

ARTICLE

**ASSESSING THE RIGHTS TO WATER AND
SANITATION: BETWEEN INSTITUTIONALIZATION
AND RADICALIZATION**

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ABSTRACT

In the past two decades, the human rights to water and sanitation have emerged, matured, and taken their place at the center of discussions about rights, sustainable development, global health, and climate change. While there was early hope that these rights—especially the right to water—would provide a strong basis for rejecting the commodification of essential services spurred by neoliberalism, as they were institutionalized, the rights to water and sanitation have in many places been tamed, if not neutralized. However, while the human rights framework concerning water and sanitation has accommodated powerful economic imperatives, it still holds promise as a vehicle for governments, courts, and—perhaps most importantly—movements facing the harsh realities of radical inequality, vulnerability to disaster, and advancing climate change. This Article provides an overview of the conceptual and theoretical issues behind the rights to water and sanitation, an account of the normative development of the rights in law, and an appraisal of the key debates concerning water and sanitation as human rights today.

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I. INTRODUCTION

In the past two decades, the human rights to water and sanitation have emerged, matured, and taken their place at the center of discussions about rights, sustainable development, global health, and climate change. While there was early hope that these rights—especially the right to water—would provide a strong basis for rejecting the commodification of essential services spurred by neoliberalism, as they were institutionalized, the rights to water and sanitation have in many places been tamed, if not neutralized. However, while the human rights framework concerning water and sanitation has accommodated powerful economic imperatives, it still holds promise as a vehicle for governments, courts, and—perhaps most importantly—movements facing the harsh realities of radical inequality, vulnerability to disaster, and advancing climate change. This Article provides an overview of the conceptual and theoretical issues behind the rights to water and sanitation, an account of the normative development of the rights in law, and an appraisal of the key debates concerning water and sanitation as human rights today.

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A. *The Reality: Water and Sanitation Around the World*

Potable water is essential for life, and safe sanitation is a pillar of public health.¹ As this Article is being written, the global coronavirus pandemic is laying bare the extreme vulnerability of those without reliable access to water, sanitation, and hygiene. For decades before the pandemic, water and sanitation had been recognized as drivers of sustainable development, and much effort had been placed behind improving access to water and sanitation to populations deprived of these imperatives. In 2019, the United Nations Joint Monitoring Programme reported that between 2000 and 2017, 1.8 billion people obtained access to “at least basic services,” and by 2017, 71% of the world’s population were using safely managed water and sanitation services—an improvement from 61% in 2000.²

While these changes are impressive, the gaps between the richest and the poorest groups in society, between urban and rural inhabitants, and between mainstream populations and those marginalized by racialization, stigma and discrimination, remain stark. These disparities exist both across and within countries. In colloquial terms, “[i]t is estimated that the water used on a typical United States golf course in a day could satisfy the daily water needs of 30,000 Africans.”³ In the poorest countries, only 35% of the population in 2017 had access to safely managed services, up only ten percentage points from 25% in 2000.⁴ While the gap between urban and rural areas did decrease, the difference remained significant, with eighty percent of those lacking basic services

1. As Langford et al. explain, “More than 150 years ago, a ‘sanitary revolution’ occurred in Europe as municipalities were pushed to make unprecedented investments in public drinking water and sanitation. The effect in controlling outbreaks of cholera, typhoid and other infectious diseases led to the *British Medical Journal*, after a 2007 survey, to crown sanitation as the most important medical advancement since 1840. However, the consequences of poor sanitation across the world remain devastating. The UNDP has noted that diarrhea has ‘killed more children than all the people lost to armed conflict since the Second World War’, while even in wealthier countries, access is not universal.” INGA WINKLER, *THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION* 394 (2012) [hereinafter WINKLER, *THE HUMAN RIGHT TO WATER*] (internal citations omitted).

2. UNICEF & WHO, *Progress on Household Drinking Water, Sanitation and Hygiene 2000–2017: Special Focus on Inequalities*, at 7 (2019), <https://www.washdata.org/sites/default/files/documents/reports/2019-07/jmp-2019-wash-households.pdf>. [hereinafter UNICEF & WHO, *Progress on household drinking water, sanitation and hygiene*].

3. Joe Wills, *A Commodity or a Right? Evoking the Human Right to Water to Challenge Neo-Liberal Water Governance*, in *CONTESTING WORLD ORDER? SOCIOECONOMIC RIGHTS AND GLOBAL JUSTICE MOVEMENTS* 196, 197 (2017).

4. UNICEF & WHO, *Progress on household drinking water, sanitation and hygiene*, *supra* note 2, at 7.

living in rural parts of the globe.⁵ An estimated 144 million people continued to use untreated surface water such as rivers, streams, or canals for drinking and other personal and household needs, and 673 million were forced to openly defecate because they still lacked even the most basic sanitation.⁶

Of the ninety countries for which data disaggregated by wealth was available, the richest quintile in twenty-four countries enjoyed basic water coverage at rates at least twice as high of the rates of the poorest quintile, and in forty-eight of the ninety countries, the richest quintile enjoyed basic sanitation rates at least twice as high as the poorest.⁷ Women—and often girls—continue to commonly bear the burden of collecting water in households that do not have access to water on the premises,⁸ and many women and adolescent girls still lack access to sanitation facilities that are safe, clean, and private enough to meet their menstrual hygiene management needs.⁹ While cross-country data concerning access to water and sanitation disagreeable along lines of group-based axes of discrimination is difficult to obtain, it is widely recognized that groups experiencing structural oppression commonly experience similar barriers in access to water and sanitation.¹⁰ A recent study by the U.N. Economic and Social Commission for Asia and the Pacific found that household wealth was the most important factor in determining differential access to water and sanitation in nine Asian countries, but that marginalization along lines of ethnicity, religion, and caste also played a significant role.¹¹ Similar gaps in access are experienced by persons with disabilities and the elderly—especially in poorer countries.¹² As the Inter-American Commission on Human Rights said in 2015:

5. *Id.*

6. *Id.* at 7–8.

7. *Id.*

8. *Id.* at 27 (“In 53 out of 73 countries with data available from multiple indicator cluster surveys (MICS) and demographic and health surveys (DHS), over half of households using sources located off premises relied on women to collect water.”).

9. *Id.* at 42.

10. See MARGARET SATTERTHWAITE, JMP WORKING GROUP ON EQUITY AND NON-DISCRIMINATION (END) FINAL REPORT 5 (2012) (on file with author); see also *Eliminating Discrimination and Inequalities in Access to Water and Sanitation*, U.N. WATER (2015), <https://www.ohchr.org/Documents/Issues/Water/DiscriminationPolicy.pdf>.

