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Obani, P.; Gupta, J.

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The Evolution of the Right to Water and Sanitation: Differentiating the Implications

Pedi Obani and Joyeeta Gupta*

Since 1980, the right to water has been seen mainly as implicitly subsumed under other social human and political rights. The global recognition of the need for access to sanitation services has led to formulations of a right to sanitation that emphasizes both the responsibilities of States and the rights of individuals. However, efforts to prioritize access to water and sanitation services have led to a gradual merger of these ideas in the human right to water and sanitation as adopted by the United Nations General Assembly and the United Nations Human Rights Council in 2010. Much of the literature on this subject focuses on water and sanitation simultaneously. This article fills a gap in knowledge by examining the different evolution of the human right(s) to water and sanitation at the international and national levels. It argues that the practical and social requirements for an environmentally sustainable and cost-effective implementation of access to water and sanitation are so different that, even if there is a combined right, the implementation may call for separating these two issues in some cases.

right, or as two distinct rights, which require the adoption of different approaches. These issues have become increasingly relevant to policy makers and stakeholders who are struggling to assess how to implement the right to water and sanitation locally. Although the right to water and sanitation has been adopted internationally, it needs to be further articulated and implemented at the national level to benefit about 748 million and 2.5 billion people, respectively, who lack access to improved drinking water sources and adequate sanitation services.⁴ This article addresses these issues through a historical review of the relevant legal, policy and scientific literature.

The following sections cover the converging history of water and sanitation rights, illustrate the respective human rights standards for access to water and sanitation, and discuss the similarities and differences between access to water and sanitation.

EMERGENCE OF THE RIGHT TO WATER AND SANITATION

This section traces three pathways to the recognition of the right to water and sanitation at the international and national levels of governance: implicit recognition of the right to water, explicit recognition of the right to water *or* sanitation, and explicit recognition of an independent, but combined right to water *and* sanitation.

After the Second World War ended, human rights emerged from the United Nations system as a prominent international law approach for the protection of human life and the promotion of equitable development.⁵ The UN's Economic and Social Council drafted

INTRODUCTION

It is increasingly clear that the right to water extends to the right to sanitation, as confirmed in the wording of the 2010 United Nations General Assembly (UNGA)¹ and United Nations (UN) Human Rights Council (UNHRC) resolutions.² As the right to water has received more research focus than the right to sanitation,³ this article focuses on the evolution of the combined right, and the similarities and differences between the water and sanitation components. It addresses whether access to water and sanitation should be implemented at the national level as a single

* Corresponding author. Email: pedi.obani@gmail.com.

¹ The Human Right to Water and Sanitation (UNGA Resolution A/64/292, 3 August 2010).

² UN Human Rights Council (HRC), Human Rights and Access to Safe Drinking Water and Sanitation (UN Doc. A/HRC/RES/15/9, 6 October 2010).

³ J. Gupta and P. van der Zaag, 'The Politics of Water Science: Unresolved Water Problems and Biased Research Agendas', 9:2 *Global Environmental Politics* (2009), 14; P. van der Zaag, J. Gupta and P. Darvis, 'Urgent Water Problems are not Sufficiently Researched', 13 *Hydrology and Earth System Sciences* (2009), 905.

⁴ UN, *The Millennium Development Goals Report 2014* (UN, 2014). This is indicative of the extent of the sanitation challenge because the assessment does not cover other aspects of sanitation such as solid waste management, drainage, storm water management and access to hygiene.

⁵ The UN Charter was signed in order to promote and encourage respect for human rights, among other objectives. See Charter of the United Nations (San Francisco, 26 June 1945; in force 24 October 1945), Articles 1, 55 and 56. Human rights were also expressed in the Covenant of the League of Nations which the UN was designed to replace. See further R.B. Henig, *The League of Nations* (Barnes & Noble, 1973).

the 'Declaration on the Essential Rights of Man'. This gave rise to the legally binding International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶

The ICESCR does not expressly recognize a right to water and sanitation. Nonetheless, some scholars suggest that the express mention of the rights to food, clothing and housing does not exclude other rights.⁷ Furthermore, some argue that the essential nature of water made it redundant to expressly mention it as a right,⁸ that water scarcity was not a concern at that time⁹ and that sanitation was not expressly mentioned because it is a taboo subject.¹⁰ Although it does not mention the issues, the ICESCR has nevertheless been the main legal basis for the recognition of water, and more recently sanitation, as human rights.

The human rights agenda initially included the right to water as subordinate to economic, social and cultural rights, such as the rights to food,¹¹ adequate standard of living,¹² adequate housing,¹³ health¹⁴ and development.¹⁵ The recognition of water as a right subordinate to other economic, social and cultural rights posed three main challenges. First, the right to water became solely dependent on the recognition/violation of the primary right and the available remedies. Second, every State had a different set of obligations with respect to

each primary right.¹⁶ Third, the quantity of water required for each of the primary rights varies. As a result, the recognition of the right to water was fragmented, and resulted in ineffectiveness and inconsistency in enforcement.¹⁷

The confusion regarding the recognition of the right to water led to the international recognition of the right to water as an independent right necessary for ensuring the rights under the ICESCR and other international instruments. This holistic approach, adopted in General Comment No. 15, ensured that the right to water was at the very least protected according to human rights standards.¹⁸ The General Comment clearly states that water 'should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations'.¹⁹

General Comment No. 15 recognized the human right to water, which 'entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.²⁰ However, it only did so in connection to the essential role of water for realizing other rights in the ICESCR.²¹ It elaborated on related issues such as the relationship between water and covenant rights,²² the normative content of the right to water,²³ non-discrimination and equality,²⁴ obligations of State parties,²⁵ violations,²⁶ national implementation²⁷ and the obligations of non-State actors.²⁸ By implication, the right to water created immediate obligations on States to take steps towards the full realization of the right, and to guarantee that the right will be exercised without discrimination. However, a State will not be held liable for violation of rights under the ICESCR where it is unable to meet its

⁶ International Covenant on Civil and Political Rights (New York, 16 December 1966; in force 23 March 1976); International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966; in force 3 January 1976) ('ICESCR').

⁷ See M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Clarendon Press, 1995); P.H. Gleick, 'The Human Right to Water', 1:5 *Water Policy* (1998), 487.

⁸ See P.H. Gleick, n. 7 above; S.C. McCaffrey, 'A Human Right to Water: Domestic and International Implications', 5:1 *Georgetown International Environmental Law Review* (1992), 1.

⁹ I.T. Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart, 2012).

¹⁰ S.L. Murthy, 'The Human Right(s) to Water and Sanitation: History, Meaning and the Controversy over Privatization', 30:1 *Berkeley Journal of International Law* (2013), 89.

¹¹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 15, The Right to Water (Articles 11 and 12 of the Covenant) (UN Doc. E/C.12/2002/11, 20 January 2003) ('General Comment No. 15'), at paragraph 6.

¹² ICESCR, n. 6 above, Article 11; General Comment No. 15, n. 11 above.

¹³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 4, The Right to Adequate Housing (Article 11 (1) of the Covenant) (UN Doc. E/1992/23, 13 December 1991) ('General Comment No. 4'), at paragraph 8(b).

¹⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant) (UN Doc. E/C.12/2000/4, 11 August 2000) ('General Comment No. 14'), at paragraphs 11, 12 (a), (b) and (d), 15, 34, 36, 40, 43 and 51.

¹⁵ Declaration on the Right to Development, 4 December 1986, (UNGA Resolution A/RES/41/128, 4 December 1986), Article 8.

¹⁶ This distinction is evident in constitutional rights provisions at the national level. Within the 1999 Constitution of the Federal Republic of Nigeria (CAP. C23 *Laws of the Federation of Nigeria* 2004), any person who alleges that any fundamental human right provision in Chapter 4 of the Constitution has been, is being or is likely to be violated in any State in relation to him may apply to a High Court in that State for redress. However, economic, social and cultural objectives enshrined in Chapter 2 of the Constitution are non-justiciable by virtue of Section 6.6(c) of the Constitution. By contrast, the Constitution of the Republic of South Africa (Act No. 108 of 1996) guarantees economic, social and cultural rights in the Bill of Rights enshrined in Chapter 2 of the Constitution.

