poor water management can significantly trigger the release of greenhouse gases (GHGs) and thereby contribute further to climate change. The emission of GHGs from reservoirs due to rotting vegetation and carbon inflows from catchments is a recently identified ecosystem impact (on climate) of storage dams. It is estimated that the gross emissions from reservoirs may account for between 1% and 28% of the global warming potential of GHG emissions.⁹⁰

5. Infrastructure development (dams, dikes, levees, diversions etc)

60% of the world's 227 largest rivers are significantly fragmented by dams, diversions and canals, which have led to the degradation of ecosystems.⁹¹ Consequentially, biodiversity is widely in decline. The Aral Sea had lost 75% of its total volume by 1998 due to the diversion of the inflowing rivers. The social impact of large dams is well documented: adversely affected livelihoods, health, social systems, and cultures. "The direct benefits they provide to people are typically reduced to monetary figures for economic analysis and are not often recorded in human terms."⁹² Case studies conducted by the World Commission on Dams indicates that the poor, vulnerable groups and future generations are likely to bear a disproportionate share of the social and environmental costs of large dam projects without gaining a commensurate share of the economic benefits.⁹³

Water has not been clearly stated as a human right though it sits at the very essence of the right to life and other fundamental human rights

Water is essential to ensuring the continuance of life, and is intrinsically linked to other fundamental human rights: water is necessary to produce food (right to adequate food), to ensure environmental hygiene (right to health), for securing livelihoods (right to gain a living

⁸⁸ *Ibid.* at 10. See also Bergkamp, Orlando, Burton, *Change: Adaptation of water resources management to climate change*, IUCN, Gland (2003).

⁸⁹ *Ibid.* at 23.

⁹⁰ *World Commission on Dams Report 2000* – Chapter 3: Ecosystems and Large Dams: Environmental Performance.

⁹¹ "U.N. Report Warns of Worsening World Water Crisis" (March 5, 2003) see at: www.usembassy.it/file2003_03/alia/a3030516.htm

⁹² *Supra* note 89. Chapter 2: People and Large Dams: Social Performance.

⁹³ *Ibid.*

by work), to enjoy certain cultural practices (right to take part in cultural life), etc. The following demonstrates that numerous fundamental human rights can not be fully realized without water.

- *Right to life*: explicitly enshrined in our understanding of human rights since 1948 and the promulgation of the Universal Declaration of Human Rights.⁹⁴ Needless to say that without water, no life can be sustained.
- *Right to food*: although not explicitly mentioned, the right to water is very strongly implied, since it is vital in preserving the right to food. Water is essential for farming: almost 70% of all available freshwater is used for agriculture⁹⁵ and it is estimated that more than one third of global food production is based on irrigation.⁹⁶
- *Right to self-determination*: rooted in both Human Rights Covenants, this right also includes the right of all people to manage their own resources and is thus connected to a right to water.
- *Right to adequate standard of living*: cannot be realized without a right to water either. The UN Committee on Economic, Social and Cultural Rights recognised that such a right “clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental condition for survival”.⁹⁷
- *Right to housing*: water is also a fundamental precondition of this right. As the Committee on Economic, Social and Cultural Rights stated “the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, ... sanitation and washing facilities...”.⁹⁸
- *Right to education*: water also plays a crucial role in the implementation of such a right. The lack of proper supply of water forces children to walk long distances, often several times a day – thus missing school – to provide their families with water.⁹⁹
- *Right to health*: it is beyond any doubt that this right cannot be realized without securing a right of access to adequate and sufficient water. More than 3 million people die every year from diseases caused by unsafe water.¹⁰⁰ WHO estimates that in developing countries 80% of illnesses and more than a third of deaths are the result of drinking contaminated

⁹⁴ Universal Declaration of Human Rights, G.A Res. 217A (III), UN Doc. A/810, at 71 (1948). Art. 25(1): “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 ...”

⁹⁵ ‘International Year of Freshwater 2003’, at www.un.org/events/water/factsheet.pdf

⁹⁶ See at www.iaea.or.at/worldatom/Press/Focus/Water/wwday_2002.shtml

⁹⁷ *Supra* note 18 at 2.

⁹⁸ The right to adequate housing (Art.11 (1)), 13/12/91. CESCR General Comment No. 4. Para 8.

⁹⁹ The UNDP Human Development Report (1996) said that school enrolment of girls at the primary level compared with boys amounts to 50% in the least developed countries, whereas it is 96% in the developed countries.

¹⁰⁰ *Supra* note 3.

water.¹⁰¹ More startling is that approximately 60% of all infant mortality worldwide is linked to water-related infectious and parasitic diseases.¹⁰²

- *Right to take part in cultural life*: embraces the right of indigenous peoples to have access to water resources on their lands. The destruction, expropriation or pollution of water-related cultural sites represents a failure to take adequate steps to safeguard the cultural identity of various ethnic groups.
- *Right to suitable working conditions*: fresh water is also a key element for this right as it is particularly important for food production and agriculture, the main income source of the majority of populations in developing countries.

Yet, a human right to water remains imperfectly defined. Among the elements of the newly debated environmental human rights¹⁰³ – i.e. the right to life, to health, to housing, to food and water, to safe working and living conditions – it is only the explicit recognition of a right to water that has not taken place in a global human rights instrument. It has been suggested that water like air is so fundamental to preserving a right to life that explicit recognition was unnecessary,¹⁰⁴ and thus little attention has been given to the question of whether there is a right to water. However, as water is becoming a scarcer resource, the mere fact that such a right has been envisaged as part and parcel of other rights may be controversial. Lifting the right to water from the shadow of other associated human rights could be seen as awarding it long overdue standing to be considered as a self-standing right.

The establishment of a right to water in international human rights law would safeguard already accepted human rights and environmental principles

The protection of the right to water is an essential prerequisite to the fulfillment of many other human rights. Therefore, without guaranteeing access to a sufficient quantity of safe water, other human rights may be jeopardised. This serves to demonstrate that the issue of water and human rights is not a radical or revolutionary suggestion, but merely “a new way of thinking about well-established concepts.”¹⁰⁵ Formal recognition of such a right would mean acknowledging the environmental dimension, more specifically the water-dependent dimension, of existing human rights. Moreover, a formally recognised right to water would make it increasingly difficult to disregard international environmental provisions that relate to the protection and management of water.

¹⁰¹ WHO and UNICEF. “Global Water Supply and Sanitation Assessment 2000 Report” at www.who.int/water_sanitation_health/Globalassessment/GlobalTOC.htm

¹⁰² Diseases such as malaria, cholera, dysentery, schistosomiasis, typhoid, infectious hepatitis and diarrhoea are included as water related.

¹⁰³ Abundant literature has been devoted to linking human rights and environment, see authors, e.g. Adriana F. Aguilar, Neil A.F. Popovic, Maguelonne Dejeant-Pons, Allan McChesney, Richard Desgagne, Dinah Shelton, Jennifer A. Downs, etc.

¹⁰⁴ Peter H. Gleick, *The World's Water 2000–2001: The Biennial Report on Freshwater Resources*. Island Press, Washington, D.C. (2000).

¹⁰⁵ A. Fabra Aguilar and Neil A.F. Popovic, “Lawmaking in the United Nations: The UN Study on Human Rights and the Environment”, *RECIEL*, vol. 3 No. 4 (1994) at 201.

Recognising water as a human right would provide more effective protection

Does it make a difference whether water is formally recognised as a human right under the banner of a legally binding instrument such as the ICESCR or not? Failure to directly recognise a right to water may weaken the enforcement capability and authority of existing provisions as they relate to water. The recognition of a right to water could make its implementation more effective and allow for a more speedy and effective development of jurisprudence. Gro Harlem Brundtland, Director General of WHO is of the opinion that “[t]he fact that water is now regarded as a basic human right will [provide] an effective tool to make a real difference at country level,”¹⁰⁶ and it is at this level that the right to water has the potential to be diligently enforced.

Human rights are formulated in terms of rights of individuals, not in terms of rights and obligations of states vis-à-vis other states as international law provisions generally do. Thus by making water a human right, it could not be taken away from the people. Through a rights-based approach, victims of water pollution and people deprived of necessary water for meeting their basic needs are provided with access to remedies. In contrast to other systems of international law, the human rights system affords access to individuals and NGOs. The explicit recognition of water as a human right could thus represent one tool for civil society to hold governments accountable for ensuring access to sufficient, good-quality water.