11. U.N. Econ. and Soc. Comm’n for Asia and the Pacific, *Inequality of Opportunity in Asia and the Pacific: Water and Sanitation*, at 24–26 (2018), https://www.unescap.org/sites/default/files/Water_Sanitation_report_20181122.pdf.

12. See Jane Wilbur, Louisa Gosling & Hazel Jones, *Breaking the Barriers: Disability, Ageing and HIV in Inclusive WASH Programming*, in *EQUALITY IN WATER AND SANITATION SERVICES* 157–58

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the Commission observes that the absence of access to water affects historically discriminated groups, persons, and communities, such as women, children, and adolescents, indigenous peoples and communities, people of African descent, rural populations and urban shantytowns, persons deprived of their liberty, persons with disabilities, the elderly, among others.¹³

In addition to issues of discrimination and marginalization, over-use, depletion of fresh water supplies and climate change will result in “severe pressure” concerning water for the majority of people on earth in the coming two generations.¹⁴ Global health crises like the COVID-19 pandemic demonstrate vividly that water and sanitation are crucial to human health, and that inequalities in access multiply vulnerabilities created by systematic discrimination, marginalization, and stigma. In this context, the import of recognizing water and sanitation as human rights become clear. Rights call for action by governments, demand prioritization, and lend status to popular movements.

B. *Map of the Article*

Following the context set out in Section I above, Section II describes some important milestones in the emergence of the rights to water and sanitation under international human rights law. Building on early formulations in political documents and studies by independent experts, the right to water was thrust into the limelight when it was taken up as a rallying cry by activists fighting the privatization of water services in the late 1990s and early 2000s. Seeing the writing on the wall, many corporate actors eventually accepted the existence of the right to water but advanced interpretations that limited its bite. U.N. human rights experts charted a middle path, avoiding categorical rules on privatization in favor of delving into the realities facing communities that have been excluded from access to water and sanitation for too long. Examining these realities led U.N. human rights bodies to articulate in detail what the rights to water and sanitation promise in substance,

(Oliver Cumming & Tom Slaymaker eds., 2018) [hereinafter Wilbur, Gosling & Jones, *Breaking the Barriers*].

13. *Annual Report 2015, Chapter IV.A. Access to Water in the Americas: An Introduction to the Human Right to Water in the Inter-American System* INTER-AM. COMM’N H.R. ¶ 7, <http://www.oas.org/en/iachr/docs/annual/2015/doc-en/InformeAnual2015-cap4A-agua-EN.pdf> (last visited Feb. 27, 2021).

14. Wills, *supra* note 3, at 197.

what states are concretely required to do to respect, protect, and fulfill these rights, and how the private sector must be regulated when playing a role in providing services. Section III examines the rights to water and sanitation in constitutions around the world, providing first an aggregate snapshot of the status of these rights, then examining both explicit and implicit protections of these rights in a variety of countries across the world. The Article concludes with Section IV, which asks whether the rights to water and sanitation are radicalizing in the face of extreme inequality, global pandemics, and advancing climate change.

II. RIGHTS EMERGING: WATER AND SANITATION UNDER HUMAN RIGHTS LAW

A. *History of the Right to Water and Sanitation*

The 1977 Action Plan of the U.N. Water Conference in Mar Del Plata is frequently cited as the earliest international document recognizing the right to water.¹⁵ The conference declared that “[a]ll peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”¹⁶ From this beginning, the international community continued to debate the existence of, framing for, and political commitments to advancing, the rights to water and sanitation. In 1979, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was finalized; it included language that explicitly recognized the rights of rural women to “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply.”¹⁷ The international community declared the 1980s the “International Drinking Water Supply and Sanitation Decade,” setting ambitious targets for improvements in populations’ access to water and sanitation and framing them in terms of “supply,” which was consonant with the focus in the 1970s and 1980s—including in CEDAW—on extending, improving, and upgrading (state-run) water infrastructures.¹⁸ When these targets were not achieved, the 1990 Global Consultation on Safe Water and Sanitation and the 1992

15. See, e.g., WINKLER, THE HUMAN RIGHT TO WATER, *supra* note 1, at 81 (referring to the “first document referring to a right to water”).

16. U.N. Water Conference, *Report of the United Nations Water Conference, Community Water Supply Resolution*, at 66, U.N. Doc. E/CONF.70/29-EN (Mar. 1977).

17. United Nations Convention on the Elimination of All Forms of Discrimination Against Women art. 14, Dec. 18, 1979, 1249 U.N.T.S. 20378.

18. Joe Wills explains that international investments in water and sanitation focused on state systems until roughly 1990. See Wills, *supra* note 3, at 198–99.

Rio Declaration committed to global access by 2000.¹⁹ In 1989, the Convention on the Rights of the Child was adopted; Article 24.2(c) explicitly embraced “the provision of . . . clean drinking water” as crucial to the right to health of children.²⁰

However, by 1992, the international community was beginning to set more cabined goals, sometimes using rights language mixed with references to the market: the Dublin Statement of the International Conference on Water and the Environment “recognize[d] first the basic right of all human beings to have access to clean water and sanitation at an affordable price.”²¹ The appearance of “price” and “affordability” in this context is telling. By the early 1990s, market forces—led by multinational corporations based in the U.K. and France—were increasingly active in the water and sanitation sector, and by 1996, the World Water Council (WWC), sponsor of the World Water Forum, was born.²² Founded by representatives of government, industry, and development agencies,²³ the WWC was established as “a common umbrella organization to unite the disparate, fragmented, and ineffectual efforts in global water management.”²⁴ The ineffectiveness the WWC identified was based on the “belief that the state alone is unable to provide the infrastructure and management required for effective and equitable water and

19. Sharmila L. Murthy, *Translating Legal Norms into Quantitative Indicators: Lessons from the Global Water, Sanitation, and Hygiene Sector*, 42 WM. & MARY ENV'T L. & POL'Y REV. 385, 409 (2018) (internal citations omitted).

20. See Convention on the Rights of the Child art. 24(2)(c), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention on the Rights of the Child] (“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”).

21. International Conference on Water and the Environment, *The Dublin Statement on Water and Sustainable Development*, Principle No. 4 (Jan. 16, 1992), <https://www.ircwash.org/sites/default/files/71-ICWE92-9739.pdf>.