¹⁷ E.K. Bluemel, 'The Implications of Formulating a Human Right to Water', 31:4 *Ecology Law Quarterly* (2004), 957.

¹⁸ *Ibid.*

¹⁹ General Comment No. 15, n. 11 above, at paragraph 11.

²⁰ *Ibid.*, at paragraph 2.

²¹ *Ibid.*, at paragraphs 3, 6 and 7.

²² *Ibid.*, at paragraphs 7–9.

²³ *Ibid.*, at paragraphs 10–12.

²⁴ *Ibid.*, at paragraphs 13–16.

²⁵ *Ibid.*, at paragraphs 17–38.

²⁶ *Ibid.*, at paragraphs 39–44.

²⁷ *Ibid.*, at paragraphs 45–59.

²⁸ *Ibid.*, at paragraph 60.

core obligations as a result of resource constraints, provided it shows that it has taken ‘deliberate, concrete and targeted’ steps ‘towards the full realization of the right to water’.²⁹ General Comment No. 15 influenced the International Law Association’s (ILA) 2004 Berlin Rules on Water Resources. Article 17 of the Berlin Rules recognizes that: ‘Every individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual’s vital human needs.’³⁰

In 2010, the UNGA adopted Resolution A/64/292 on the human right to water and sanitation, with 122 States voting in favour, none against and 41 abstentions.³¹ Among the abstaining States were major donors in the water sector such as the United Kingdom, Canada, Sweden, Japan, Ireland, Australia, Austria and the United States,³² as well as Kenya – a country that recognizes the right to water and sanitation in its Constitution. Some of the reasons for the abstentions question whether the human right to water forms part of customary international law yet.³³ For example, the United States noted that the right to water and sanitation does not exist in a legal sense as described by the resolution. Similarly, the United Kingdom stated that ‘there was no sufficient legal basis for declaring or recognising water or sanitation as freestanding human rights, nor was there evidence that they existed in customary law’.³⁴ Other States, such as Australia and Canada, abstained because there was no consensus on the right.³⁵ That same year, the UN Human Rights Council adopted the ‘Human Right on Access to Safe Drinking Water and Sanitation’ by consensus, affirming ‘that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity’.³⁶ This led the then UN Independent Expert on human rights obligations related to access to safe drinking water and sanitation to declare that ‘it means that for the UN, the right to water

and sanitation is contained in existing human rights treaties and is therefore legally binding’.³⁷ Nevertheless, some States continue to question the legal status of the right.³⁸

In 2010, the UN Committee on Economic, Social and Cultural Rights issued a statement on the right to sanitation,³⁹ which reaffirmed, *inter alia*, that the right is integrally related to the right to water, which the Committee had recognized in its General Comment No. 15.⁴⁰ This is significant, because it was the first official recognition of the right to sanitation by the Committee. General Comment No. 15 had only recognized that adequate sanitation is fundamental for human dignity and privacy, and one of the principal mechanisms for protecting the quality of drinking water supplies and resources.⁴¹ Furthermore, one of the core obligations of States relating to the right to water in General Comment No. 15 was ‘[t]o take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation’.⁴² These provisions highlight the importance of sanitation for human dignity and privacy, as well as the protection of water resources, but still fall short of an official recognition of the right to sanitation within General Comment No. 15.

In addition to these developments in human rights law, various international conferences since the 1970s have also made declarations on the right to water and sanitation.⁴³ The right to water was affirmed in the Action Plan on ‘Community Water Supply’ issued by the Mar del Plata Conference in Argentina in 1977,⁴⁴ and in Agenda

²⁹ *Ibid.*, at paragraph 17.

³⁰ Berlin Rules on Water Resources (International Law Association, 21 August 2004), found at: <http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf>, Article 17. Although non-binding, the Berlin Rules and other instruments of the International Law Association have had substantial influence on the development of international water law.

³¹ UNGA Resolution A/64/292, n. 1 above.

³² *Ibid.*

³³ S.C. McCaffrey, ‘International Water Cooperation in the Twenty-first Century: Recent Developments in the Law of International Watercourses’, 23:1 *Review of European, Comparative and International Environmental Law* (2014), 4.

³⁴ UN, ‘General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None Against, 41 Abstentions’, GA/10967 (28 July 2010), found at: <<http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>>.

³⁵ *Ibid.*

³⁶ UN HRC, n. 2 above, at paragraph 3.

³⁷ UN Office of the High Commissioner for Human Rights, ‘UN United to Make the Right to Water and Sanitation Legally Binding’ (1 October 2010), found at: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10403&LangID=E>>.

³⁸ See S.C. McCaffrey, n. 33 above.

³⁹ UN Committee on Economic, Social and Cultural Rights, Statement on the Right to Sanitation (UN Doc. E/C.12/2010/1, 19 November 2010) (‘Sanitation Statement’).

⁴⁰ General Comment No. 15, n. 11 above.

⁴¹ *Ibid.*, at paragraphs 29 and 34(i). Previously, the need for access to sanitation was always tied to the realization of other economic, social, and cultural rights. See, e.g., Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979; in force 3 September 1981) (‘CEDAW’), Article 14.2(h); Convention on the Rights of the Child (New York, 20 November 1989; in force 2 September 1990) (‘CRC’), Article 24.2(e). Similarly, in 1991 and 2000, the Committee through General Comment No. 4, n. 13 above, and General Comment No. 14, n. 14 above, previously highlighted the importance of sanitation for realizing the rights to adequate housing and health, respectively.

⁴² General Comment No. 15, n. 11 above, at paragraph 34(i).

⁴³ The rising number of declarations on the right to water and sanitation indicates a growing normative consensus, if not willingness, to commit to action on this issue.

⁴⁴ In addition, the Conference recognized that water and wastewater disposal are essential for life and human development, and called for international cooperation for equitable distribution of access to water within countries. See Report of the United Nations Water Conference (Mar del Plata, 14–25 March 1977) (UN Doc. E/CONF.70/29, 1977) (‘Mar del Plata Declaration’).

21 of the 1992 UN Conference on Environment and Development.⁴⁵ The International Conference on Water and the Environment in Dublin in 1992⁴⁶ also recognized the right to clean water and sanitation. However, its Principle 4 that water has an economic value has been very controversial in the delivery of water and sanitation services.⁴⁷ The right to water and sanitation is violated where States fail to extend and maintain basic services to poor and marginalized communities.⁴⁸ The economic good discourse represents the initial response of the international community to the need for maximum efficiency in water management.⁴⁹

Social activists advocate that the concept of water as an economic good must be limited by human rights standards so that access is not determined solely by market forces without regard to the needs of the poor, vulnerable and marginalized.⁵⁰ Consequently, many communities, particularly in Latin America, Africa and Asia,⁵¹ promoted the recognition of their right to water in their struggles to maintain access to traditional water sources and improve the quantity and quality of affordable services for their basic needs.⁵² On the other hand, the proposed justification for full cost recovery is that privatization is necessary for a stable and financially sustainable service delivery⁵³ because States may be unable to afford the cost of infrastructure and maintenance.⁵⁴ The negative impacts of full cost recovery on

some poor and marginalized communities gave impetus to the calls for the recognition of water and sanitation as human rights.⁵⁵ Human rights law does not specify any model for delivering basic services, but its norms cover the regulation, monitoring and oversight of private providers.

The legal status of the human right to water and sanitation is not yet settled, although the scholarly community is convinced that the right is legally binding; jurisprudence on this subject is still forthcoming, however. It is possible that the right is seen as a derivative right or as independent.⁵⁶ However, where it is derived from other economic, social and cultural rights, the human right to water and sanitation naturally assumes the legal status of the primary right. In the case of independent recognition, the legal status would flow directly from the language and character of the source of the right, such as a treaty or court judgement. Nonetheless, the human right to water and sanitation has arguably evolved into customary international law, based on evidence of State practice and *opinio juris*.⁵⁷ For instance, evidence of State practice exists in various judicial decisions and national constitutions and laws. Furthermore, the reservations expressed by developed States (e.g., Netherlands and the United Kingdom) that abstained from the UNGA votes were mostly on the grounds of the substance of the proposed right and the procedure adopted, but not because they did not recognize the right in practice.⁵⁸

PATHWAYS TO THE RECOGNITION OF THE RIGHT TO WATER AND SANITATION

This section explores the three main pathways to the recognition of the right to water and sanitation at the

⁴⁵ Agenda 21, in: Report of the UN Conference on Environment and Development (UN Doc. A/Conf.151/26, 14 June 1992), Chapter 18.