Existing substantive rights (e.g. right to life, right to health) offer only a narrow scope of protection for the individuals suffering from water pollution or deprivation of enough, clean water. Under the current regime, such harm to people cannot by itself constitute a cause of action, but needs to be linked to other rights, “leaving courts and commissions on the shaky ground of creatively extending rights.”¹⁰⁷ The formal recognition of a substantive human right to water could remedy this situation.

If the right to water were to be recognised within a legally binding human rights instrument, not only would the obligations arising from such a right become more clear-cut, but the violations of this right would also be evident. Injurious deprivation or pollution of an individual’s water supply, or denial of his/her access to sufficient and safe water would enable him/her to seek redress through the court system of the state concerned. In the event of failure at national level, aggrieved individuals would still have an international avenue of redress through human rights institutions. Human rights treaties have the advantage of relying upon State reporting procedures, inter-State complaints, and individual petitions or complaints, all of which directly or indirectly permit attack or criticism of non-complying States.¹⁰⁸ Furthermore, national human rights institutions exist that can act as mechanisms for the domestic implementation of international human rights obligations and assist in strengthening human rights protection. Though they typically do not have power to make binding decisions in response to complaints of human rights violations, they can play a central role by providing “a viable forum

¹⁰⁶ Dr Gro Harlem Brundtland, Director General of the World Health Organization (WHO). Press release “Water for health enshrined as a Human Right” at: www.who.int/mediacentre/releases/pr91/en/print.html

¹⁰⁷ J. Eaton, “The Nigerian Tragedy”, *Boston University International Law Journal*, vol. 15:261, (1997) at 297.

¹⁰⁸ D. Shelton, “Human Rights, Environmental Rights, and the Right to Environment”, *Stanford Journal of International Law*, vol.28(1) Stanford Law School (1991), at 134.

for investigation and resolution of human rights complaints where the judicial system is weak, politicized, slow or otherwise incapacitated.”¹⁰⁹

A human right to water would impose obligations on states, as human rights need to be translated into specific national legal obligations and responsibilities.

Richard Jolly of the UNDP notes: “to emphasize the human right of access to drinking water does more than emphasize its importance. It grounds the priority on the bedrock of social and economic rights, it emphasizes the obligations of states parties to ensure access, and it identifies the obligations of states parties to provide support internationally as well as nationally” (Jolly, 1998).

Any human right imposes three obligations on states:

1. *Obligation to respect*: requires that States refrain from interfering directly or indirectly with the enjoyment of a human right. If water were recognised as a human right, states would be obliged, *inter alia*, to refrain from:
 - engaging in any practice or activity that denies or limits equal access to adequate water;
 - arbitrarily interfering with traditional arrangements for water allocation;
 - unlawfully polluting water;
 - limiting access to, or destroying, water services and infrastructure.
2. *Obligation to protect*: obliges States to prevent third parties (i.e. individuals, groups, corporations, other entities) from interfering in any way with the enjoyment of a human right. If water were recognised as a human right, States would be obliged, *inter alia*, to:
 - adopt the necessary and effective legislative and other measures to restrain third parties from denying access to adequate water and from polluting and inequitably extracting from water resources;
 - prevent third parties from compromising equal, affordable, and physical access to sufficient and safe water where water services are operated or controlled by third parties.
3. *Obligation to fulfil*: requires States to adopt the necessary measures directed towards the full realization of a certain human right. If water was recognised as a human right, States could meet this obligation by way of legislative implementation, adoption of a national water strategy and plan of action to realize this right while ensuring that water is affordable and available for everyone.

¹⁰⁹ Linda C. Reif, “Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection”, *Harvard Human Rights Journal*, vol. 13 (Spring 2000) at 2.

Acknowledging a human right to water would help focus attention to resolve conflicts over the use of shared watercourses

Many of today's conflicts have been attributed to the lack of water. There are presently 261 international river basins, and 145 nations have territory in shared basins.¹¹⁰ According to the United Nations, some 3000 basins are the scenes of current conflicts.¹¹¹ Many of the most difficult cases involve upstream/downstream controversies, but competition over scarce resources raises complex issues for all users.¹¹²

The customary rule of 'reasonable and equitable utilization', governing international watercourses, has been most recently codified in the UN Watercourses Convention.¹¹³ Art. 6(3) stipulates that all relevant factors are to be considered together when determining what is a reasonable and equitable use. This provision was directly taken from Art. V of the International Law Association's Helsinki Rules, the commentary for which stated that to be relevant, a factor must aid in the determination of the social and economic needs of the co-basin states.¹¹⁴ This means that particular interests referred to in Art. 10 (vital human needs) and Art. 21 (pollution harm) of the Watercourses Convention must be treated within the rule of allocation established under Arts. 5–7. Access to safe and sufficient water as a basic human right, and the consequential duty on governments to provide basic water supply for its populations will enable its consideration within such an allocation framework, i.e. minimum water requirements have to be agreed upon among co-basin states.

To maintain at least a minimum water requirement to serve human populations, and to resolve conflict over the use of shared water resources, an integrated and co-operative approach should be undertaken. Chapter 18 of Agenda 21 and more recently the WSSD Plan of Implementation recognised that an ecosystem approach is the most appropriate way to move forward on the issue of managing water resources. This reinforces the need to improve the efficient use of water resources and promote their allocation among competing uses in a way that gives priority to the satisfaction of basic human needs and balances the requirement of preserving or restoring ecosystems and their functions, in particular, in fragile environments, with human domestic, industrial and agricultural needs, including safeguarding drinking water quality. Recognising a right to water as a 'human' right would have a mutually reinforcing effect upon both the advancement of human rights protection, and the strengthening of what has been seen as environmental principles.

¹¹⁰ *Supra* note 84.

¹¹¹ T. Swartzberg, "The World's Freshwater Supplies: The Crunch is Here", *International Herald Tribune*, (30 September 1997), at 13.

¹¹² See conflicts, e.g. over the Jordan River, shared by Lebanon, Syria, Israel and Jordan; Turkey's hydroelectric power plants on the Tigris and Euphrates basins, which resulted in a serious controversy with Syria and Iraq; the Arab Sea basin, where more than 20 million people in five basin states struggle to share the "shrinking and polluted" resource; the dispute over the Danube between Slovakia and Hungary; Ethiopia's planned measures on the Blue Nile, which may adversely affect downstream uses in Egypt; etc.

¹¹³ In May 1997, the General Assembly adopted the Convention on the Law relating to the Non-Navigational Uses of International Watercourses, which is not yet in force.

¹¹⁴ P. Wouters, "The Legal Response to International Water Scarcity and Water Conflicts: The UN Watercourses Convention and Beyond", at www.thewaterpage.com/pat_wouters1.htm

A human right to water can help set priorities for water policy to ensure that no person may be deprived of enough, good-quality water to satisfy basic needs

The explicit recognition of water as a human right could represent a usable tool for civil society to hold governments accountable for guaranteeing access to water of sufficient quality and quantity and assist governments to establish effective policies and strategies. To ensure access to drinking water without discrimination, and to allow the individual right to water to be fully exercised, public authorities need to take measures aimed at improving the quality of water, reducing losses and establishing better (more equitable) pricing of water supplies. Active legal measures – under the auspices of human rights protection (rather than the traditional means of international environmental commitments) – can be taken to benefit disadvantaged groups, especially people living in poverty. Where the management of drinking water and sanitation is entrusted to private entities, States would need to ensure that the poor receive a minimum supply of drinking water and sanitation.

Global problems need global solutions: the water crisis requires a major shift in policies in order to eradicate poverty and to enhance sustainable development

The issue of safe water is central to work on both poverty and environment. The water supply and sanitation sector will face enormous challenges over the coming decades. The urban populations of Africa, Asia, Latin America and the Caribbean are expected to double over the next 25 years.¹¹⁵ Just in these regions, to achieve the 2015 target of halving the proportion of people lacking safe and affordable water, and basic sanitation, an additional 2.2 billion people will need access to sanitation and 1.5 billion to water supply. This means providing water supply services to 280,000 people and sanitation to 384,000 every day for the next 15 years.¹¹⁶

The overall economic and social benefits of meeting basic human needs far outweigh the costs of providing for these needs. Pearce and Warford estimated that water-related diseases cost society \$125 billion (in late 1970 dollars) just in direct medical expenses and lost work time alone, whereas the cost of providing new infrastructure needs for all major urban water sectors would be around \$25 to \$50 billion per year.¹¹⁷

Given the enormous economic investment required to better secure water supplies – which is simply not a viable option in most developing countries – one gets a sense of impending water crisis. Reliance on large water storages is beginning to fail for environmental, economic and social reasons and it is becoming more difficult to find new, or even retain existing, water resources to supply croplands.¹¹⁸ Technological solutions, such as nuclear desalination of sea water, drilling deep into groundwater aquifers – all of which have their own environmental, economic and social implications – are not readily accessible to developing nations.