22. For a discussion, see Bronwen Morgan, *Introduction: The Field of Global Water Policy: Struggles Over Redistribution and Recognition*, in WATER ON TAP: RIGHTS AND REGULATION IN THE TRANSNATIONAL GOVERNANCE OF URBAN WATER SERVICES 1, 4–9 (2011) (finding that 1997 was the “unprecedented peak in private sector investment in water and sanitation”).

23. *Constitution and By-Laws*, WORLD WATER COUNCIL 7(2018), https://www.worldwatercouncil.org/sites/default/files/2019-01/Constitution_By-Laws_2019_2021_EN.pdf.

24. *History*, WORLD WATER COUNCIL, <https://www.worldwatercouncil.org/en/history> (last visited Oct. 31, 2020). The WWC is now comprised of inter-governmental organizations, government and government-promoted organizations, commercial organizations, civil society organizations, and professional and academic organizations. See *Constitution and By-Laws*, WORLD WATER COUNCIL 17 (2018), https://www.worldwatercouncil.org/sites/default/files/2019-01/Constitution_By-Laws_2019_2021_EN.pdf.

sanitation services due to its inefficiency, corruption, and lack of capital.”²⁵ Embedded in the broader context of structural adjustment, integration of the private sector into government efforts—through privatization of services, public-private investments in infrastructure, or broad divestiture by the state—was offered as a solution to these problems, and soon market-led “reforms” were instituted in the water and sanitation sector, with the ideas of cost recovery and profitability proliferating.²⁶ The idea was that the private sector could improve services to all through “full cost recovery”—meaning that consumers would be made to pay for the water and sanitation that they needed and valued.²⁷ By the end of 2000, “at least ninety-three countries had private sector involvement in their piped water services, a transformation that affected over 2000 water and sewage projects, and made more than 460 million people dependent upon global firms for their water supply.”²⁸

When U.N. member states adopted the Millennium Declaration in 2000, they promised not universal access but instead “to halve the proportion of people who are unable to reach or to afford safe drinking water” by 2015.²⁹ As Murthy has written, “[t]his shift away from universal water access reflected the international community’s embrace of more realistic time-bound goals that could be measured” using indicators,³⁰ but this early formulation also integrated the market-based language of affordability into these targets. By the time the Declaration’s promises were translated into final goals, targets, and indicators, the global community had moved away from explicit reference to affordability and embraced sanitation as well as water, committing to “halv[ing] by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation.”³¹ However, “the actual indicators used to measure progress with this Millennium Development Goal (MDG) target did not consider sustainability, safety, or affordability.”³² Instead, debates over how best to

25. Wills, *supra* note 3, at 200 (internal citations omitted).

26. *Id.*; Alex Loftus, Hug March & Thomas F. Purcell, *The Political Economy of Infrastructure: An Introduction to Financialization*, 6 WIREs WATER 1, 3–4 (2019) [hereinafter Loftus, March & Purcell, *The Political Economy of Infrastructure*] (internal citations omitted).

27. Cristy Clark, *Of What Use Is a Deradicalized Human Right to Water?*, 17 HUM. RTS. L. REV. 231, 235–36 (2017).

28. Wills, *supra* note 3, at 198–99 (internal citations omitted).

29. See G.A. Res. 55/2, United Nations Millennium Declaration (Sept. 18, 2000).

30. Murthy, *supra* note 19, at 409–10 (internal citations omitted).

31. *Millennium Development Goals (MDGs)*, WHO (Feb. 19, 2018), [https://www.who.int/news-room/fact-sheets/detail/millennium-development-goals-\(mdgs\)](https://www.who.int/news-room/fact-sheets/detail/millennium-development-goals-(mdgs)).

32. Murthy, *supra* note 19, at 410 (internal citations omitted).

understand the entitlements to water and sanitation, and the private sector's role in ensuring access, would shift to the human rights arena, where the emerging rights became the site for intense struggle over neoliberal policies concerning water and sanitation.

Indeed, the wave of privatization had gone too far, and cost recovery was not solving the exclusion of the poor from services.³³ As Morgan explains, the 1990s saw a flowering of “sustained political protest” in countries from rich to poor against privatization of water and sanitation.³⁴ At the beginning of 2000, a joint venture involving multinational U.S.-based infrastructure giant Bechtel Corporation raised water prices in Cochabamba, Bolivia's third largest city.³⁵ The population—already fed up with the privatization of other major state-run enterprises, the informalization of work, and increasing urbanization—flooded into the streets to reject the newly exorbitant water prices.³⁶ The Water Wars had started, and—following city-wide strikes, popular protests, and crackdown by security forces—the population emerged victorious, forcing the government of Bolivia to cancel its contract with the joint venture.³⁷ In the midst of this struggle, demonstrators formulated the “Declaration of Cochabamba” in December 2000, which stated that “[w]ater is a fundamental human right and a public trust to be guarded by all levels of government, therefore it should not be commodified, privatized or traded for commercial purposes.”³⁸ This early invocation of the right to water conceptualized the right in opposition to privatization and marketization.³⁹ As movements embraced this right,⁴⁰ the U.N. worked to advance a more consensus formulation.

33. See Clark, *supra* note 27, at 234–37.

34. See Morgan, *supra* note 22, at 10–12.

35. The joint venture had taken over the municipal water system in late 1999 and, due to World Bank-imposed privatization rules, was required to seek cost recovery for extension of services from users. See Susan Spronk, *Roots of Resistance to Urban Water Privatization in Bolivia: The “New Working Class,” the Crisis of Neoliberalism, and Public Services*, 71 INT'L LAB'Y & WORKING-CLASS HIST. 8, 14–15 (2007), <https://www.jstor.org/stable/27673068>.

36. See *id.* at 16–17.

37. See *id.* at 11–18; see also Clark, *supra* note 27, at 234–36. Although Bechtel and its partners brought a complaint seeking \$50 million from Bolivia before the International Centre for Settlement of Investment Disputes (ICSID), the companies ultimately withdrew their complaint for a nominal amount following global campaigns aimed at the companies. See *Bechtel Surrenders in Bolivia Water Revolt Case*, EARTHJUSTICE (Jan. 19, 2006), <https://earthjustice.org/news/press/2006/bechtel-surrenders-in-bolivia-water-revolt-case>; see also Morgan, *supra* note 22, at 19.

38. As quoted in Wills, *supra* note 3, at 215 (internal citations omitted).

39. See Clark, *supra* note 27, at 238 (describing the “rights vs commodification approach”); see also Morgan, *supra* note 22, at 10–11.