⁴⁶ Dublin Statement on Water and Sustainable Development (Dublin, 31 January 1992), found at: <<http://www.un-documents.net/h20-dub.htm>>.

⁴⁷ *Ibid.*, Principle 4.

⁴⁸ See World Health Organization (WHO), *The Right to Water* (WHO, 2003), at 21; Millennium Project, *Achieving the Millennium Development Goals for Water and Sanitation: What Will It Take? Interim Full Report* (Millennium Project, 2004), at 3.

⁴⁹ See E.K. Bluemel, n. 17 above; B.U. Calaguas, *The Right to Water, Sanitation and Hygiene and the Human Rights Based Approach to Development* (WaterAid, 1999).

⁵⁰ See M. Barlow, *Blue Covenant: The Global Water Crisis and the Coming Battle for the Right to Water* (New Press, 2009); E. Gutierrez, *Boiling Point: Issues and Problems in Water Security and Sanitation* (WaterAid, 1999); E.K. Bluemel, n. 17 above.

⁵¹ See A. Nickson and C. Vargas, 'The Limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia', 21:1 *Bulletin of Latin American Research* (2002), 99; E.J. Woodhouse, 'The "Guerra del Agua" and the Cochabamba Concession: Social Risk and Foreign Direct Investment in Public Infrastructure', 39:2 *Stanford Journal of International Law* (2003), 295; M. Barlow, n. 50 above.

⁵² See S.L. Murthy, n. 10 above.

⁵³ This is why international financial institutions such as the World Bank impose privatization as a major lending condition. However, privatization is still a very controversial model and the support for it is not universal. See E.K. Bluemel, n. 17 above; and S. Grusky, 'Privatization Tidal Wave: IMF/World Bank Water Policies and the Price Paid by the Poor', 22:9 *Multinational Monitor* (2001), 14; M. Barlow, n. 50 above.

⁵⁴ See World Bank, *World Development Report, 1994* (Oxford University Press, 1994), at 4–5; World Water Forum and World Water Council, *The 3rd World Water Forum: Final Report* (Secretariat of the 3rd World Water Forum, 2003), at 28.

⁵⁵ Since the end of the Second World War, human rights have become increasingly used to protect human life and promote human dignity; the atrocities of the war further exposed the dangers of entrusting the realization of human development objectives to States alone. See, generally, World Bank, *World Development Report, 1992: Development and the Environment* (Oxford University Press, 1992); L. Levin, *Human Rights: Questions and Answers* (UNESCO Press, 1981).

⁵⁶ A. Cahill-Ripley, 'The Human Right to Water: A Right of Unique Status – The Legal Status and Normative Content of the Right to Water', 9:3 *International Journal of Human Rights* (2005), 389; P. Thielbörger, *The Right(s) to Water: The Multi-level Governance of a Unique Human Right* (Springer, 2014).

⁵⁷ See generally Statute of the International Court of Justice (San Francisco, 26 June 1945; in force 24 October 1945), Article 38(b)–(c); and H.W.A. Thirlway, *The Sources of International Law* (Oxford University Press, 2014).

⁵⁸ United Kingdom of Northern Ireland and Great Britain, National Explanation of Position on Human Rights Council Resolution 15/14 of 30 September 2010, found at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35453/explanation-of-position-hrr15.pdf>. The United Kingdom has now recognized the existence of a right to sanitation, as derived from the right to adequate standard of living in Article 11 of the ICESCR, n. 6 above.

TABLE 1 IMPLICIT RECOGNITION OF THE HUMAN RIGHT TO WATER AND SANITATION AT THE INTERNATIONAL LEVEL

| YEAR | SOURCE | LEGAL STATUS | |
|------|---|--------------|----|
| | | B | NB |
| 1948 | Universal Declaration on Human Rights (D) ⁶⁰ | | ✓ |
| 1950 | European Convention for the Protection of Human Rights and Fundamental Freedoms ⁶¹ (C) | ✓ | |
| 1961 | European Social Charter ⁶² (RHI) | ✓ | |
| 1966 | International Covenant on Civil and Political Rights ⁶³ (C) | ✓ | |
| 1966 | International Covenant on Economic, Social and Cultural Rights ⁶⁴ (C) | ✓ | |
| 1969 | American Convention on Human Rights ⁶⁵ (C) | ✓ | |
| 1972 | Stockholm Declaration ⁶⁶ (D) | | ✓ |
| 1977 | Protocols Additional to the Geneva Conventions (I & II) ⁶⁷ (D) | ✓ | |
| 1981 | African Charter on Human and Peoples' Rights ⁶⁸ (RHI) | ✓ | |
| 1989 | Indigenous and Tribal Peoples Convention ⁶⁹ (C) | ✓ | |
| 1991 | UN Principles for Older Persons ⁷⁰ (D) | | ✓ |
| 1992 | Rio Declaration ⁷¹ (D) | | ✓ |
| 1994 | UNGA Resolution 45/94 ⁷² (R) | | ✓ |
| 1996 | European Social Charter (revised) ⁷³ (RHI) | ✓ | |
| 1997 | UN Watercourses Convention ⁷⁴ (C) | ✓ | |
| 1999 | UNECE Protocol on Water and Health to the 1992 Watercourses Convention ⁷⁵ (RHI) | ✓ | |
| 2002 | Johannesburg Plan of Implementation ⁷⁶ (D) | | ✓ |

Notes: GC = General Comment; D = Declaration; R = Resolution; C = Convention/Covenant; RHI = Regional Human Rights Instrument; B = binding; NB = non-binding.

international and the national levels of governance. From the previous section on the emergence of the right to water and sanitation, it is clear that there is increasing recognition of the right to water and sanitation in different international fora. This section further analyzes written documents such as general comments, declarations and resolutions of UN bodies, conventions and regional human rights instruments to reveal three main pathways to the recognition of the right to water and sanitation: implicit recognition of the right to water (see Table 1);⁵⁹ explicit recognition of either the right to

the States that have not yet joined the American Convention. See <http://www.hrea.org/index.php?base_id=150>.

⁶⁶ Stockholm Declaration on the Human Environment, found in: Report of the UN Conference on the Human Environment (UN Doc. A/CONF.48/14/Rev.1, 16 June 1972), Principles 1 and 2.

⁶⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977; in force 7 December 1978), Articles, 55, 69 and 70; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977; in force 7 December 1978), Article 18.

⁶⁸ African Charter on Human and Peoples' Rights (Banjul, 27 June 1981; in force 21 October 1986), Articles 16, 18 and 24.

⁶⁹ Indigenous and Tribal Populations Convention, C107 (Geneva, 26 June 1957; in force 2 June 1959), Article 2.

⁷⁰ United Nations Principles for Older Persons (UNGA Resolution A/RES/46/91, 16 December 1991), Principle 1.

⁷¹ Rio Declaration on Environment and Development, found in: Report of the UN Conference on Environment and Development (UN Doc. A/CONF.151/26/Rev.1 (Vol. I), 14 June 1992), Annex, Principles 1 and 10.

⁷² Need to Ensure a Healthy Environment for the Well-being of Individuals (UNGA Resolution A/RES/ 45/94, 14 December 1990), at 1.

⁷³ European Social Charter, n. 62 above, Article 31.

⁷⁴ Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997; in force 17 August 2014) ('UN Watercourses Convention'), Articles 5–7 and 10.

⁷⁵ Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 17 June 1999; in force 4 August 2005), Articles 1, and 4.1(2).

⁷⁶ Johannesburg Plan of Implementation, in: Report of the World Summit on Sustainable Development (UN Doc. A/CONF.199/20, 4 September 2002), at paragraphs 24–29.

⁵⁹ For this purpose, the recognition of the right to water is taken to imply the right to sanitation, because sanitation is an essential aspect of fulfilling the right to water through treating wastewater and preventing the pollution of water sources.