¹¹⁵ *Supra* note 89. Chapter 1 at www.who.int/water_sanitation_health/Globassessment/GlobalTOC.htm

¹¹⁶ *Ibid.*

¹¹⁷ *Supra* note 12.

¹¹⁸ Peter H. Gleick, “The Changing Water Paradigm: A Look at Twenty-First Century Water-Resources Development.” *Water International*, vol. 25, No. 1 (2001) at 127–138.

Poverty lies at the centre of a number of failures to meet human rights and is a major obstacle to achieving sustainable development. Gleick has observed that “[t]he most important single goal for the future is to re-integrate water use with maintaining ecological health and environmental well-being.”¹¹⁹ To do this, a more holistic environmental ethic needs to be promoted that also meets the needs of present and future generations. A rights-based approach can enhance the impact of policies and strategies at both national and international levels.¹²⁰ Strengthening the link between human rights and water may be a useful tool in the eradication of poverty and achievement of sustainable development. What is needed is a major effort to implement commitments that have been made to bring lasting solutions to the water crisis.

¹¹⁹ *Ibid.*

¹²⁰ Final Text of the Meeting of Experts on Human Rights and the Environment, 16 January 2002, Para 13.

IV. Content of a right to water

If the international community agreed upon the value of establishing an explicit human right to water, its terminology, content and scope would need to be determined.

Terminology – a rights-based approach supplemented by an ecosystem approach

‘Water’ is looked upon as a social and environmental resource. The term ‘right to water’ does not only refer to the rights of people but also to the needs of the environment with regard to river basins, lakes, aquifers, oceans and ecosystems surrounding watercourses. Realistically, a right to water cannot be secured without this broader respect. A failure to recognise water as an environmental resource may jeopardise the rights-based approach, which views water primarily as a social resource. If we are to consider the maintenance of adequate access to and supply of good quality water, we need to look at how this is to be achieved beyond the provision of safe drinking water and sanitation. Maintaining a safe water supply means that overall river basin management, agricultural practices, and other works are important if we are to meaningfully strengthen and uphold any right to water. Thus, we need to make certain that river basins and groundwaters are managed in their entirety. Steps need to be taken to make provision for environmental flows for healthy river systems, i.e. to maintain downstream ecosystems and their benefits.¹²¹

The global environmental instruments that incorporate a right to water point to wider environmental resource management as important to respecting such a right. Practically, what should be assessed is whether “adequate supplies of water of good quality are maintained for the entire population of this planet”,¹²² and if not, how this can be achieved. If we accept that there is a right to water, guaranteeing this right in the face of increasing populations and increasing environmental stresses, especially in developing countries, becomes increasingly challenging. Ensuring this right for present and future generations requires that a long-term view be taken. A greater integration of environmental principles and human rights principles (particularly the ecosystem approach) will be required.

Management of water is not merely about managing water in-stream, but about the health of the land and ecosystem. Contemporary environmental management wisdom promotes an ecosystem orientation. Both Agenda 21 and the WSSD’s Plan of Implementation affirm the need to develop integrated water resources management. There are numerous well-established customary rules aiming at meeting the imperatives of environmental protection; these are the governing principles of watercourse law. Examples are the principles of equitable and reasonable utilization and no-significant harm, as also codified in the UN Watercourses

¹²¹ See Dyson, Bergkamp, Scanlon, – *Flow: The Essentials of Environmental Flows*. IUCN, Gland, Switzerland, released on 5 June 2003 during the 7th International Conference on Environmental Law Sao Paulo. It is the world’s first guide on environmental flows. See www.iucn.org/themes/law for details.

¹²² *Supra* note 31.

Convention.¹²³ The implementation of these principles should be promoted through the work of effective institutional mechanisms.

As mentioned above, a human rights approach would provide more protection for individuals. Yet, how widely deprivations of individual rights to water supply would be interpreted remains an issue for speculation. For example, would the establishment of a large dam upstream, impacting water quality/quantity potentially amount to injurious deprivation of individual rights? Or even more broadly, could forestry activity within a certain river basin be causally connected to deteriorated individual water quality, or would it be considered too remote? The question of how environmental norms relate to any future right to water will require serious consideration. If an ecosystem approach to managing water resources at a river basin level is taken, further considerations will arise for deliberation.

Content

A. Substantive human right to water

The content of the right to water should be defined as a right to access water of *adequate quality* and in *sufficient quantity* to meet basic human needs. All three aspects are closely tied to sustainable development and management of the physical environment. Thus, three facets must be explicitly acknowledged when conceptualizing water as a human right:

- accessibility – entailing three elements: water must be:
 - within safe physical reach for all,
 - affordable for all, and
 - accessible to all in law and in fact;
- adequate quality – water for personal or domestic use must be safe;
- quantity – water supply must be sufficient and continuous for personal and domestic uses.

International conventions and other instruments preserving all three stated aspects of a human right to water are rare. The Mar del Plata Conference included for the first time such a definition of a basic human right to water. The Preamble of the 1977 Declaration inspired Chapter 18 of Agenda 21, which repeated the “commonly agreed premise” 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 needs”. This three-aspect concept was also invoked by the UN Committee on Economic, Social and Cultural Rights in November in 2002, when it stated “[t]he human right to water entitles everyone to sufficient, affordable, physically accessible, safe and acceptable water for personal and domestic uses...”¹²⁴ In addition to these occasions, the Millennium Declaration also recognised that supply of drinking water is not simply a matter of quality but also includes both quantity and access as important; it acknowledges the necessity “[t]o stop the unsustainable exploitation

¹²³ *Supra* note 112.

¹²⁴ *Supra* note 18 at 2.

of water resources by developing water management strategies at the regional, national and local levels, which promote both equitable access and adequate supplies.”¹²⁵

Accessibility

General Comment No. 15 of the Economic, Social and Cultural Rights Committee listed four dimensions necessarily linked to the accessibility aspect of water and water facilities:

- (i) physical accessibility: meaning that water should be “within safe physical reach for all sections of the population”. When water is to be collected at distant sources, children miss school, and women might be attacked.
- (ii) economic accessibility: meaning that “costs and charges associated with securing water must be affordable”. In practical terms, this would require governments to intervene when water suppliers cut off the supply of water to persons unable to pay for those services. Thus, if the management of water were entrusted to a private company, states would have an obligation to ensure that the poor receive a minimum supply of water.
- (iii) non-discrimination: meaning that even “the most vulnerable or marginalized sections of population” should have access to water and water services. Where water supplies are not free of charge, states should make sure that costs are adjusted so that every person has access to water facilities. Often, poor pay on average 12 times more per litre of water than their counterparts with a municipal supply.¹²⁶ The General Comment affirmed “the obligation of States parties to guarantee that the right to water is enjoyed without discrimination (Art. 2(2)), and equally between men and women (Art. 3), pervades all of the Covenant obligations.”¹²⁷
- (iv) information accessibility: a procedural necessity for the implementation of the right to water and thus will be discussed further below.

Quality

Poor quality of water is a severe and widespread problem. It is quite likely that although people receive sufficient drinking water, it can be contaminated and unhealthy. In its 1993 Guidelines for drinking-water quality, WHO advised states to develop national standards that ensure “the safety of drinking water supplies through the elimination, or reduction to a minimum concentration, of constituents of water that are known to be hazardous to health.”¹²⁸

Quantity

As a minimum, the quantity should be sufficient to meet ‘basic human needs’ in terms of drinking, bathing, cleaning, cooking and sanitation. There are many other human uses of water, including water for food production and for industrial use. Although they are important for ensuring an adequate standard of living, agricultural and industrial production require huge

¹²⁵ *Supra* note 6.

¹²⁶ The Right to Water, WHO (2003).

¹²⁷ *Supra* note 18 at 6.