40. See Morgan, *supra* note 22, at 10–11.

B. *The Rights to Water and Sanitation Crystalize at the United Nations*

In 1998, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities—an expert human rights body under the auspices of the then-Commission on Human Rights—debated and approved a working paper on—and then a resolution to create—an expert mandate on the “right of access of everyone to drinking water supply and sanitation services.”⁴¹ However, the Commission on Human Rights was not prepared to move forward on the issue, deciding to postpone the appointment of the expert on the basis that the right “remained undefined.”⁴² In 2001, the Commission did approve appointment of a Special Rapporteur on the “Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation.”⁴³ In his preliminary report, Special Rapporteur El Hadji Guissé alternated between descriptive and normative modes, concluding that:

In a few industrialized countries very recently, such rights have emerged as guaranteeing, within a liberal system, the access for all users, even the poorest, to a minimum supply of drinking water in areas covered by a distribution network, for a reasonable price. While water is undoubtedly an economic good, it would be absolutely wrong and harmful to subject it entirely to market conditions, which are basically geared to profit. States must take all necessary measures to enable the poorest people to enjoy this right, which is vital for all human beings. The right to drinking water must be considered as a non-derogable right.⁴⁴

41. Subcomm’n on Prevention of Discrimination & Prot. of Minorities, Working Paper on the Right of Access of Everyone to Drinking Water Supply and Sanitation Services, U.N. Doc. E/CN.4/Sub.2/1998/7 (1998); Subcomm’n on Prevention of Discrimination & Prot. of Minorities Res. 1998/7 (Aug. 20, 1998) (appointing Mr. El Hadji Guissé as Special Rapporteur).

42. See U.N. Comm’n on Hum. Rts., Preliminary Rep. Submitted by Mr. El Hadji Guissé in Pursuance of Decision 2002/105 of the Comm’n on Human Rights and Resolution 2001/2 of the Sub-Comm’n on the Promotion and Protection of Human Rights on the Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation, ¶ 1, U.N. Doc. E/CN.4/Sub.2/2002/10 (June 25, 2002) (citing U.N. Commission on Human Rights decision 1999/108).

43. See *id.* ¶¶ 1–2.

44. See *id.* ¶ 48. In his final report in 2004, the Special Rapporteur found that the right to water was more commonly recognized than the right to sanitation. See U.N. Comm’n on Hum. Rts., Final Rep. of the Special Rapporteur on the Relationship Between the Enjoyment of Economic,

This passage is fascinating for its descriptive and normative work. It suggested that the right to water had “emerged” in rich countries and was relevant only to those living in areas already covered by water infrastructure. At the same time, it rejected commodification and argued that the right should be recognized as incapable of limitation during times of public emergency. To be meaningful to those who needed it, the report suggested, the right should be formulated in a manner that made clear that water services should be affordable and extended to those outside the reach of existing networks.

In this terrain, the Committee on Economic, Social, and Cultural Rights (CESCR) released its General Comment No. 15 on the Right to Water (GC 15) in 2002, clarifying the legal status, content, and scope of obligations of the emerging human right to water.⁴⁵ The legal contours of GC 15 will be discussed in Section II.C.1, below. For the purpose of this Section, it is important to note a few things. First, the right to water—encompassing water for “consumption, cooking, personal and domestic hygienic requirements”—was found to be implicit in Article 11(1) on the right to adequate food and housing and 12(1) on the right to health.⁴⁶ Second, no mention was made of the right to sanitation apart from the role of sanitation in ensuring safe access to water, despite pressure by some NGOs and international health experts for its inclusion.⁴⁷ And finally, the CESCR worked hard to thread the commodity versus right needle in GC 15, articulating a vision that theoretically allowed for government-led water supply, privatization, or something in between—so long as the poor and marginalized were able to access “sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”⁴⁸ Indeed, GC 15 specified that states could choose from a menu of options for ensuring the poor and marginalized could access water, from “appropriate low-cost techniques and technologies” to “pricing policies such as free or low-cost water” and “income supplements.”⁴⁹ As Langford has written,

Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation, ¶ 23, U.N. Doc. E/CN.4/Sub.2/2004/20 (July 14, 2004).

45. Comm. on Econ., Soc. and Cultural Rts., General Comment No. 15: The Right to Water (Articles 11 and 12 of the Covenant), U.N. Doc E/C.12/2002/11 (Jan. 20, 2003) [hereinafter CESCR, GC 15].

46. *Id.* ¶¶ 2–3.

47. See Inga Winkler, *The Human Right to Sanitation*, 37 U. PA. J. INT’L. L. 1351, 1354–56 (2016).

48. CESCR, GC 15, *supra* note 45, ¶ 2. Many hoped the balance struck by the CESCR would ensure that the poor and marginalized could use the right to correct the excesses of privatization and neoliberal “reforms.” See, e.g., Odeh Al Jayyousi, *Water as a Human Right: Towards Civil Society Globalization*, 23 INT’L J. WATER RES. DEV. 329, 331 (2007).

49. CESCR, GC 15, *supra* note 45, ¶ 27.

GC 15 walked a “careful middle road” on privatization.⁵⁰ Perhaps in part because of this approach, GC 15 was subsequently “embraced” by the WWC and transnational water corporations.⁵¹

A few years after the adoption of GC 15, the U.N. Sub-Commission asked El Hadji Guissé to prepare a set of guidelines on the right to water and sanitation. In 2006, as the Sub-Commission’s Special Rapporteur, Guissé released guidelines that were designed to help states make sense of their obligations concerning water and sanitation arising under the major human rights treaties, as well as their duties encompassed in the Millennium Development Goals.⁵² The guidelines were consonant with GC 15 and “highlight[ed] the main and most urgent components of the right to water and sanitation” that states, international agencies, and civil society should prioritize when working to make both water and sanitation a reality for all.⁵³

While the expert bodies established the conceptual and legal aspects of the right to water, multilateral and political bodies advanced the issue as well. The Fourth World Water Forum in Mexico City in 2006 was the site of intense debate about the meaning of the right to water. The synthesis report asserted that all stakeholders—including, in particular, the private sector—recognized the right to water, but the Ministerial Declaration did not include such language.⁵⁴ In 2007, the Office of the High Commissioner for Human Rights called for the recognition of the right to water and sanitation and decried the dearth of “[s]pecific, dedicated and sustained attention to safe drinking water and sanitation” at the international level.⁵⁵ Partially in response to this report, in 2008, the Human Rights Council appointed Catarina de Albuquerque as the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, requesting that she prepare a report examining both water and sanitation, noting specifically “that certain aspects of human rights obligations related to the access to safe drinking water and sanitation have yet

50. Wills, *supra* note 3, at 220 (quoting and citing Langford).

51. See Morgan, *supra* note 22, at 11.

52. El Hadji Guissé (Special Rapporteur on the Right to Water), *Realization of the Right to Drinking Water and Sanitation*, ¶¶ 1–3, U.N. Doc. E/CN.4/Sub.2/2005/25 (July 11, 2005).