⁶⁰ Universal Declaration of Human Rights (UNGA Resolution 217 A (III), 10 December 1948), Articles 3, 7 and 25. Although the Universal Declaration of Human Rights in itself is not legally binding, its provisions are widely accepted as fundamental norms of human rights; the declaration also forms part of the International Bill of Human Rights, found at: <<http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>>.

⁶¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (Rome, 4 November 1950; in force 3 September 1953), Article 2.

⁶² European Social Charter (Strasbourg, 3 May 1996; in force 1 July 1999), Articles 11, and 13.

⁶³ ICCPR, n. 6 above, Articles 1.2, 2.1, 6.1, 17.1–2 and 26.

⁶⁴ ICESCR, n. 6 above, Articles 1.2, 2, 11 and 12.

⁶⁵ American Convention on Human Rights (San Jose, 22 November 1969; in force 18 July 1978), Article 26. The American Convention on Human Rights is binding on all its signatories, while the American Declaration of the Rights and Duties of Man, 1948, is still applied to

TABLE 2 EXPLICIT RECOGNITION OF THE HUMAN RIGHT TO WATER AND SANITATION

| YEAR | SOURCE | LEGAL STATUS | | EXPLICIT RECOGNITION | | |
|------|--|--------------|-------------|----------------------|---------------------|-------------------------------|
| | | BINDING | NON-BINDING | RIGHT TO WATER | RIGHT TO SANITATION | RIGHT TO WATER AND SANITATION |
| 1949 | Geneva Conventions (III and IV) ⁷⁷ (C) | ✓ | | ✓ | | |
| 1977 | Mar del Plata Declaration ⁷⁸ (D) | | ✓ | ✓ | | |
| 1979 | Convention on the Elimination of All Forms of Discrimination against Women ⁷⁹ (C) | ✓ | | | ✓ | |
| 1989 | Convention on the Rights of the Child ⁸⁰ (C) | ✓ | | ✓ | | |
| 1990 | African Charter on the Rights and Welfare of the Child ⁸¹ (RHI) | ✓ | | ✓ | | |
| 1992 | Agenda 21 ⁸² | | ✓ | ✓ | ✓ | |
| 1992 | Dublin Statement ⁸³ (D) | | ✓ | ✓ | ✓ | |
| 1994 | International Conference on Population and Development ⁸⁴ (D) | | ✓ | ✓ | ✓ | |
| 2001 | Recommendation (2001) 14 of the Committee of Ministers to Member States on the European Charter on Water Resources ⁸⁵ (D) | | ✓ | ✓ | | |
| 2002 | General Comment No. 15 ⁸⁶ (GC) | | ✓ | ✓ | | |
| 2005 | Sub-Commission on the Promotion and Protection of Human Rights ⁸⁷ (R) | | ✓ | | | ✓ |
| 2006 | Abuja Declaration ⁸⁸ (D) | | ✓ | | | ✓ |
| 2007 | Message from Beppu, First Asia-Pacific Water Summit ⁸⁹ (D) | | ✓ | | | ✓ |
| 2008 | Delhi Declaration ⁹⁰ (D) | | ✓ | | | ✓ |
| 2010 | UNGA Resolution A/64/292 ⁹¹ (R) | | ✓ | | | ✓ |
| 2010 | UN Human Rights Council Resolution 15/9 ⁹² (R) | | ✓ | | | ✓ |

water or the right to sanitation; and explicit recognition of a combined right to water and sanitation (see Table 2). Implicit recognition is inferred from provisions which indirectly support or accommodate the existence of a right to water and sanitation. Explicit recognition is expressed through direct provisions

that affirm the existence of a right to water and/or sanitation.

Table 1 shows the evolution of the use of the right to water and sanitation in different binding or

⁷⁷ Convention (III) Relative to the Treatment of Prisoners of War (Geneva, 12 August 1949; in force 21 October 1950) ('Geneva Convention III'), Articles 20, 26, and 46; Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949; in force 21 October 1950) ('Geneva Convention IV'), Articles 89, 127.

⁷⁸ Mar del Plata Declaration, n. 44 above, at preamble.

⁷⁹ CEDAW, n. 41 above, Article 14.2(h).

⁸⁰ CRC, n. 41 above, Articles 24.1 and 24.2(c).

⁸¹ African Charter on the Rights and Welfare of the Child (Addis Ababa, 11 July 1990; in force 29 November 1999), Articles 14.1 and 14.2(c).

⁸² Agenda 21, n. 45 above, Chapter 18.47.

⁸³ Dublin Statement on Water and Sustainable Development, n. 46 above, Principle 4.

⁸⁴ Report of the International Conference on Population and Development (Cairo, 5–13 September 1994) (UN Doc. A/CONF.171/13, 18 October 1994), Principle 2.

⁸⁵ Council of Europe, Recommendation (2001) 14 of the Committee of Ministers to Member States on the European Charter on Water Resources (17 October 2001), at paragraphs 5 and 19.

⁸⁶ General Comment No. 15, n. 11 above, at paragraph 12.

⁸⁷ Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation, in: Economic and Social Council, Realization of the Right to Drinking Water and Sanitation Report of the Special Rapporteur, El Hadji Guissé (UN Doc. E/CN.4/Sub.2/2005/25, 11 July 2005), at paragraphs 1.1–1.3.

⁸⁸ Abuja Declaration, First Africa-South America Summit (26–30 November 2006 Abuja, Nigeria), at paragraph 18.

⁸⁹ Message from Beppu, First Africa-Pacific Water Summit (Beppu, Japan 3–4 December 2007), found at: <http://www.apwf.org/archive/documents/summit/Message_from_Beppu_071204.pdf>, at 1.

⁹⁰ The Delhi Declaration, The Third South Asian Conference on Sanitation (SACOSAN) 'Sanitation for Dignity and Health' (16–21 November 2008, Vigyan Bhawan, New Delhi, India), found at: <<http://www.ehu.es/ceinik/tratados%5C22TRATADOSOBBREELAGUA%5C223Derechohumanoalagua%5CTA2234ING.pdf>>, at paragraph 1.

⁹¹ UNGA Resolution A/64/292, n. 1 above, at paragraph 1.

⁹² UN HRC, n. 2 above, at paragraph 3.

non-binding legal documents.⁹³ The fact that not all the provisions on the right to water and sanitation in international instruments are legally binding contributes to the uncertainty over the status of the right. In addition to implicit or explicit recognition, the source should also have a binding effect on the State in order to have a legal effect. The implicit recognition of the right to water and sanitation can create much broader obligations on States than expressly recognizing a right to safe drinking water and adequate sanitation. Under the right to food, it would be necessary to provide equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology.⁹⁴ Similarly, environmental hygiene, under the right to health, would require the protection of natural water resources from contamination.⁹⁵ Furthermore, explicit provisions (Table 2) can also be open to diverse interpretations;⁹⁶ the specific quantitative and qualitative

requirements for realizing the human right to water and sanitation are contextual.

International law provisions are important for the realization of the right to water and sanitation; such provisions apply to the regulation and management of domestic waters⁹⁷ and place a duty on States not to use their resources in a way that causes harm outside their territories.⁹⁸ This brief overview of international law reveals a growing consensus to address lack of access to water and sanitation services through the human rights approach.⁹⁹ This is dependent on the interpretation of the legal status of the instruments, as well as the wording in the various sources. The human rights obligation for States prohibits them from interfering with the realization of the rights outside their jurisdictions.¹⁰⁰ Although the obligation for respecting, protecting and fulfilling the right to water and sanitation lies directly with States, there are corresponding obligations imposed on non-State actors¹⁰¹ and relevant UN agencies to promote the mainstreaming of the human right to water and sanitation in their agendas.¹⁰² The international right to water and sanitation could therefore strengthen the claims of rights holders.¹⁰³ The

⁹³ General Comments are not legally binding, but they carry significant legal weight because there is no other authoritative body or procedure available to resolve questions over the interpretation of the ICESCR provisions. See M. Craven, n. 7 above, at 91; and S.M.A. Salman and S. McInerney-Lankford, *The Human Right to Water Legal and Policy Dimensions* (World Bank, 2004). Declarations and recommendations generally reflect intent, but do not create a legally binding duty on States. Resolutions are not legally binding, with the exception of resolutions adopted by the UN Security Council, but they may affirm customary international legal principles or reflect emerging principles of international law. Resolutions could also indicate the commitment of States to the realization of the contents. See Centre for Housing Rights and Evictions (COHRE), *Source No. 8: Legal Resources for the Right to Water – International and National Standards* (COHRE, 2003). Conventions and covenants are legally binding instruments for States that have ratified or acceded to them once they enter into force. Otherwise, their provisions can also become binding on States generally upon becoming part of customary international law norms. Regional human rights treaties are adopted by States from a particular region and are legally binding on State parties. In this regard, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992; in force 6 October 1996), the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991; in force 10 September 1997) and its the Protocol on Strategic Environmental Assessment (Kiev, 21 May 2003; in force 11 July 2010) are unique because countries outside the UN Economic Commission for Europe region are now able to join these conventions.