¹²⁸ *Guidelines for drinking-water quality*, 2nd ed. vol. 1 – Recommendations WHO, Geneva, (1993) at 2–4.

amounts of water, thus it should be provided only after basic human needs are met.¹²⁹ How much water constitutes ‘basic human needs’ is an issue under debate. The WHO, the World Bank, and the U.S Agency for International Development recommended between 20 and 40 litres per person per day – excluding water for cooking, bathing and basic cleaning – which must be located within a reasonable distance (interpreted as less than 200m from the household).¹³⁰ Gleick has argued for the adoption of an overall basic water requirement (BWR) for meeting the four domestic basic needs. He recommended 50 litres per person per day to meet basic human needs: five for drinking water, 20 for sanitation and hygiene, 15 for bathing and 10 for cooking.¹³¹

Table I. Data on domestic water use

<i>Countries</i>	<i>Litres of water used per person per day</i>
Gambia	4.5
Mali	8.0
Somalia	8.9
Mozambique	9.3
Uganda	9.3
Cambodia	9.5
Tanzania	10.1

In 1990, 55 countries with a population of nearly a billion fell below the 50 l/p/d level. In 2000, 2.157 million people lived in 62 countries that reported average domestic water use below this level. This data however does not indicate the quality of the water received. It is likely that many people who receive more than the recommended BWR are getting contaminated water.

By contrast, Western Europe generally uses four times the suggested BWR, while the current domestic use in US and Canada is more than 10 times of this amount (Gleick, 1996).

Beyond the immediacy of a human right to water, there is also a need to consider this human right in its temporal aspect, that is, to bear in mind not only the human rights of present generations, but also to ensure that the human rights of future generations are not compromised. Intergenerational equity means that “[s]ufficient water should be obtained in a sustainable manner” so that “the right can be realized for present and future generations.”¹³²

B. Procedural human rights to water

Procedural rights are necessary complements to a substantive human right to water because they enable the enforcement of substantive rights. Denial of these fundamental procedural rights, i.e. right to information, just administrative action, public participation and right to justice, would endanger the protection of substantive human rights. The Universal Declaration of Human Rights codifies these procedural rights in Art. 8 (effective remedy); Art. 19 (freedom of opinion and expression); Art. 20 (freedom of association); Art. 21 (right to take part in

¹²⁹ www.worldwaterday.org/2001/thematic/hmnrights

¹³⁰ H. Smets, “The Right to Water as a Human Right”, *Environmental Policy and Law*, 30(5), (2000) at 249.

¹³¹ Peter H. Gleick, “Basic Water Requirements for Human Activities: Meeting Basic Needs”, *Water International*, 21 (1996) at 88–89.

¹³² *Supra* note 18 at 5.

government); and Art. 26 (right to education). The ICCPR and other conventions set forth these procedural guarantees as fundamental human rights.¹³³

The core procedural rights that should accompany a human right to water are:

- a. the right of individuals to information concerning the government's activities on water-related issues;
- b. the right of individuals to participate in decision-making, which concerns water issues;
- c. the right of individuals to recourse for environmental harm suffered;
- d. the right of individuals to fair and just administrative action.

The right to information enables citizens to obtain information about water-related issues and human health; about proposed projects, laws, policies affecting or potentially affecting water resources as well as about threats to the environment and how to respond to them. It enables citizens to participate meaningfully in decisions that directly affect their livelihood thus promoting accountability and transparency in decision-making in the water sector. Effective participation requires education, access to information, a role in decision-making, transparency of decision-making processes, monitoring, environmental impact assessment and enforcement mechanisms.¹³⁴ The right to remedy guarantees that victims of human rights violations can initiate and rely on meaningful enforcement measures. The procedural right of effective remedy requires that in case existing mechanisms are inadequate, governments have the duty to establish new ones. The right to just administrative action requires a State to refrain from action which would deprive an individual of the right to water.

These rights have been incorporated in all basic human rights declarations and other environmental instruments as Appendix IV shows. Therefore, the procedural remedies that look at practical dimensions of the water problem are already in place. Water may be integrated within an existing human rights convention or in a separate legal instrument, such as the Draft Declaration of Principles on Human Rights and the Environment. A substantive human right to water would be accompanied by the well-established concepts of procedural guarantees, which will serve as a protective shield above such right.

Scope – duties for the public and private sector alike

Recognition of a human right to water could effectively supplement existing means of environmental regulation of transnational corporations (TNCs). Environmentally abusive practices of some transnational corporations have caused devastation of the natural resources of people around the world in the last decades. The attempts to regulate TNC behaviour have failed so far. In 1993, the UN gave up the effort to establish a code for TNCs when it became obvious that compromise was nearly impossible.¹³⁵ The OECD published 'Guidelines for Multinational Enterprises' in 1976, but because it was non-binding it lacked enforceability. Agenda 21 attempted to encourage TNCs "to introduce policies demonstrating the commitment...to adopt standards of operation equivalent to or not less stringent than those existing

¹³³ See Appendix IV.

¹³⁴ Neil A.F. Popovic, "In Pursuit of Environmental Human Rights", *Columbia Human Rights Law Review*, vol. 27 (1996) at 555.

¹³⁵ *Supra* note 106 at 272.

in the country of origin.”¹³⁶ This represents progress since ninety percent of the world’s TNCs originate from developed countries with more stringent environmental regulation. However, it is a non-binding instrument.

If the international community decides to formulate a human right to water in a legally binding instrument, it also could expressly provide a corresponding duty on State and private actors alike, to protect that right. This seems straightforward in a rights-based approach, from which the duty of States to prevent third parties from interfering with the enjoyment of human rights flows directly.

The Draft Declaration of Principles on Human Rights and the Environment places the duty on States to take measures so that TNCs comply with their environmental and human rights duties. Several environmental treaties have taken a direct approach and made TNCs liable for their environmental delicts.¹³⁷ The Inter-American Court of Human Rights was of the opinion that a State becomes responsible for violations by private actors if it fails to exercise due diligence to prevent those violations or to respond to them. In the *Velasquez Rodriguez Case*¹³⁸ (1988), the court stated that in case a government does not seriously investigate human rights violations committed by private parties, that makes such a state “responsible on the international plane”.¹³⁹ National court rulings also point to the evolution of ‘horizontal operations’ of constitutional duties and rights, whereby private citizens, corporations, and other legal persons are liable for their actions. In the *M. C. Mehta v. Shriram Food and Fertilizer Industries Case*¹⁴⁰ (1987), the Supreme Court of India held that Art. 32 of the Constitution, which provides for writs against the state for any breach of fundamental rights, also applies to private parties. Despite the unlikelihood that a legal instrument to award damages against TNCs will soon be established, the international community – when formulating a human right to water – should consider the creation of duties as with regards to the private sector.

¹³⁶ *Ibid.* at 274.

¹³⁷ e.g. International Convention on Civil Liability for Oil Pollution Damage (1970) making ship-owners liable for pollution damage; Convention for the Prevention of Pollution of the Sea by Oil (1954) imposing penalties for violations against offending ships; Convention on Third Party Liability in the Field of Nuclear Energy (1960) imposing liability on operators of nuclear installations; Vienna Convention on Civil Liability for Nuclear damage (1968) imposing liability on operators of nuclear installations.

¹³⁸ 4 Inter-Am. Ct. H.R. (ser. C) Judgment of July 29, 1988 concerning disappearances of civilians perpetrated by the Honduran army.

¹³⁹ *Velasquez Rodriguez Case*, 4 Inter-Am. Ct. H.R. (Judgment of July 29, 1988) at 154.

¹⁴⁰ *M. C. Mehta v. Shriram Food and Fertilizer Industries*, 1987 A.I.R. (S.C.) 1026 (1987).

V. Concluding remarks

The overall framework is in place to work towards enhanced realization of a right to water through the implementation of the Millennium Declaration and the WSSD's Plan of Implementation. The Millennium Development Goal to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water, and who do not have access to basic sanitation should be accompanied by a specific action plan. The Plan of Implementation has taken the first step by outlining specific actions that are necessary to achieve this goal.¹⁴¹ This includes the need to "integrate sanitation into water resources management strategies".

Water, as an environmental resource, needs to be further promoted and managed within the framework of a river basin and ecosystem approach. The rights-based approach, that this paper seeks to advance, is based on an essentially human-centred view as it promotes water as a social resource. However, a human right to water would not only mean the expansion of existing human rights and duties in the context of achieving access to water by all, but also an acknowledgement that healthy, functioning river systems and groundwaters are essential for people, plants and animals.

Ultimately, there is no substitute for making meaningful change 'on the ground'. Recognition of a right to water may provide an impetus for change at the State level. Practically, the way forward extends beyond merely acknowledging a formal human right to water. Any long-term and sustainable approach to advancing a right to water cannot be divorced from the wider origin of freshwater, and from the important role that healthy ecosystems play in ensuring adequate quality and quantity of freshwater for basic human needs, for justifiable social and economic development and poverty alleviation.