53. *Id.* ¶ 3.

54. *Synthesis of the Fourth World Water Forum*, WORLD WATER COUNCIL 87–97 (2006), https://www.worldwatercouncil.org/sites/default/files/World_Water_Forum_04/synthesis_sept06.pdf.

55. Off. of the High Comm’r for Hum. Rts., Rep. of the U.N. High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Drinking Water and Sanitation Under International Human Rights Instruments, ¶¶ 66–69, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007).

to be further studied.”⁵⁶ The Independent Expert was also tasked with ensuring a gender lens and advancing dialogue among states and other key actors on “best practices related to access to safe drinking water and sanitation.”⁵⁷

The Independent Expert’s first report focused on access to sanitation, finding—and supporting—a trend toward recognition of the right to sanitation as a “distinct right.”⁵⁸ Noting that GC 15 provided little guidance on the content of the right to sanitation, she explained that sanitation had been a taboo subject for too long.⁵⁹ She opined that the close links between sanitation, human dignity, and the enjoyment of other rights, as well as the fact that lack of access to sanitation is “frequently a consequence of larger societal discrimination, inequality and exclusion” meant it must be a core priority for her mandate.⁶⁰

Much attention was focused on what position Catarina de Albuquerque would take on the privatization debate. She hosted a consultation on the topic and solicited written submissions; business submissions asserted that corporations were key to fulfilling the right to water, while many NGO submissions argued against privatization—either in whole or on the basis that, in reality, privatization had led to exclusion of the poor and marginalized from water services.⁶¹ In 2010, the Independent Expert released her report rejecting the terms of the rights versus market controversy:

While the debate surrounding private sector participation has often been polarizing, the independent expert observes that concrete situations are rarely “black or white”, but instead are characterized by varying shades of grey.⁶²

56. U.N. Hum. Rts. Council Res. 7/22, Human Rights and Access to Safe Drinking Water and Sanitation (Mar. 28, 2008).

57. *Id.* ¶ 2(a).

58. U.N. Hum. Rts. Council, Rep. by Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation: Rep. on Sanitation, ¶ 59, U.N. Doc. A/HRC/12/24, (July 1, 2009).

59. U.N. Hum. Rts. Council, Rep. by Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation: Rep. on Sanitation, ¶¶ 27–33, U.N. Doc. A/HRC/10/6, (Feb. 25, 2009).

60. *Id.*

61. *Written Contributions—Private Sector Participation*, OFF. U.N. HIGH COMM’R HUM. RTS., <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/ContributionsPSP.aspx>.

62. U.N. Hum. Rts. Council, Rep by Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation: Rep. on Sanitation, ¶ 2, U.N. Doc. A/HRC/15/31, (June 29, 2010) [hereinafter UNHRC, REPORT ON SANITATION].

Zooming in on the reality of the private sector's engagement in service delivery, the Independent Expert explained that, although the debate focused mostly on state provision of services or services sold by businesses pursuant to a contract with the state, informal or "de facto" provision of services was also common, especially in places where the need was not met by either the state or formal businesses.⁶³ This focus on informal water and sanitation services—including water hawkers, operators of shared sanitation facilities, as well as non-governmental organizations—was a major contribution by the mandate to understanding the realities facing very poor countries and underserved communities more broadly. In many places, the state had entirely abandoned the population, not only allowing water and sanitation to be commodified, but also failing to regulate NGOs and small-scale providers, a situation that could have dire consequences when those organizations were incompetent or unaccountable to communities. The report noted that the role of the formal private sector was comparatively small—and declining—with "only 5 per cent of world's population . . . being served by the formal private sector."⁶⁴ On the other hand, "up to 25 per cent of the urban population in Latin America and almost 50 per cent of the urban population in Africa rely on small-scale providers to some extent," with the goods and services offered by these actors typically expensive and often inferior and even unsafe.⁶⁵

Having painted a more complex picture than that conjured in the polarized debate, the Independent Expert then asserted that "[h]uman rights are neutral as to economic models in general, and models of service provision more specifically."⁶⁶ Human rights make clear that the state retains the obligation to respect, protect, and fulfill the rights to water and sanitation—no matter whether it provides services directly, contracts with businesses, or delegates in a "de facto" manner by failing to regulate private provision in the absence of public services.⁶⁷

As for the direct obligations on non-state actors, the Independent Expert referred to the obligation to act with due diligence (in line with the Ruggie Principles), developing the meaning of this obligation in the context of water and sanitation at some length.⁶⁸ She also set out a series of specific ways that service providers—including through

63. *Id.* ¶ 4.

64. *Id.* ¶ 8.

65. *Id.* ¶ 11.

66. *Id.* ¶ 15.

67. *Id.* ¶¶ 18–21.

68. *Id.* ¶¶ 22–28.

compliance with regulations, in the case of private provision—must comply with both the substantive content of the right to water and sanitation and rights-based principles such as participation, accountability, and non-discrimination and equality.⁶⁹ This report was especially striking in its handling of informal small-scale providers: acknowledging that they “often provide poor quality services at exorbitant prices,” the Independent Expert also recognized that “many people would be far worse off without their services.”⁷⁰ Ultimately, the state must find ways to ensure that all populations have access to water and sanitation, and cannot eliminate informal providers until other services are in place.⁷¹

Despite this nuanced analysis, many in the water justice movement heard the headline and not the details—or believed that governments and private actors would do so. As Farhana Sultana and Alex Loftus note, many were concerned that this approach could “open[] the floodgates to further commercialization.”⁷² To avoid such a turn, water justice advocates worked with the government of Bolivia to push for recognition of the right to water by the U.N.’s universal political body, the General Assembly. In June 2010, the Bolivian government presented a draft resolution; Maude Barlow explains that although the draft was met with “intensive criticism,” Bolivia’s U.N. Ambassador Pablo Solón stood strong, rebuffing calls to dilute the language by adding the phrase “access to” water.⁷³ When she saw the first draft, the Independent Expert recommended adding sanitation throughout the resolution; this recommendation was enthusiastically taken up.⁷⁴ The final draft was presented by Bolivia and thirty-eight other countries on July 28; the United States called for a vote: 122 countries supported the resolution’s passage—including China, Russia, Germany, France, Spain, and Brazil; the remaining forty-one

69. *Id.* ¶¶ 29–60.

70. *Id.* ¶ 53.