⁹⁴ General Comment No. 15, n. 11 above, at paragraph 7. See also UN Watercourses Convention, n. 74 above, Articles 5–7 and 10, which states that in determining 'vital human needs . . . special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation'. *Ibid.*, Article 10.

⁹⁵ General Comment No. 15, n. 11 above, at paragraph 8.

⁹⁶ E. Chapple and F. Leitch, 'The Right to Water: Does It Exist and is It Justiciable Content?'. Paper Presented at the ANU College of Law, Environmental Law Student Society Symposium 'Toward Rio+20: Contemporary Issues in International Environmental Law', 28 May 2011, found at: <<http://150.203.86.5/coast/events/environment/papers/chapple&leitch.pdf>>; E.K. Bluemel, n. 17 above, at 968; J. Gupta, R. Ahlers and L. Ahmed, 'The Human Right to Water: Moving towards Consensus in a Fragmented World', 19:3 *Review of European Community and International Environmental Law* (2010), 294, at 297–299.

⁹⁷ Permanent Court of Arbitration, *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Final Award, 20 December 2013, found at: <http://www.pca-cpa.org/showpage.asp?pag_id=1392>.

⁹⁸ See *Trail Smelter (United States v. Canada) Arbitration*, [1938/1941] 13 RIAA 1905; ICJ 25 September 1997, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Rep 7; ICJ 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep. 14.

⁹⁹ R. Baum, J. Luh and J. Bartram, 'Sanitation: A Global Estimate of Sewerage Connections without Treatment and the Resulting Impact on MDG Progress', 47:4 *Environmental Science and Technology* (2013), 1994; UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2006/10, Promotion of the Realization of the Right to Drinking Water and Sanitation (UN Doc. A/HRC/Sub.1/58/L.11, 2006). See also J. Gupta *et al.*, n. 96 above.

¹⁰⁰ General Comment No. 15, n. 11 above, at paragraph 32.

¹⁰¹ UN HRC, n. 2 above, at paragraphs 6–7.

¹⁰² General Comment No. 15, n. 11 above, at paragraph 60.

¹⁰³ See, e.g., *Socio-economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*, ECW/CCJ/APP/0808 (ECOWAS, 27 October 2009). Victims may also refer their cases to the International Criminal Court if such may violations constitute crimes against humanity, genocide or war crimes, and if the national courts are either unwilling or unable to investigate and prosecute the cases. The Rome Statute of the International Criminal Court (Rome, 17 July 1998; in force 1 July 2002) defines crimes against humanity to include extermination; and it defines extermination to include 'the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'. *Ibid.*, Article 7.1(b), 7.2(b). Article 8.2(b)(xxv) defines war crimes to include: '[I]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.'

TABLE 3 EXPLICIT RECOGNITION OF THE RIGHT TO WATER AND SANITATION IN NATIONAL CONSTITUTIONS

| YEAR | NATIONAL CONSTITUTION | RIGHT TO WATER | RIGHT TO SANITATION |
|------|--|----------------|---------------------|
| 1917 | Mexico* ¹⁰⁷ | ✓ | ✓ |
| 1967 | Uruguay* ¹⁰⁸ | ✓ | ✓ |
| 1995 | Uganda ¹⁰⁹ | ✓ | |
| 1996 | South Africa ¹¹⁰ | ✓ | |
| 2005 | Nicaragua* ¹¹¹ | ✓ | |
| 2006 | Democratic Republic of Congo* ¹¹² | ✓ | |
| 2008 | Ecuador* ¹¹³ | ✓ | |
| 2008 | Maldives ¹¹⁴ | ✓ | ✓ |
| 2009 | Bolivia* | ✓ | |
| 2010 | Kenya ¹¹⁵ | ✓ | ✓ |
| 2010 | Niger ¹¹⁶ | ✓ | |
| 2011 | Morocco* ¹¹⁷ | ✓ | |
| 2012 | Somalia ¹¹⁸ | ✓ | |
| 2013 | Zimbabwe ¹¹⁹ | ✓ | |
| 2014 | Tunisia* ¹²⁰ | ✓ | |

Notes: *Unofficial translation.

human right to water and sanitation also promotes monitoring and evaluation.¹⁰⁴

THE NATIONAL LEVEL

States have been guided by international law provisions to formulate the measures for the realization of the right to water and sanitation within their territories. However, national provisions may differ from international provisions. For instance, the United Kingdom recognizes the rights to water and sanitation as elements of the right to an adequate standard of living,¹⁰⁵ but it does not recognize them as independent customary international law rights or as being derived from the right to life.¹⁰⁶

¹⁰⁴ The practice of monitoring and evaluation is useful for the increased transparency and improved performance of programmes as it can help identify trends, evaluate changes and capture knowledge. See <<http://www.mdgfund.org/content/monitoringandevaluation>>.

¹⁰⁵ United Kingdom, 'The Human Right to Sanitation' (United Kingdom, undated), found at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/36541/human-right-sanitation270612.pdf>; United Kingdom, 'UK Position on the Human Right to Water' (United Kingdom, undated), found at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/36540/uk-position-human-right-water.pdf>.

¹⁰⁶ Ibid.

¹⁰⁷ Constitution of the United Mexican States (as amended), Article 4.

¹⁰⁸ Uruguayan Constitution, 1967 (as amended), Article 47.

¹⁰⁹ Constitution of the Republic of Uganda (as at 15 February 2006), Articles XIV(b) and XXI.

¹¹⁰ Constitution of the Republic of South Africa, n. 16 above, Articles 27.1(b) and 27.2.

¹¹¹ Political Constitution of the Republic of Nicaragua, 1986 (as amended), Article 105.

National governments (mostly of developing countries) have increasingly recognized the right to water and sanitation in their laws and constitutions. Courts in countries such as South Africa and India have also recognized the right. The pathways to the recognition of the right to water and sanitation at the national level mirror the developments at the international level: implicit recognition; explicit recognition of the right to water or sanitation; and explicit recognition of a combined but independent right to water and sanitation, as in the case of Uruguay (see Table 3).

A review of national constitutions shows more instances of the explicit recognition of the right to water, unlike the right to sanitation (see Table 3). The right to water and sanitation, however, is not expressly recognized in any national constitution within Europe. Hence, all the examples in Table 3 are drawn from Africa, Asia, (Latin) America and Oceania. As well as through constitutional provisions, the right to water and sanitation has also been expressly recognized through other national laws. For instance, in France the

¹¹² Constitution of the Democratic Republic of the Congo, 2006, Article 48.

¹¹³ Constitution of the Republic of the Ecuador 2008, Article 12.

¹¹⁴ Functional Translation of the Constitution of the Republic of Maldives, 2008, Articles 23(a) and 23(f).

¹¹⁵ Constitution of Kenya, 2010, Articles 43.1(b) and 43.1(d).

¹¹⁶ Constitution of the Republic of Niger, 2010, Article 12.

¹¹⁷ Constitution of the Kingdom of Morocco, 2011, Article 31.

¹¹⁸ Provisional Constitution of the Federal Republic of Somalia, 2012, Article 27.1.

¹¹⁹ Constitution of Zimbabwe, Amendment (No. 20) Act, 2013, Section 77(a).

¹²⁰ Constitution of the Republic of Tunisia, 2014, Article 39.

law on water and the aquatic environment recognizes the right to water under favourable economic conditions.¹²¹ However, national law provisions, apart from national constitutions, are not covered within the scope of this study.