¹⁴¹ *Supra* note 66, Para 7(a): Develop and implement efficient household sanitation systems; (b) Improve sanitation in public institutions, especially schools (c) Promote safe hygiene practices; (d) Promote education and outreach focused on children, as agents of behavioral change; (e) Promote affordable and socially and culturally acceptable technologies and practices; (f) Develop innovative financing and partnership mechanisms; (g) Integrate sanitation into water resources management strategies.

Appendix I

Legally binding instruments

<i>Convention</i>	<i>Article</i>
United Nations Charter (1945)	Article 55: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (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.
Geneva Convention III (1949)	Article 20: The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention. Article 26: Sufficient drinking water shall be supplied to prisoners of war. Article 29: The Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics...Also, apart from the baths and showers with which the camps shall be furnished prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose. Article 46: The Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health, likewise with the necessary clothing, shelter and medical attention.
Geneva Convention IV (1949)	Article 85: The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health...Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene, and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose shall be granted to them. Showers or baths shall also be available. Article 89: Sufficient drinking water shall be supplied to internees. Article 127: The Detaining Power shall supply internees during transfer with drinking water and food sufficient in quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention.
International Covenant on Political and Civil Rights (1966)	Article 6(1): Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

<i>Convention</i>	<i>Article</i>
<p>International Covenant on Economic, Social and Cultural Rights (1966)</p>	<p>Article 11(1): The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent; Article 11(2): The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.</p> <p>Article 12(1): The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and Article 12(2): The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.</p>
<p>Additional Protocol I to the Geneva Convention (1977)</p>	<p>Article 54(2): It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party; (3) The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party: (b) If not as sustenance, then in direct support of military action, <i>provided</i>, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.</p> <p>Article 55(1): Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare, which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.</p>

<i>Convention</i>	<i>Article</i>
Additional Protocol II to the Geneva Convention (1977)	Article 5(b): Persons whose liberty has been restricted... shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene. Article 14: It is therefore prohibited to attack, destroy, remove or render useless for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works.
The Convention on the Elimination of All Forms of Discrimination against Women (1979)	Article 14(2): States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality with men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: ... (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.
The Convention on the Rights of the Child (1989)	Article 24(2): States Parties shall pursue full implementation of this right [i.e. the right of the child to the enjoyment of the highest attainable standard of health] and, in particular, shall take appropriate measures: ... (a) To combat disease and malnutrition, including within the framework of primary health care, through, <i>inter alia</i> , 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 . . .

Non-legally binding instruments

<i>Convention</i>	<i>Article</i>
The Universal Declaration of Human Rights (1948)	Article 25(1): 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...
The Stockholm Declaration (UN Conference on the Human Environment)(1972)	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... 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.

<i>Convention</i>	<i>Article</i>
Universal Declaration on the Eradication of Hunger and Malnutrition (1974)	<p>Article 1: Every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties. Society today already possesses sufficient resources, organizational ability and technology and hence the competence to achieve this objective. Accordingly, the eradication of hunger is a common objective of all the countries of the international community, especially of the developed countries and others in a position to help.</p> <p>Article 5: Marine and inland water resources are today becoming more important than ever as a source of food and economic prosperity. Accordingly, action should be taken to promote a rational exploitation of these resources, preferably for direct consumption, in order to contribute to meeting the food requirements of all peoples.</p>
Mar Del Plata Declaration of the United Nations Water Conference (1977)	<p>Preamble: All peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.</p>
Declaration on the Right to Development (1986)	<p>Article 8(1): States 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, education, health services, food, housing, employment and the fair distribution of income....</p>
“Our Common Future”, Report of the World Commission on Environment and Development (1987)	<p>Annex 1(1): All human beings have the fundamental right to an environment adequate for their health and well being.</p>
Resolution 45/94 on the need to ensure a healthy environment for the well-being of individuals, adopted by the United Nations General Assembly (1990)	<p>Article 1: recognises that all individuals are entitled to live in an environment adequate for their health and well being.</p>
World Summit for Children Plan of Action (1990)	<p>Para 5(d): calls for concerted national action and international co-operation to strive for the achievement, in all countries, of “universal access to safe drinking water and to sanitary means of excreta disposal” for the survival, protection and development of children by the year 2000.</p>
UN Rules for the Protection of Juveniles Deprived of their Liberty (1990)	<p>Article 34: Sanitary installations should be located and of a sufficient standard to enable every juvenile to comply, as required, with their physical needs in privacy and in a clean and decent manner.</p> <p>Article 37: Clean drinking water should be available to every juvenile at any time.</p>

<i>Convention</i>	<i>Article</i>
Dublin Statement (International Conference on Water and the Environment)(1992)	Principle 4: Water has an economic value in all its competing uses and should be recognised as an economic good. Within this principle, 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. Past failure to recognize the economic value of water has led to wasteful and environmentally damaging uses of the resource. Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.
Rio Declaration on Environment and Development (1992)	Principle 1: Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. Principle 3: Right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.
Agenda 21, Report of the United Nations Conference on Environment and Development (1992)	<i>Inter alia:</i> 18. 2: Water is needed in all aspects of life. The general objective is to make certain that adequate supplies of water of good quality are maintained for the entire population of this planet, while preserving the hydrological, biological and chemical functions of ecosystems, adapting human activities within the capacity limits of nature and combating vectors of water-related diseases. 18.3: The widespread scarcity, gradual destruction and aggravated pollution of freshwater resources in many world regions, along with the progressive encroachment of incompatible activities, demand integrated water resources planning and management . . . Rational water utilization schemes for the development of surface and underground water-supply sources and other potential sources have to be supported by concurrent water conservation and wastage minimization measures. 18.18: Integrated water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization. To this end, water resources have to be protected, taking into account the functioning of aquatic ecosystems and the perennality of the resource, in order to satisfy and reconcile needs for water in human activities. In developing and using water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of ecosystems. 18.47: 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.
Declaration of Amsterdam (Second International Water Tribunal) (1992)	Article 1: All members of present and future generations have the fundamental right to a sustainable livelihood including the availability of water in sufficient quantity and quality. Article 2: Each individual human being, collectivity and entity which has an interest in a water resource has the right to effective participation in decision making processes concerning activities that may in any way affect that water resource.

<i>Convention</i>	<i>Article</i>
Draft Principles on Human Rights and the Environment (UN Sub-Commission on Prevention of Discrimination and Protection of Minorities) (1994)	<p>Principle 2: All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.</p> <p>Principle 4: All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.</p> <p>Principle 6: All persons have the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems.</p> <p>Principle 7: All persons have the right to the highest attainable standard of health free from environmental harm.</p> <p>Principle 10: All persons have the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment.</p>
Programme of Action of the United Nations International Conference on Population and Development (1994)	<p>Principle 2: Human beings ... have the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation.</p>
IUCN Draft International Covenant on Environment and Development (1995)	<p>Art. 12(1) recognises “the right of everyone to an environment and a level of development adequate for their health, well being and dignity.”</p> <p>Art. 19: Parties shall take all appropriate measures to maintain and restore the quality of water, including atmospheric, marine, ground and surface fresh water, to meet basic human needs and as an essential component of aquatic systems. Parties also shall take all appropriate measures, in particular through conservation and management of water resources, to ensure the availability of a sufficient quantity of water to satisfy basic human needs and to maintain aquatic systems.</p>
Programme of Action of the World Summit for Social Development (1995)	<p>Paragraph 35(b) stresses the need to create “public awareness that the satisfaction of basic human needs is an essential element of poverty reduction; these needs are closely interrelated and comprise nutrition, health, water and sanitation, education, employment, housing and participation in cultural and social life.”</p>
Final Declaration of the International Conference on Water and Sustainable Development (1998)	<p>Underline that :</p> <ul style="list-style-type: none"> ■ water resources are essential for satisfying basic human needs, health, energy and food production, and the preservation of ecosystems, as well as for social and economic development; ■ water is a key natural resource for future prosperity and stability, which should be recognised as a catalyst for regional cooperation.
Ministerial Declaration of The Hague on Water Security in the 21 st century (2000)	<p>Article 1: To provide water security in the 21st Century... means ensuring that ...every person has access to enough safe water at an affordable cost to lead a healthy and productive life and that the vulnerable are protected from the risks of water-related hazards.</p>