71. *Id.* ¶¶ 53–54.

72. Farhana Sultana & Alex Loftus, *The Right to Water: Prospects and Possibilities*, in *THE RIGHT TO WATER: POLITICS, GOVERNANCE AND SOCIAL STRUGGLES* 1, 3 (Farhana Sultana & Alex Loftus eds., Routledge 1st ed., 2012).

73. MAUDE BARLOW, *BLUE FUTURE: PROTECTING WATER FOR PEOPLE AND THE PLANET FOREVER* 29–31 (2014) [hereinafter *BARLOW, BLUE FUTURE*].

74. Inga T. Winkler & Catarina de Albuquerque, *Doing It All and Doing It Well? A Mandate’s Challenges in Terms of Cooperation, Fundraising and Maintaining Independence*, in *THE UNITED NATIONS SPECIAL PROCEDURES SYSTEM* 194–95 (Nolan, Freedman & Murphy eds., 2017).

states—including Australia, Canada, the Netherlands, the United Kingdom, and the United States⁷⁵—abstained.⁷⁶

Containing no legal grounding for the right, this resolution was mostly symbolic. To ensure the binding nature of the right was firmly recognized, Germany and Spain, along with fifty co-sponsors⁷⁷, introduced a resolution before the Human Rights Council, which was adopted on September 30, 2010. The resolution affirmed by consensus that the right to 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.”⁷⁸ While the resolution recognized that states may allow “third parties” to play a part in fulfilling the right to water and sanitation, it also reaffirmed the state obligation to effectively regulate the private sector.⁷⁹ The United States—to the surprise of many—declared that it was “proud” to join the consensus set out in the resolution.⁸⁰

Some felt that a bit of clean-up work was needed to ensure the right to sanitation was recognized with the same force as the right to water. In November 2010, the Committee on Economic, Social and Cultural Rights—instead of amending GC 15—issued a formal statement clarifying that “since sanitation is fundamental for human survival and for leading a life in dignity, the right to sanitation is an essential component of the right to an adequate standard of living” and that the right is “integrally related” to the rights to health, housing, and water, all protected by the International Covenant on Economic, Social, and Cultural Rights (ICESCR).⁸¹ With the right to water and sanitation now firmly entrenched, the Human Rights Council decided in 2011 to

75. The U.K. abstained because sanitation was included in the resolution. See Malcolm Langford, Jamie Bartram & Virginia Roaf, *The Human Right to Sanitation*, in *THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS* 345, 357 (Malcolm Langford & Anna F. S. Russell eds., 2017).

76. Press Release, United Nations Press Off., G.A. Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None against, 41 Abstentions (July 28, 2010), <https://www.un.org/press/en/2010/ga10967.doc.htm> (transcribing the United States’ representative’s statement explaining its abstention on the basis that the resolution was not adequately supported in international law).

77. WINKLER, *THE HUMAN RIGHT TO WATER*, *supra* note 1, at 80.

78. U.N. Hum. Rts. Council, *Human Rights and Access to Safe Drinking Water and Sanitation*, ¶ 3, U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010).

79. *Id.* ¶¶ 6–7.

80. BARLOW, *BLUE FUTURE*, *supra* note 73, at 32.

81. U.N. Comm. on Econ., Soc. & Cultural Rts., Statement on the Right to Sanitation, ¶ 7, U.N. Doc. E/C.12/2010/1 (Mar. 18, 2011).

appoint the then-serving Independent Expert as the first Special Rapporteur on the Right to Safe Drinking Water and Sanitation.⁸² In 2013, the General Assembly adopted—this time by consensus—a resolution recognizing the right to water and sanitation under international law.⁸³ In 2014, the Human Rights Council’s right to water resolution underscored the importance of menstrual hygiene management to gender equality.⁸⁴ In 2015, the General Assembly’s consensus resolution recognized the “rights” to water and sanitation—thus recognizing the separate and distinct status of the two rights under international law.⁸⁵

C. *The Normative Status of the Rights to Water and Sanitation Across the U.N.*

While the difference between civil and political rights on one side, and economic, social, and cultural rights on the other was once seen as a sharp difference of kind, over the past several decades this divide has softened significantly. In time, theories and doctrines relevant to one side of the divide have come to be used in understanding the other, and the understanding of the nature of obligations has developed in a more harmonious manner. The rights to water and sanitation have emerged during this slow process of mutual cross-fertilization, and elements of the rights are now recognized as essential to rights on both sides of the old divide. By now, it is understood that all rights have “positive” and “negative” aspects, as well as immediate and more progressive elements,⁸⁶ and that all rights impose obligations on the state to

82. U.N. Hum. Rts. Council Res. 16/2, The Human Right to Safe Drinking Water and Sanitation, ¶ 4 (Apr. 8, 2011).

83. G.A. Res. 68/157, The Human Right to Safe Drinking Water and Sanitation 2014 (Feb. 12, 2014). See discussion in Valérie Bernaud, *La Consécration d’un Droit Fondamental à l’Eau est Possible. Étude de Droit Comparé le Démontrant*, 110 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 317, 319 (2017).

84. U.N. Hum Rts Council Res. 27/7, The Human Right to Safe Drinking Water and Sanitation (Oct. 2, 2014).

85. G.A. Res. 70/169, The Human Rights to Safe Drinking Water and Sanitation 2016 (Feb. 22, 2016). For a discussion, see generally Inga Winkler, *The Human Right to Sanitation*, *supra* note 47, at 1365.

86. For example, the right to water imposes an immediate obligation of non-discrimination and equality—which may require special attention to certain groups that experience discrimination in access to water. See U.N. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 15: The Right to Water (Articles 11 and 12 of the Covenant), U.N. Doc E/C.12/2002/11 (Jan. 20, 2003). States’ obligations are understood to vary according to their resources, whether under the explicit “progressive realization” standard in the ICESCR, or through de facto limits under the ICCPR.

respect, protect, and fulfill—though this set of obligations is articulated differently under various treaties.⁸⁷ The core minimum content of some economic and social rights can be seen as forming part of the irreducible nucleus of some civil and political rights. The minimum core of the right to water, for example, which “encompasses a minimum standard that is indispensable for human survival and dignity,”⁸⁸ also forms part of the right to life under the International Covenant on Civil and Political Rights (ICCPR).⁸⁹

Thus, while the Committee on Economic, Social, and Cultural Rights has been the leading force in articulating the rights to water and sanitation under treaty law, the treaty bodies interpreting CEDAW, the ICCPR, the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) have all had a role to play. The extent to which different states may be bound to uphold these rights will certainly depend on what treaties they have ratified, but even those states that have only ratified treaties concerning civil and political rights have obligations to ensure water and sanitation sufficient for human survival, to ensure that those detained have water and sanitary conditions that respect their dignity, and that withholding water is not used as a means to deprive groups of their right to enjoy their culture. This Section will briefly examine the status of these rights under each relevant treaty.