GREATER PRIORITY TO THE RIGHT TO WATER THAN THE RIGHT TO SANITATION

This section briefly explains the normative content of the right to water and sanitation, and shows evidence of the incorporation of the norms in national laws. Access to both water and sanitation has increasingly been prioritized in law and policy, but historically there has been more emphasis on water issues than sanitation. For instance, the Millennium Development Goals (MDGs) first contained a target on improving access to improved water sources. It was only in 2002 during the World Summit on Sustainable Development that a sanitation target was introduced. Similarly, the Economic and Social Council Rights recognized the right to water in General Comment No. 15 in 2003; it was only in 2010 that it also issued a statement on the right to sanitation.¹²² At the national level, constitutions have also focused more on the right to water.

There are parameters for measuring the progressive realization of access to water and sanitation; the World Health Organization (WHO) and UNICEF Joint Monitoring Programme for Water Supply and Sanitation technology ladder focuses on the technology for separating excrement from human contact,¹²³ and the proposed function-based 'sanitation ladder' focuses more on the functional value and environmental impacts of sanitation solutions.¹²⁴ The normative content of the right to water and sanitation specified in General Comment No. 15 includes safety, affordability, accessibility and acceptability.

Safety requires that the water available for personal or domestic use must be devoid of micro-organisms, chemical substances and radiological hazards that constitute health risks.¹²⁵ The colour, odour and taste of the

water must also be acceptable for each personal or domestic use.¹²⁶ Sanitation facilities must ensure the hygienic separation of human excreta and other types of waste from human, animal and insect contact; water for personal hygiene; and safe disposal of wastewater, excreta and menstrual products.¹²⁷ The design of the facilities and maintenance must ensure physical safety¹²⁸ and privacy.¹²⁹

The cost of accessing water and sanitation must be affordable.¹³⁰ The direct and indirect costs¹³¹ of water and sanitation facilities must not compromise the well being of users.¹³² However, the human right to water and sanitation does not specify any amount that would be considered affordable, as this is contextual.¹³³ The WHO recommends a threshold of 3% of household income for water services, but it is not clear whether this also includes expenditure on both water and sanitation. Other recommendations range between 3% and 6% of household income.¹³⁴ In addition to the theoretical complexities,¹³⁵ measuring affordability as a percentage of household income will not apply to rural economies in developing countries, which may rely on non-monetary forms of payment like labour exchange.¹³⁶ Generally, affordability requires the use of subsidies and other economic instruments to secure access for the poor.¹³⁷

Availability means access to sufficient water and sanitation services. Water supply should also be continuous. This has been quantified by the UN Development Programme as at least 20 litres of clean water per person daily, including the poor who cannot pay.¹³⁸

¹²⁶ General Comment No. 15, n. 11 above, at paragraph 12(b).

¹²⁷ Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation (UN Doc. A/HRC/12/24, 1 July 2009) ('Report of the Independent Expert'), at paragraph 72.

¹²⁸ *Ibid.*, at paragraph 73.

¹²⁹ UN-Water Decade Programme on Advocacy and Communication and Water Supply and Sanitation Collaborative Council, 'The Human Right to Water and Sanitation: Media Brief' (UN, 2010) ('Media Brief').

¹³⁰ See C. Fonseca, 'Affordability of WASH Services: Rules of Thumb and Why It's Difficult to Measure' (27 June 2014), found at: <<http://www.ircwash.org/blog/affordability-wash-services-rules-thumb-and-why-it%E2%80%99s-difficult-measure>>.

¹³¹ Indirect costs could include the construction and maintenance of facilities, as well as emptying of facilities in the case of sanitation.

¹³² See Report of the Independent Expert, n. 127 above, at paragraph 77; General Comment No. 15, n. 11 above, at paragraph 12(c)(ii).

¹³³ See Report of the Independent Expert, n. 127 above, at paragraph 78.

¹³⁴ COHRE, WaterAid, Swiss Agency for Development and Cooperation and UN-HABITAT, *Sanitation: A Human Rights Imperative* (COHRE, 2008).

¹³⁵ See C. Fonseca, n. 130 above.

¹³⁶ See COHRE *et al.*, n. 134 above.

¹³⁷ See Report of the Independent Expert, n. 127 above, at paragraphs 78–79.

¹³⁸ United Nations Development Programme (UNDP), *Human Development Report 2006: Beyond Scarcity – Power, Poverty and the Global Water Crisis* (UNDP, 2006), at 8.

¹²¹ Loi n° 2006-1772 du 30 décembre 2006 sur l'eau et les milieux aquatiques, NOR: DEVX0400302L, Version consolidée au 14 juillet 2010, found at: <<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000649171>>.

¹²² See Sanitation Statement, n. 39 above.

¹²³ See generally G. Howard and J. Bartram, *Domestic Water Quantity, Service Level and Health* (WHO, 2003); WHO and UNICEF, *Progress on Sanitation and Drinking-water: 2013 Update* (WHO and UNICEF, 2013).

¹²⁴ E. Kvarnström *et al.*, 'The Sanitation Ladder: A Need for a Revamp?', 1:1 *Journal of Water, Sanitation and Hygiene for Development* (2011), 3, at 8.

¹²⁵ WHO, *Guidelines for Drinking Water Quality, Volumes 1–3*, 2nd edn (WHO, 1993).

There is no similar quantitative guideline set for sanitation at the international level¹³⁹ because it is highly contextual.¹⁴⁰ It is, however, important to minimize users' waiting times. Sanitation is narrowly defined under the rights approach 'as a system for the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene'.¹⁴¹ This definition is restrictive because it largely depends on the prevalent technical definition of sanitation systems – that is, 'all the technical appliances necessary for a safe use and handling of water from the water user (e.g., households, agriculture, industry) over the collection, treatment and reuse of wastewater'.¹⁴² An example of this technical definition is also contained in the Lagos State (Nigeria) water sector law, which states that sewerage works 'means the whole system of sewers sewage treatment plant, tanks, silos, pumps, valves, meters and channels, other appurtenances for the purpose of conveying of sewage and storm water and the treatment of sewage or both'.¹⁴³ The emphasis on systems does not expressly oblige States to provide services especially for those who are unable to afford same without some form of support. In South Africa, the constitution¹⁴⁴ mentions domestic wastewater and sewage disposal under the sanitation services functions of the local government. This is significant because without water and sanitation services, end users cannot access the benefits of the available systems.

Water and sanitation must be universally accessible. Physically, water must be accessible within or in the immediate vicinity of households.¹⁴⁵ The WHO recommends water supply through multiple taps, continuously, and not further than 100 metres from the home.¹⁴⁶ Accessibility also requires a safe location, culture and gender sensitivity, non-discrimination and

privacy.¹⁴⁷ Some cultures may require separate facilities for women and girls in public places;¹⁴⁸ or special facilities for hygiene practices like hand washing, and genital and anal cleansing.¹⁴⁹ The right to seek, receive and impart information is also an aspect of accessibility;¹⁵⁰ individuals and groups should be given full and equal access to information held by public authorities or third parties concerning water and sanitation services and the environment.¹⁵¹

It is important for national laws and policy provisions to specify the quantitative and qualitative requirements for safety, affordability, accessibility and acceptability based on the local contexts. States should establish strong administrative, legal and political mechanisms, as well as judicial mechanisms for addressing consumers' complaints and to ensure equity, compliance and accountability by the service providers.¹⁵² Marginalized groups should be encouraged to actively participate in the decision-making processes.¹⁵³ Furthermore, sustainable customary water use practices and water rights of indigenous communities should be protected to enable them to realize their right to water and sanitation.¹⁵⁴

There are examples of national laws and judicial decisions on the normative content of the right to water and sanitation. For safety, the United States requires large water systems and states to report annually on incidents of water contamination, and violations of

¹³⁹ See Report of the Independent Expert, n. 127 above, at paragraph 71.

¹⁴⁰ For instance, in Education, England and Wales, the Education (School Premises) Regulations (1999 No. 2) stipulate the minimum standards for school premises; and the Workplace (Health, Safety and Welfare) Regulations (1992 No. 3004) cover the minimum number of toilets within the work environment.