<i>Convention</i>	<i>Article</i>
Resolution 2002/6 of the UN Sub-Commission on the Promotion and Protection of Human Rights on the Promotion of the Realization of the Right to Drinking Water (2002)	<p>Preamble:</p> <p><i>Reaffirming</i> the fundamental principles of equality, human dignity and social justice, and the right to drinking water supply and sanitation for every woman, man and child,</p> <p><i>Convinced</i> of the urgent and persistent need for increased attention and commitment by all decision makers to the right of everyone to drinking water supply and sanitation...</p>
World Summit on Sustainable Development, Plan of Implementation (2002)	<p>Para 25(c): Improve the efficient use of water resources and promote their allocation among competing uses in a way that gives priority to the satisfaction of basic human needs and balances the requirement of preserving or restoring ecosystems and their functions, in particular in fragile environments, with human domestic, industrial and agriculture needs, including safeguarding drinking water quality.</p>

Regional instruments

<i>Convention</i>	<i>Article</i>
African Charter on Human and People's Rights (1981)	Article 24: All peoples shall have the right to a general satisfactory environment favourable to their development.
Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (The Protocol of San Salvador) (1988)	Article 11(1): Everyone shall have the right to live in a healthy environment and to have access to basic public services. (2) The State Parties shall promote the protection, preservation and improvement of the environment.
African Charter on the Rights and Welfare of the Child (1990)	Article 14(1): Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. (2) States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures: c) to ensure the provision of adequate nutrition and safe drinking water...
Madeira Declaration on the Sustainable Management of Water Resources (ECEL)(1999)	No person may be deprived of the amount of water needed to meet his basic needs.

<i>Convention</i>	<i>Article</i>
Protocol on Water and Health to the 1992 Convention on the Use of Transboundary Watercourses and International Lakes, European Commission of the United Nations for Europe (ECE) (1999)	Article 4(2): Parties shall, in particular, take all appropriate measures for the purpose of ensuring: (a) adequate supplies of wholesome drinking water...; (b) adequate sanitation... Article 5: Parties shall be guided in particular by the following principles and approaches: (1) . . . equitable access to water, adequate in terms of both quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion. Article 6(1): The Parties shall pursue the aims of: (a) access to drinking water for everyone; (b) provision of sanitation for everyone.
European Council of Environmental Law (ECEL) Resolution on the Right to Water (2000)	Consider[s] that access to water is part of a sustainable development policy and cannot be regulated by market forces alone. Consider[s] that the right to water cannot be dissociated from the right to food and the right to housing which are recognised as human rights and that the right to water is also closely linked to the right to health. Each person has the right to water in sufficient quantity and quality for his life and health.
Declaration of the Forum on Human Rights – Second Peoples’ Summit of the Americas (2001)	Article 4: States must take measures to ensure complete fulfillment of the right of all people to free determination, food, health care, access to water, land, and other resources under conditions of equity.
Recommendation 14 of the Committee of Ministers to Member States on the European Charter on Water Resources (2001)	Para 5: International human rights instruments recognize the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene. Para 19: Without prejudice to the right to water to meet basic needs, the supply of water shall be subject to payment in order to cover financial costs associated with the production and utilization of water resources.

National provisions

<i>State</i>	<i>Legal Provision</i>
Argentina	Const. Art. 41: All residents enjoy the right to a healthy, balanced environment.
Belarus	Const. Art. 46: Every person shall have the right to a wholesome environment.
Benin	Const. Art. 27: Every person has the right to a healthy, satisfying and lasting environment.
Brazil	Const. Art 225: Everyone has the right to an ecologically balanced environment.

<i>State</i>	<i>Legal Provision</i>
Bulgaria	Const. Art. 55: Citizens have the right to a healthy and favourable environment.
Burkina Faso	Const. Art. 31: The right to a healthy environment shall be recognized.
Cambodia	Const. (1993) Art. 59: The State shall protect the environment and balance of abundant natural resources and establish a precise plan of management of land, water, air, wind geology, ecological system, mines, energy, petrol, and gas, rocks and sand, gems, forests and forest products, wildlife, fish and aquatic resources.
Cape Verde	Const. Art. 70: Everyone shall have the right to a healthy, ecologically balanced environment.
Chile	Const. (1980) Art. 19(8): The Constitution guarantees to all persons: ... The right to live in an environment free from pollution.
Colombia	Const. Art. 79: Every individual has the right to enjoy a healthy environment.
Congo	Const. Art. 46: Each citizen shall have the right to a healthy, satisfactory and enduring environment.
Costa Rica	Constitution recognises a right of the people to a healthy environment (Art. 46, 50)
Ecuador	Constitution recognises a right of the people to a healthy environment (Art. 23)
Eritrea	Const. (1996) Art. 10: The State shall work to bring about a balanced and sustainable development throughout the country, and shall use all available means to ensure all citizens to improve their livelihood in a sustainable manner, through their development. The State shall have the responsibility to regulate all land, water and natural resources and to ensure their management in a balanced and sustainable manner and in the interest of the present and future generations; and to create the right conditions for securing the participation of the people to safeguard the environment.
Ethiopia	Const. (1998) Art. 90(1): Every Ethiopian is entitled, within the limits of the country's resources, to clean water. Art. 92: The state has a duty to control and utilize land and natural resources for the common good of the nation's people and for their development. The state has an obligation to strive to ensure a clean and healthy environment and other environmental rights.
France	Para 11 of the Preamble to the French Constitution of 1946: "[the nation] guarantees to all [...] health protection, material security". The French Water Act of 1992 says that the use of water belongs to everyone.
Gambia	Const. (1996) Art. 216(4): The State shall endeavor to facilitate equal access to clean and safe water.

<i>State</i>	<i>Legal Provision</i>
Greece	Constitution recognises a right of the people to a healthy environment (Art. 24).
Guatemala	Const. (1985): Article 127: Water regime. All waters belong to the public domain, and are inalienable and imprescriptible. The use and enjoyment are granted in the ways established by law, and in accordance to social interest. A specific law will regulate this matter. Article 128: Use and enjoyment of water, lakes and rivers. The use and enjoyment of lake and river waters, for agricultural, farming, tourist or purposes of any other nature, that contribute to the development of domestic economy, is at the service of the community and not of any particular person, but users shall have the obligation to reforest the shores and channels, as well as to provide access routes.
Honduras	Art. 145 of the Const. recognises a right of the people to a healthy environment.
Hungary	Const. (1990) Ch. I, § 18: The Republic of Hungary recognises and enforces everyone's right to a healthy environment.
India	Const. Art. 48A: The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. Art. 51A: It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for living creatures.
Japan	Const. Art. 25: citizens "have the right to maintain the minimum standards of wholesome and cultured living."
Kazakhstan	Const. Art. 26: „A citizen...shall have the right to a favorable environment.
Korea	Const. (1987) Ch. II, Art. 35: All citizens shall have the right to a healthy and pleasant environment.
Kyrgyzstan	Const. Art. 35: Citizens of the Kyrgyz Republic shall have the right to a healthy safe environment.
Laos	Const. (1991) Art. 17: All organizations and citizens must protect the environment and natural resources: land, underground, forests, fauna, water sources and atmosphere.
Macedonia (Former Yugoslav Republic)	Const. Art. 43: Everyone has the right to a healthy environment to live in.
Mali	Const. Art. 15: Every person shall have the right to a healthy environment.

<i>State</i>	<i>Legal Provision</i>
Mexico	Const. (amended 1999) Art. 27: Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property... Centers of population which at present either have no lands or water or which do not possess them in sufficient quantities for the needs of their inhabitants, shall be entitled to grants thereof, which shall be taken from adjacent properties, the rights of small landed holdings in operation being respected at all times.
Moldova	Const. Art. 37: Every human being has the right to live in an environment that is ecologically safe for life and health.
Namibia	Preamble to Sixth Draft Water Resources Management Bill, (2001): Government's overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water to ensure the right of all citizens to sufficient safe water for a healthy and productive life and the redistribution of water.
Netherlands	Const. Art. 21: It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.
Nicaragua	Const. (1987) Ch. III, Art. 60: Nicaraguans have the right to live in a healthy environment. Law No. 28 (1987) Art. 36: Communal property are the lands, waters, and forests that have traditionally belonged to the Communities of the Atlantic Coast, and they are subject to the following provisions: 1. Communal lands are inalienable; they cannot be donated, sold, encumbered nor mortgaged, and they are inextinguishable.
Panama	Const. Art 114: It is a fundamental duty of the State to guarantee that the population live in a healthy environment, free of pollution, where air, water and food satisfy the development requirements for an adequate development of human life.
Paraguay	Const. Art 7: Everyone has the right to live in a healthy, ecologically balanced environment.
Peru	Const. Art. 123: Everyone has the right to live in a healthy environment, ecologically balanced and adequate for the development of life and the preservation of the countryside and nature.
Philippines	Const. Art. II, §15: The state shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.
Portugal	Const. (1982) Art. 66(1): Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it.
Slovakia	Const. Art. 44: Every person has the right to a favourable environment.
Slovenia	Const. Art. 72: Everyone shall have the right to a healthy living environment in accordance with law.