1. The Rights to Water and Sanitation under the ICESCR

As discussed above, the rights to water and sanitation are not explicitly protected in the text of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). As Winkler notes, it is striking that the right to an adequate standard of living set out in Article 11(1) explicitly mentions food but not water. However, as she explains, an examination of the object and purpose of this provision demonstrates

87. Winkler points out that Shue’s original tripartite framing in 1980 was clarified and furthered by Eide in 1989 via the “respect, protect, fulfill” typology we know today. See WINKLER, *THE HUMAN RIGHT TO WATER*, *supra* note 1, at 107. Concerning the right to water, the obligation to respect means that, for example, states must not pollute drinking water or arbitrarily disconnect water services for failure to pay. The obligation to protect requires states to protect drinking water from pollution, e.g., by corporations and means that they must regulate third parties in the sector to ensure non-discriminatory access. States must also fulfill the rights by ensuring that infrastructure is built in unserved or underserved areas and must provide water in emergency situations or to those experiencing extreme poverty.

88. WINKLER, *THE HUMAN RIGHT TO WATER*, *supra* note 1, at 121.

89. See discussion *infra*.

that the things listed as part of an “adequate standard of living”—food, clothing, and housing—are illustrative and not exhaustive.⁹⁰ Examining the *travaux préparatoires* allows Winkler to conclude that, although there was brief consideration of including water explicitly in the treaty text, “the importance of [water] was overlooked rather than deliberately left out.”⁹¹ As Takele Saboka Bulto explains, articulating the full content of the right to water has been “more a discovery than an invention.”⁹²

Indeed, before the rights to water and sanitation were firmly established as separate rights, some aspects of these rights were recognized as inherent to other rights set out in the ICESCR. For example, the former Special Rapporteur on the Right to Food, Jean Ziegler, opined that the right to water is implicit as “liquid food” in the right to food under Article 11(1).⁹³ The Committee on Economic, Social, and Cultural Rights (CESCR) identified “safe drinking water” and “sanitation and washing facilities” as elements of the right to adequate housing set out in Article 11(1) in its General Comment on the Right to Adequate Housing in 1992.⁹⁴ The Committee also made clear that “access to safe and potable water and adequate sanitation” is an underlying determinant of health, implicit in the right to health set out in Article 12 of the Covenant.⁹⁵ However, these early observations were too “limited” to encompass the full content of the rights to water and sanitation, leaving out such crucial aspects as access to water and sanitation away from the home and quantities of water above that needed for basic human health.⁹⁶

90. WINKLER, *THE HUMAN RIGHT TO WATER*, *supra* note 1, at 42–43.

91. *Id.* at 42.

92. Takele Saboka Bulto, *The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?*, 12 MELBOURNE J. INT’L L. 290, 314 (2011).

93. *See* WINKLER, *THE HUMAN RIGHT TO WATER*, *supra* note 1, at 45–47 (noting that Ziegler suggested water should be treated as “liquid food”). Interestingly, the CESCR did not include mention of water and sanitation in its General Comment on the Right to Adequate Food in 1999, though it did mention “environmental hygiene” as necessary in safe food handling. U.N. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 12: The Right to Adequate Food (Article 11 of the Covenant), ¶ 10, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

94. U.N. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 4: The Right to Adequate Housing (Article 11(1) of the Covenant), ¶ 8(b), U.N. Doc. E/1992/23, Annex III (Dec. 13, 1991).

95. U.N. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12) of the Covenant), ¶ 11, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

96. WINKLER, *THE HUMAN RIGHT TO WATER*, *supra* note 1, at 45–49.

Almost two decades after its publication, GC 15 remains the leading formulation of the human right to water, carrying “significant legal and political weight.”⁹⁷ In brief, GC 15 articulated the right to water using a version of the AAAQ framework, which the Committee had adapted from the public health field in its work on the right to health.⁹⁸ GC 15 explains that water must be:

- *Available*: water must be available in sufficient quantities⁹⁹ for “personal and domestic uses” including “drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene,” as well as in key institutions like schools, workplaces, and hospitals.¹⁰⁰
- *Acceptable*: water must be an acceptable color, odor, and taste.¹⁰¹
- *Accessible*: water must be *physically* accessible (inside or in the immediate surroundings of dwellings)¹⁰² in sufficient quantities in schools, workplaces, hospitals, etc. Water must also be economically accessible: while GC 15 makes clear that human rights law does not necessarily require that water be free, it does need to be affordable for all.¹⁰³
- *Quality*: water must be of a quality that ensures it is safe, and does not pose a threat to human health.¹⁰⁴

97. *Id.* at 41.

98. See ALICIA ELY YAMIN, POWER, SUFFERING, AND THE STRUGGLE FOR DIGNITY: HUMAN RIGHTS FRAMEWORKS FOR HEALTH AND WHY THEY MATTER 107 (2015).

99. CESCR, GC 15, *supra* note 45, ¶ 12. Winkler explains that while “sufficient” quantities will vary greatly depending on a variety of factors, it is reasonable to understand this amount as roughly 25 liters per person per day at minimum (and as suggested by the WHO) and 100 per person per day for complete fulfillment of the right. See WINKLER, THE HUMAN RIGHT TO WATER, *supra* note 1, at 131–34.

100. CESCR, GC 15, *supra* note 45, ¶ 12(a). Winkler notes that personal hygiene includes handwashing, anal and genital cleansing, and menstrual health management. See WINKLER, THE HUMAN RIGHT TO WATER, *supra* note 1, at 131–33.

101. CESCR, GC 15, *supra* note 45, ¶ 12.

102. *Id.*

103. *Id.* Winkler notes that three to five percent of household income “seems to have crystallised as a common indicator” of affordability for water. See WINKLER, THE HUMAN RIGHT TO WATER, *supra* note 1, at 137.

104. CESCR, GC 15, *supra* note 45, ¶ 12. GC 15 points to the WHO Guidelines for Drinking Water Quality as a good reference point for microbial, chemical, and radiological aspects of water for consumption.