¹⁴¹ See Report of the Independent Expert, n. 127 above, at paragraph 63.

¹⁴² D. Spuhler and R. Gensch, 'Sanitation Systems', found at: <<http://www.sswm.info/category/implementation-tools/wastewater-collection/hardware/introduction/sanitation-systems>>.

¹⁴³ Lagos State of Nigeria, A Law to Provide for the Lagos State Water Sector, Lagos Water Corporation and for Connected Matters (Law No. 14 of 2004) ('Lagos State Water Sector Law'), Section 142.

¹⁴⁴ Constitution of the Republic of South Africa, n. 16 above, Schedule 4(b).

¹⁴⁵ General Comment No. 15, n. 11 above, at paragraph 12(c)(i).

¹⁴⁶ See G. Howard and J. Bartram, n. 123 above, Executive Summary; CEDAW, n. 41 above, Article 14.2; CRC, n. 41 above, Article 24. Although most studies focus on the distance from the home, in determining access to water and sanitation services, it is also important to analyze distance from every other type of human habitation, including schools, markets and other public places, and vehicles for long distance transportation like buses and aircrafts.

¹⁴⁷ General Comment No. 15, n. 11 above, at paragraph 12(c)(i); COHRE *et al.*, n. 134 above, at 18; Report of the Independent Expert, n. 127 above, at paragraphs 75–76; Media Brief, n. 129 above, at 5.

¹⁴⁸ Geneva Convention III, n. 77 above Article 29 also provides for separate conveniences for women.

¹⁴⁹ See Report of the Independent Expert, n. 127 above, at paragraph 80.

¹⁵⁰ General Comment No. 15, n. 11 above, at paragraph 12(c)(iv).

¹⁵¹ *Ibid.*, at paragraph 48.

¹⁵² In Nigeria, the Lagos State Water Sector Law, n. 96 above, provides for the establishment of a Water Sector Complaints Centre to perform functions such as to receive and pursue complaints from consumers regarding water and wastewater services, settle disputes and protect the interests of consumers. See also UN Office of the High Commissioner for Human Rights (OHCHR), UN-Habitat and WHO, (*The Right to Water, Fact Sheet No. 35*, (UN-Habitat and WHO, 2010).

¹⁵³ G. Hutton, 'Global Costs and Benefits of Reaching Universal Coverage of Sanitation and Drinking-water Supply', 11:1 *Journal of Water and Health* (2013), 1; WHO, *Global Costs and Benefits of Drinking-water Supply and Sanitation Interventions to Reach the MDG Target and Universal Coverage* (WHO, 2012).

¹⁵⁴ C. Bosch *et al.*, 'Water and Sanitation', in: J. Klugman (ed.) *Macroeconomic and Sectoral Approaches* (World Bank, 2002), 373; UN Office of the Special Adviser on Gender Issues and Advancement of Women, *Gender, Water and Sanitation Case Studies on Best Practices* (UN, 2006); J. Adams *et al.* (eds.), *Water, Sanitation and Hygiene Standards for Schools in Low-cost Settings* (WHO, 2009), at 5; D. Spears, 'The Nutritional Value of Toilets: How Much International Variation in Child Height Can Sanitation Explain?' (Princeton University, 2013).

national drinking water regulations.¹⁵⁵ On accessibility, in *Mazibuko and Others v. City of Johannesburg and Others*,¹⁵⁶ South Africa's Constitutional Court held that Johannesburg's free basic water policy of 25 litres per person daily in the poor suburb of Phiri was reasonable. The court also held that the use of prepaid water metres was lawful. In Argentina, in *Marchisio José Bautista y Otros Case*, the District Court ordered the municipality to provide 200 litres of safe drinking water per household daily until full access to the public water services was restored.¹⁵⁷ In Paraguay, in *Sawhoyamaxa Indigenous Community*, the Inter-American Court of Human Rights ordered the government to set up sanitation facilities in the community's settlements and ensure the supply of sufficient drinking water to the members of the community until their traditional lands were restored.¹⁵⁸ In the United Kingdom, it is a legal requirement that there should be at least one toilet and wash basin for every ten pupils under five years and for every 20 pupils over five years in schools; as well as one toilet for every ten students in special schools, irrespective of age.¹⁵⁹

In New Zealand, the Local Government Act specifically requires a local authority contemplating partnering with the private sector to develop a formal policy on how to assess, monitor and report on the contributions of the partnership to the wellbeing of the community outcomes; the duration of water services contracts must not exceed 15 years, and the authority has a duty to control pricing.¹⁶⁰ In the Flemish region of Belgium, residents are required to pay a basic connection fee for the free supply of a minimum quantity of water per person, and additional amounts consumed are priced separately.¹⁶¹ This ensures that basic water needs of residents are met. The foregoing illustrations, in addition to the country constitutions mentioned in Table 3, show relevant examples of the progressive development of the normative content of the right to water and sani-

tation in various countries, but also point to more developments in the area of water.

SIMILARITIES AND DIFFERENCES BETWEEN THE RIGHTS

This section explores the similarities and differences between the water and sanitation components of the combined right to water and sanitation. The right to water and sanitation are similar to the extent that both: (i) promote human dignity and support the realization of other human rights,¹⁶² as well as the MDGs;¹⁶³ (ii) require infrastructural investments;¹⁶⁴ (iii) are linked to poverty and vulnerability;¹⁶⁵ and (iv) are public merit goods,¹⁶⁶ meaning that lack of access has negative impacts on the general population.¹⁶⁷ These similarities could be seen as necessitating the integration of the right to water and sanitation at the policy level and in implementation.

However, there are also important differences in the cultural perceptions, costs and technical requirements related to water and sanitation provision.¹⁶⁸ Access to water is openly demanded. Sanitation, on the other hand, is generally a taboo subject, making its demand latent;¹⁶⁹ in countries like Madagascar, toilets are not even allowed inside private houses or lands.¹⁷⁰ While there are no alternatives to safe drinking water con-

¹⁵⁵ This leads to sustainable outcomes. For instance, it was reported in 2010 that following community meetings and recommendations based on human rights standards that were made to the Nairobi City Water and Sewerage Company, the company adopted a policy to extend water supply to informal settlements in Kenya. See OHCHR *et al.*, n. 152 above.

¹⁵⁶ *Mazibuko and Others v. City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

¹⁵⁷ *Ciudad de Córdoba, Primera Instancia y 8 Nominación en lo Civil y Comercial, Marchisio José Bautista y. Otros, Acción de Amparo* (Expte. No. 500003/36).

¹⁵⁸ Inter-American Court of Human Rights 29 March 2006, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, reparations and costs, IACHR Series C No 146, IHRL 1530 (IACHR 2006).

¹⁵⁹ Education (School Premises) Regulations, n. 140 above.

¹⁶⁰ See OHCHR *et al.*, n. 152 above.

¹⁶¹ United Nations Educational, Scientific and Cultural Organization (UNESCO), *Outcome of the International Experts Meeting on the Right to Water, Paris, 7 and 8 July 2009* (UNESCO, 2009).

¹⁶² See COHRE *et al.*, n. 134 above; UNDP, n. 138 above; WHO and UNICEF, *Meeting the MDG Drinking Water and Sanitation Target: The Urban and Rural Challenge of the Decade* (WHO and UNICEF, 2006).

¹⁶³ J. Toubkiss, *Costing MDG Target 10 on Water Supply and Sanitation: Comparative Analysis Obstacles and Recommendations* (World Water Council, 2006).

¹⁶⁴ See G. Hutton, n. 153 above; WHO, n. 78 above.

¹⁶⁵ See C. Bosch *et al.*, n. 154 above; UN Office of the Special Adviser on Gender Issues and Advancement of Women, n. 154 above; J. Adams *et al.*, n. 154 above; D. Spears, n. 154 above.

¹⁶⁶ R.C.G. Varley, 'Financial Services and Environmental Health: Household Credit for Water and Sanitation' (1995), found at: <<http://www.gdrc.org/icm/enviro/usaidd.html>>; P. Mader, 'Attempting the Production of Public Goods through Microfinance: The Case of Water and Sanitation' 25:1 *Economic Research* (2012), 190.