<i>State</i>	<i>Legal Provision</i>
South Africa	<p>Const. (1996) §24(a): Everyone has the right to an environment that is not harmful to their health or well-being.</p> <p>South African Bill of Rights (1996) enshrines a right of access to water in Section 27:</p> <p>(1) Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.</p> <p>(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights...</p>
Spain	<p>Const. Art. 45: Every person shall have the right to enjoy an environment suitable for the development of the person.</p>
Switzerland	<p>Const. (1991) Article 24bis: (1) To ensure the economical use and the protection of water and the prevention of damage by water, the Confederation, having regard to the total water economy, shall by legislation establish principles in the general interest concerning: a) the conservation and exploitation of water, especially for the supply of drinking water and the enrichment of underground water: b) the use of water for energy production and for cooling purposes; c) the regulation of water levels and of the flow of surface and underground water, the diversion of water outside its natural course, irrigation and drainage and other intervention in the water cycle.</p>
Togo	<p>Const. Art. 41: Every person shall have the right to a clean environment.</p>
Turkey	<p>Const. (1982) Art. 56: Everyone has the right to live in a healthy, balanced environment.</p>
Uganda	<p>Const. (1995) Preamble: The State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda.</p> <p>Art 14: The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that... all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, decent shelter, adequate clothing, food, security and pension and retirements benefits.</p>
United States of America	<p>Eight state constitutions recognise the right to a healthy environment. Besides, the Constitutions of Illinois, Pennsylvania, Massachusetts and Texas all recognise the right of people to pure water.</p>
Venezuela	<p>Art. 127 of the Const. recognises the right of the people to a healthy environment.</p>
Zambia	<p>Const. (1996) Art. 112: The State shall endeavour to provide clean and safe water.</p>

Appendix II

Expanding the right to life

India has generated the largest volume of jurisprudence regarding the environmental aspects of the constitutional right to life.

- The High Court held in *L.K.Koolwal v State of Rajasthan and Others* that “maintenance of health, preservation of the sanitation and environment falls within the purview of Article 21” and thus Jaipur City violated residents’ right to life by failing to implement adequate sanitation measures.¹⁴²
- In *Attakoya Thangal v Union of India* 1990, the court considered the legality of extracting water to increase water supply in the Lakshwadeep islands.¹⁴³ It concluded that the “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 sweet water and the right to free air attributes of the right to life, for these are the basic elements which sustain life itself.”
- In 1991, the Supreme Court in the *Charan Lal Sahu Case* interpreted the right to life guaranteed by Art. 21 of the Constitution, to include the right to a wholesome environment.
- In *V. Laxmipathy and Others v State of Karnataka and Others* (1991), the High Court went further and observed that “[e]ntitlement to a clean environment is one of the recognised basic human rights”.¹⁴⁴
- In the *Subash Kumar Case*, the Court said that the right to life includes the right to enjoyment of pollution-free water and air for full enjoyment of life. It was added in the *D.D. Vyas v Ghaziabad Development Authority Case* (1993) that “[i]f anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Art. 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.”¹⁴⁵
- The *M.C. Mehta v. Union of India and Others Case* (1988) concerned the problem of pollution of the Ganga by the Kanpur Municipal Council and the duty of the government, under Art. 21, to ensure a better quality of environment. The Supreme Court ordered the government to improve its sewerage system and to ensure that the practice of throwing burnt corpses into the river was stopped.¹⁴⁶ The court emphasized that due to the “grave consequences of the pollution of water and air”, the “need for protecting and improving

¹⁴² L.K. Koolwal v State of Rajasthan, 1988 A.I.R. (Raj.) 2 (High Court of Rajasthan, 1988).

¹⁴³ A. Rosencranz and S. Rustomjee, “Citizens’ Right to a Healthful Environment under the Constitution of India”, at 7.

¹⁴⁴ *Ibid.* at 4.

¹⁴⁵ *Ibid.* at 7.

¹⁴⁶ *Ibid.* at 8.

the natural environment...is considered to be one of the fundamental duties under the Constitution (vide clause (g) Art. 51A of the Constitution)..."

- The Supreme Court held in *Virendra Gaur and others v State of Haryana* (1995) that "Environmental, ecological, air, water pollution etc should be regarded as amounting to violation of Article 21."
- Similarly, in the *Vellore Citizens Welfare Reform v. Union of India*, the Supreme Court held that tanneries had violated citizens' right to life by discharging untreated effluents into agricultural areas and local drinking water supplies, thereby severely polluting the drinking water.¹⁴⁷

Bangladesh

- In the *Dr. M. Farooque v. Bangladesh Case*, the Appellate Division decided that "Articles 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, and sanitation, without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life."¹⁴⁸ In the same case, the High Court Division reinforced this interpretation.

Pakistan

- In *Shala Zia v. WAPDA*¹⁴⁹ (1994), the Supreme Court interpreted the constitutionally protected rights to life and dignity to include the right to a healthy environment. This decision is even more remarkable as there are no specific provisions on environmental protection.
- Later in the same year, the Supreme Court, citing *Shala Zia*, found in the *Salt Miners Case*¹⁵⁰ that mining companies have violated the right of citizens by polluting local drinking water supplies. The Court expanded Art. 9 of the right to life and said: "[i]n hilly areas where access to water is scarce, difficult or limited, the right to have water free from pollution and contamination is a right to life itself... The right to have unpolluted water is a right of every person, wherever he lives."¹⁵¹

Nepal

- In *LEADERS, Inc. v. Godawi Marble Industries*, it was held that a marble mining operation contaminating the water supplies and the soil violated nearby residents' constitutional right to life.¹⁵²

¹⁴⁷ *Vellore Citizens Welfare Reform v. Union of India*, 1996 A.I.R. (S.C.) 2715 (1996).

¹⁴⁸ Jona Razzaque, "Human Rights and the Environment – National Experiences", *Environmental Policy and Law*, 32/2 (2002), at 101.

¹⁴⁹ *Shala Zia v. WAPDA*, PDL (1994) SC 693. This case also led to many similar decisions. For an extensive analysis see: Dr Parvez Hassan, "Environmental Rights as Part of Fundamental Rights: the Leadership of the Judiciary in Pakistan", IUCN/Ecopravo-Lviv/UNEP 'EECCA Region Judges Symposium', May 2003.

¹⁵⁰ *General Secretary, West Pakistan Salt Miners Labor Union Khwra, Khelum v. The Director, Industries and Mineral Development*, Punjab, Lahora, Human Rights Case No. 120 of 1993, (1994) S.C.M.R. at 2061.

¹⁵¹ *Ibid.* at 2070.

¹⁵² *LEADERS, Inc. v. Godawi Marble Industries* (Supreme Court Nepal, Oct. 31, 1995)

Costa Rica

- The Supreme Court held in *Carlos Roberto Mejia Chacon v. Municipalidad de Santa Ana*, that a waste disposal site in a small canyon threatened the constitutional right to life of the petitioner.¹⁵³

Though not explicitly enshrined in the constitutions, a human right to water could be viewed as part and parcel of the fundamental right to a healthy environment.

Right to healthy environment

India

Of the many countries that have interpreted constitutional environmental provisions, India has the most experience and has been the most creative in giving effect to its constitutional environmental provisions:

- *Rural Litigation and Entitlement Kendra v. Uttar Pradesh* concerned unauthorized mining in the Dehra Dun area that adversely affected the ecology and resulted in environmental damage. The Supreme Court upheld the right to a “healthy environment” and ordered the ceasing of the mining operations saying “it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance.”¹⁵⁴
- The High Court held in *L.K. Koolwal v State of Rajasthan and Others* that “maintenance of health, preservation of the sanitation and environment falls within the purview of Article 21”. It recalled Art. 51 of the Constitution – which poses a duty on every citizen “to protect and improve the natural environment...” – and concluded that “it creates the right in favor of the citizen to move the Court to see that the State performs its duties faithfully” ... thus, “Art. 51 gives the right to the citizen to move to the Court for the enforcement of the duty cast on the State instrumentalities, agencies, etc...”¹⁵⁵

Ecuador

- The Constitutional Court held in the *Arco Iris v. Instituto Ecuatoriano de Minería Case* that “environmental degradation in Podocarpus National park is a threat to the environmental human right of the inhabitants of the provinces of Loja and Zamora Chinchipe to have an area which ensures the natural and continuous provision of water....”¹⁵⁶

¹⁵³ *Carlos Roberto Mejia Chacon v. Municipalidad de Santa Ana*, Judgment No. 3705-93 (Supreme Court, Constitutional Chamber, July 30, 1993).