¹⁶⁷ The private ownership and control of water and sanitation systems and services can lead to the exclusion of some members of the public. Hence, there is a need for the State to regulate and ensure universal access. This implies the need for public subsidies or other appropriate government interventions where people are unable or unwilling to pay for their water and sanitation needs.

¹⁶⁸ P. Obani and J. Gupta, 'The Human Right to Water and Sanitation: Reflections on Making the System Effective', in: A. Bhaduri *et al.* (eds.), *The Global Water System in the Anthropocene* (Springer, 2014), 385.

¹⁶⁹ M. Black and B. Fawcett, *The Last Taboo: Opening the Door on the Global Sanitation Crisis* (Routledge, 2008).

¹⁷⁰ IRIN, 'Madagascar: Addressing Toilet Taboos to Improve Sanitation', IRIN (23 March 2012), found at: <<http://www.irinnews.org/report/95136/madagascar-addressing-toilet-taboos-to-improve-sanitation>>.

sumption,¹⁷¹ open defecation is an (unhygienic) alternative to improved sanitation services¹⁷² and may even be desirable as part of social interactions in some communities.¹⁷³ The result is a low demand for improved sanitation services¹⁷⁴ and the perception that the right is imposed or of low priority.¹⁷⁵ Further, toilets require more intensive maintenance compared to water facilities and many cultures are averse to using dirty facilities.¹⁷⁶ Drinking water is potable, while sanitation facilities are often stationary, which leads to absenteeism by girls in schools without adequate sanitation.¹⁷⁷ The cost of drinking water provision is less than that of sanitation (and also depends on the technologies used), but the returns on investment assessed in benefit-cost ratios are higher for sanitation.¹⁷⁸

The differences between water supply and sanitation might partly explain why there has been more progress with the provision of access to water than access to sanitation services¹⁷⁹ and sanitation has often been subsumed under water issues.¹⁸⁰ Even before the end of the 'Water for Life' decade and a successful assessment of

the outcomes, attention is already steadily shifting away to the water, food and energy nexus. Sanitation is equally crucial to water quality, and waste from sanitation can be re-used in food production or energy generation. This reality underscores the need to recognize the distinct and equally important sanitation aspect when implementing the right to water and sanitation, while considering the financial and environmental costs of alternative infrastructure options.

CONCLUSION

This article has provided an overview of the evolution of the human right to water and sanitation at the global and national levels, and discussed the similarities and differences between the two aspects of the combined right to water and sanitation. It has shown the disparity in the degree of attention on the water and the sanitation aspect of the right. Although from an environmental perspective it may make sense to combine both at the policy level, there are fundamental social, economic and technological differences between access to water and access to sanitation services that need to be considered during implementation.¹⁸¹

This raises the question whether water and sanitation should be two separate rights, especially at the national level, where many States are still in the process of implementing the international right. This is a complex issue, because from a merit goods perspective it is essential to resolve sanitation issues to limit negative effects on society. From a policy perspective, the right to sanitation can benefit from the popularity of the right to water, provided it receives the necessary focus and resources for its realization. However, financial issues are not negligible. Providing water and sanitation simultaneously may increase the short-term costs, and possibly reduce the attention given to alternative sanitation solutions that may require less water, especially in water insecure regions. Nonetheless, from an environmental and social perspective, the integration of water and sanitation provision has the potential to yield significant returns over time, and to improve efficiency through resource recovery from the process.

In either case – that is, whether the provision of water and sanitation is pursued separately or together – there is a need to manage water resources, finances and human operations efficiently to minimize wastage. Furthermore, there is a need for education and open discussions with stakeholders about the impacts of poor sanitation as a way of strengthening demand for

¹⁷¹ Although safe drinking water is necessary for human health, it would appear that poor households are willing to trade off the quality of water for quantity and would therefore prefer to pay less for water even though the quality might be poor. Furthermore, most households have access to inexpensive alternatives to pipe-borne network water, including boreholes, springs, rivers and lakes, which further reduces the motivation to pay more for good quality water. See J. Sy, R. Warner and J. Jamieson, *Tapping the Markets: Opportunities for Domestic Investments in Water and Sanitation for the Poor* (World Bank, 2014).

¹⁷² S. Pappas, 'With 7 Billion People, World has a Poop Problem', *LiveScience* (25 October 2011), found at: <<http://www.livescience.com/16713-7-billion-people-world-poop-problem.html>>; A. Patkar and L. Gosling, *Equity and Inclusion in Sanitation and Hygiene in Africa: A Regional Synthesis Paper* (WSSCC and WaterAid, 2011), at 3.

¹⁷³ For instance, a government project of providing subsidized toilets in India in the 1980s failed due to lack of use. People simply preferred to return to the open defecation to which they were accustomed. See S. Pappas, n. 172 above. See also K. Senior, 'In the Market for Proper Sanitation', 88:3 *Bulletin of the World Health Organization* (2010), 161.

¹⁷⁴ Another factor affecting the demand for sanitation is the tendency of households to desire solutions they cannot afford. This affects at least 90 million people living below the poverty line who are forced to settle for sanitation options that fall below their aspirations. See J. Sy *et al.*, n. 171 above.

¹⁷⁵ This requires a focus on developing affordable and culturally acceptable sanitation solutions, and building informed demand for improved sanitation solutions backed with attitudinal change, rather than building demand for pre-determined sanitation solutions. See DFID Sanitation Reference Group, *Sanitation Policy Background Paper: Water is Life, Sanitation is Dignity* (DFID, 2007), at 3; and P. Obani and J. Gupta, n. 168 above.

¹⁷⁶ S. Pappas, n. 172 above; BBC, 'School Toilets "Bullying Fears"', *BBC News* (29 January 2008).

¹⁷⁷ See C. Bosch *et al.*, n. 154 above; J. Adams *et al.*, n. 154 above.

¹⁷⁸ G. Hutton, n. 153 above; J. Toubkiss, n. 163 above.

¹⁷⁹ United Nations Environment Programme (UNEP), *Vital Water Graphics: An Overview of the State of the World's Fresh and Marine Waters* (UNEP, 2008); UN, n. 4 above.

¹⁸⁰ C. de Albuquerque, *On the Right Track Back: Good Practices in Realising the Rights to Water and Sanitation* (2012).

¹⁸¹ See P. Obani and J. Gupta, n. 168 above.

sustainable sanitation solutions. There should also be greater emphasis on the maintenance of available infrastructure. The actual cost of water and sanitation provision is highly context-specific, and the cost of retrofitting to include sanitation infrastructure in the future could also be higher. This calls for further investigation of the actual costs of water and sanitation provision in relation to ensuring human rights requirements for safety, affordability, accessibility and acceptability.

Pedi Obani is a Barrister and Solicitor of the Supreme Court of Nigeria. She lectures undergraduate students in the Department of Public Law of the University of Benin, Edo State, Nigeria. She is also a PhD Research Fellow of the University of Amsterdam and the UNESCO-IHE Institute for Water Education, The Netherlands. Pedi has facilitated the training of journalists on reporting the environment under the auspices of the Environmental Rights Action/Friends of the Earth Nigeria. She has also been involved in the reform of the Lagos State water and sanitation sector, working with the Lagos Water Regulatory Commission in an advisory role. Her publications include: P. Obani and J. Gupta, 'The Human Right to Water and Sanitation: Reflections on Making the System Effective', in: A. Bhaduri *et al.* (eds.), *The Global Water System in the Anthropocene* (Springer, 2014).

Joyeeta Gupta is Professor of Environment and Development in the Global South at the Amsterdam Institute for Social Science Research of the University of Amsterdam and UNESCO-IHE Institute for Water Education in Delft. She is also a member of the Amsterdam Global Change Institute. She is editor-in-chief of *International Environmental Agreements: Politics, Law and Economics*. She is on the scientific steering committees of many different international programmes, including the Global Water Systems Project and the Earth System Governance project. She is also on the Board of Oxfam Novib, Vice-President of the Commission on Development Cooperation and a member of the Advisory Council on International Issues – a statutory body that advises the Dutch cabinet. She has published several books, including J. Dellapenna and J. Gupta (eds.), *The Evolution of the Law and Politics of Water* (Springer, 2009).

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