¹⁵⁴ *Rural Litigation and Entitlement Kendra v. Uttar Pradesh*, 1985 A.I.R. (S.C.) 652, 656 (1985); 1988 A.I.R. (S.C.) 2187 (1988).

¹⁵⁵ *Supra* note 142 at 9.

¹⁵⁶ *Arco Iris v. Instituto Ecuatoriano de Minería*, Case No. 224/90, Judgment No. 054-93-CP (Constitutional Court of Ecuador)

Peru

- The citizens’ constitutional right to a healthy environment was at stake when petroleum residues were dumped into a lake that served as a source of drinking water. The judge ordered the barge owner to stop the pollution.¹⁵⁷

USA

- In *Montana Environmental Information Center v. Department of Environmental Quality*, the Montana Supreme Court utilized strict scrutiny when reviewing the granting of an exploration licence to a gold mining operation. The Court also held that the groups did not have to demonstrate a threat to public health or water quality standards when invoking the constitutional right to a clean and healthy environment – the derogation of high-quality water was sufficient.

Right to water

South Africa is the only country where the right to access to water is embodied in the Constitution: Section 27(1)(b) of the Constitution states that everyone has the right to have access to sufficient water. Section 27(2) requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right.

- In the *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, the Court found that the disconnection of water supply would constitute a prima facie breach of the State’s duty to respect the right of access to water. The court held in favour of the residents on the grounds that the municipality did not prove that it had valid grounds for disconnecting the water supply, nor that it had acted according to fair procedures.

France does not provide in its Constitution for a right to water, but the French Water Act adopted in 1992 stipulates that the use of water belongs to everyone.¹⁵⁸ In a 1996 judgment, the Regional Court of Roanne convicted a distribution company of unlawful interruption of the water supply, on the grounds that a supplier who has not been paid must apply to the court for the enforcement warrant.¹⁵⁹ Though not constitutionally protected, such ruling made the right to drinking water a legally protected reality.

¹⁵⁷ *Supra* note 42 at 19.

¹⁵⁸ Law No. 92-3 of January 3, 1992, On Water, (“Journal officiel” Jan. 4, 1992, at 187).

¹⁵⁹ Preliminary report submitted by Mr Hadji Guisse to the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2002/10, at 11.

Appendix III

The human right to a healthy environment

Evolution

1972 The first explicit link between environmental protection and human rights was made in the Stockholm Declaration, of which Principle 1 proclaims that “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 for present and future generations.”¹⁶⁰

1981 The African Charter of Human and People’s Rights was adopted, of which Art 24. recognises that “all peoples shall have the right to a general satisfactory environment favorable to their development”.

1986 The Experts Group on Environmental Law of the World Commission on Environment and Development (WCED) considering that there was not yet a well-recognised right to a healthy environment under international law, proposed a draft of universal legal principles on environmental protection, which could have been later incorporated in a global, legally binding instrument. The draft included: “All human beings have the fundamental right to an environment adequate for their health and well-being”.

1988 In Art. 11 of the San Salvador Protocol to the American Convention on Human Rights – for the first time in history – the individual right to environment was explicitly mentioned: “everyone shall have the right to live in a healthy environment and to have access to basic public services.”

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted Resolution 1988/26, which stated that the movement and dumping of toxic and dangerous products “endangers basic human rights, such as ... the right to live in a sound and healthy environment”.

1989 The Hague Declaration, signed by the heads of states of 24 countries, recognised “the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere.”

1990 The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities while “affirming the inextricable relationship between human rights and the environment” appointed a Special Rapporteur to study the relationship between human rights and the environment.

¹⁶⁰ The principle is more an indirect recognition of right to a healthy environment, since it establishes a link between well-known human rights (right to freedom, right to life) and the quality of environment, rather than a direct one. Its language has bred from the 1966 Covenant on Economic, Social and Cultural Right, which recognised the individual’s right to a “continuous improvement of living conditions” (Art. 11) as well as to “the enjoyment of the highest attainable standard of physical and mental health” (Art. 12).

The Commission on Human Rights adopted Resolution 1990/41, which underscored the link between preservation of the environment and promotion of human rights.

The European Council adopted the Dublin Declaration on “The Environmental Imperative” stating that the objective of the Community action for the protection of the environment “must be to guarantee citizens the right to a clean and healthy environment”.

1991 The Commission on Human Rights adopted Resolution 1991/44, which recognises that “all individuals are entitled to live in an environment adequate for their health and well-being.”

1992 No provision explicitly addressed the issue in the Rio Declaration, although Principle 1 states that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”¹⁶¹ The Declaration does recognize though in Principle 10 the procedural right of a human right to a healthy environment.

1994 The UN General Assembly in its Resolution 45/94, recognised “that all individuals are entitled to live in an environment adequate for their health and well-being.”

More than 20 experts on human rights and the environment met in Geneva and produced the Draft Declaration of Principles on Human Rights and the Environment. The document explains the concept of “the right to a secure and healthy and ecologically sound environment” and becomes a reference point for further development of environmental human rights.

The Ksentini Final Report was adopted together with the Draft Declaration on Principles of Human Rights and the Environment.

1998 The Aarhus Convention was agreed upon at the Environment for Europe Ministerial Conference, which stated: “...every person has the right to live in an environment adequate to his or her health and well-being.”

1999 The Commission on Human Rights adopted a resolution reaffirming that “illicit traffic and dumping of toxic and dangerous products constitute a serious threat to the human right to life, health and a sound environment for every individual”.¹⁶² Many delegates opposed the consideration of hazardous wastes and other environmental issues by the Commission, claiming it was not the right forum for solving those problems.

UNEP when reporting on its activities in the field of human rights and the environment explicitly referred to the individual’s right to a clean and healthy environment.¹⁶³

¹⁶¹ The vague entitlement to live “in harmony with nature” is seen as a step backwards when compared to Principle 1 of the Stockholm Declaration.

¹⁶² UNCHR Resolution 1999/23, Para. 4.

¹⁶³ Adriana Fabra, “The Intersection of Human Rights and Environmental Issues: A review of institutional developments at the international level” at [http://www.unep.ch/glo/glo%20pages/hr_env%20experts%20meeting%20report%20\(revised\).pdf](http://www.unep.ch/glo/glo%20pages/hr_env%20experts%20meeting%20report%20(revised).pdf)

Appendix IV

Procedural rights as codified in several human rights and environmental instruments

	Right to participation	Right to information	Right to effective remedy
Universal Declaration of Human Rights (1948)	Art. 21	Art. 19	Art. 8
American Declaration of the Rights and Duties of Man (1948)	Art. XX	Art. IV (freedom of expression)	Art. XVII
European Convention (1950)*		Art. 10	Art. 13
CERD (1965) **	Art. 5	Art. 5(d)(vii) (freedom of expression)	Art. 6
ICCPR (1966)***	Art. 25	Art. 19	Art. 2(3)
CEDAW (1979) ****	Art. 7	Art. 14(2)(b), 16(1)(e)	
African Charter on Human and People's Rights (1981)	Art. 13	Art. 9	Art. 7
World Charter for Nature (1982)	Art. 23	Art. 21(a)	Art. 23
Convention on the Rights of the Child (1990)	Art. 12	Art. 13	
Rio Declaration on Environment and Development (1992)	Pr. 10	Pr. 10	Pr. 13
Agenda 21 (1992)	Ch. 23	Ch. 8	Ch. 8.18
Draft Declaration of Principles on Human Rights and the Environment (1994)	Art. 18	Art. 15	Art. 20
IUCN Draft Covenant on Environment and Development (1995)	Art. 12(4)	Art. 12(3)	Art. 12(5)

* European Convention for the Protection of Human Rights and Fundamental Freedoms

** International Convention on the Elimination of All Forms of Racial Discrimination

*** International Covenant on Civil and Political Rights

**** Convention on the Elimination of all Forms of Discrimination against Women



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