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Of note, GC 15 emphasizes that to ensure that the right to water is available without discrimination and on a basis of equality, states must extend “special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum-seekers, internally displaced persons, migrant workers, prisoners and detainees.”¹⁰⁵ GC 15 makes clear that, due to the discrimination and marginalization that these groups face, states may need to take specific and additional steps to ensure the right to water is protected. For example, states should ensure that women’s common and extra burden of collecting water is “alleviated,” and that Indigenous peoples can enjoy their right to “access to water resources on their ancestral lands,” which must be “protected from encroachment and unlawful pollution.”¹⁰⁶

GC 15 makes clear that while the right to water must be respected, protected, and fulfilled in relation to all within their jurisdiction, states also have international obligations concerning the right to water.¹⁰⁷ Specifically, the Committee explained that:

- States must *respect* “the enjoyment of the right in other countries,” which means that states are obligated to “refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries.”¹⁰⁸
- States may never use water as a tool of statecraft and cannot impose embargoes or sanctions that interfere with the right to water in other countries.¹⁰⁹
- States should adopt measures “to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.”¹¹⁰
- States that enjoy adequate resources—specifically “economically developed States parties”—should “facilitate realization of the right to water in other countries” (especially “poor” countries) through assistance and aid.¹¹¹

105. *Id.* ¶ 16.

106. *Id.* Note that the right of Indigenous peoples to ancestral water resources is not limited to water for personal and domestic use.

107. *Id.* ¶¶ 20–29, 44.

108. *Id.* ¶ 31.

109. *Id.* ¶ 32.

110. *Id.* ¶ 33.

111. *Id.* ¶ 34.

- States must consider impacts on the right to water when concluding international agreements, especially those “concerning trade liberalization.”¹¹²
- States should ensure that their actions as part of international financial institutions (IFIs)—such as the IMF and the World Bank—are consistent with the right to water and do not hinder states’ ability to fulfill that right.¹¹³

With respect to the right to sanitation,¹¹⁴ state obligations have been more difficult to specify as compared to water, but have emerged more clearly in the past decade.¹¹⁵ Until recently, the right was both tied to the right to water and seen as implicit in a range of rights, including the rights to an adequate standard of living, adequate housing, and health.¹¹⁶ The CESCR’s 2010 *Statement on the Right to Sanitation* advanced the discussion significantly by setting out the right to sanitation as a “distinct and separate right”¹¹⁷ rooted in human dignity, “integrally related” to the right to water, while also being an underlying determinant of the right to health and inherent in the right to adequate standard of living and the right to adequate housing.¹¹⁸ The CESCR adopted the definition of sanitation set out by Catarina de Albuquerque, as “a system for the collection, transport, treatment and

112. *Id.* ¶ 35.

113. *Id.* ¶ 36.

114. Definition proposed by Langford et al. (attempting to overcome shortcomings of the other frequently used definitions): “sanitation constitutes the ability to effectively access space and facilities (whenever and wherever needed), that afford privacy, dignity and safety, in which to urinate, defecate and practice related hygiene, including menstrual hygiene, in a culturally acceptable manner, by which virtue of their design, management, and accompanying services protect the user, the locality (e.g., households, school, workplace, hospital or community) and wider population from the adverse consequences of contamination from the process.” THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS, *supra* note 75, at 345, 348–49 (italics removed). See also WHO definition of sanitation as “the provision, access, and use of facilities and services for the safe disposal of human urine and faeces that provides privacy and dignity, and the maintenance of hygienic conditions, including though services such as garbage collection and wastewater disposal.” See Jimena Suárez Ibarrola, *Right to Sanitation*, MAX PLANCK ENCYCLOPEDIA OF COMPAR. CONST. L., <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e168> (last updated Sept. 2018).

115. See Ibarrola, *Right to Sanitation*, *supra* note 114.

116. *Id.*

117. THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS, *supra* note 75, at 347.

118. Comm. on Econ. Soc. & Cultural Rts., Statement on the Right to Sanitation, ¶ 7, U.N. Doc. E/C.12/2010/1 (Jan. 24, 2011) [hereinafter CESCR, *Statement*].

disposal or re-use of human excreta and associated hygiene,”¹¹⁹ and used the AAAQ framework to identify state obligations, specifying that:

States must ensure that everyone, without discrimination, has physical and affordable access to sanitation in all spheres of life, which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity. The Committee is of the view that the right to sanitation requires full recognition by States parties in compliance with the human rights principles related to non-discrimination, gender equality, participation and accountability.¹²⁰

Providing further clarification of the contents of the right, the former Special Rapporteur on Water and Sanitation has explained that the availability element means that individuals should be able to access to a “safe” and “proximate” sanitation facility, though she concluded that this does not necessarily mean that everyone must have a toilet inside their home.¹²¹ Langford, Bartram, and Roaf reason that “[p]ersonal dignity and freedom from harassment point in the direction of urgently making sanitation accessible within the home . . . unless a country’s resources or natural environment do not permit.”¹²² Concerning the quality element, Langford et al. explain that sanitation facilities “must be hygienically safe to use” and include water or other facilities for genital, anal, and hand washing, as well as menstrual hygiene.¹²³ At the collective level, sanitation facilities must be available in health, educational, and public institutions, as well as workplaces; they should be regularly cleaned, with pits emptied and well maintained.¹²⁴ As for physical accessibility, sanitation facilities should be available round the clock, and must ensure they are usable by all portions of the population, including children, the elderly, and persons with disabilities.¹²⁵ Sanitation must also be economically accessible (affordable)—not necessarily free of charge—but at a price that will not force households to limit other “basic goods and services,” including water, food, housing, healthcare, etc.¹²⁶ Finally, sanitation facilities

119. *Id.* ¶ 8.

120. *Id.* (internal quotations and citations omitted).

121. *See* THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS, *supra* note 75, at 372–73.

122. *See id.* at 373 (internal citations omitted).

123. *See id.* at 374.

124. *See id.* at 374–75 (quoting and citing SR Report).

125. *See id.* at 375 (quoting and citing SR Report).

126. *See id.*

should be constructed in line with local customs and beliefs, including those concerning privacy.¹²⁷

While the right to sanitation has now been well established at the international level, conceptual issues remain, including the status of the right as an “individual, group, or hybrid right.”¹²⁸ Langford et al. point out that it is hard to see sanitation as solely an individual right, suggesting that it would be incoherent to “argue that a *single individual’s* interest in sanitation services being universally provided would be sufficient to justify the creation of an entire sanitation system.”¹²⁹ They conclude instead that the right to sanitation is a “hybrid right, with individual and group components.”¹³⁰ Ultimately, although the group elements are often prominent in practice, individuals have the right to access quality sanitation services, and the state is responsible for ensuring this right is met—through public or private provision—and must construct and maintain such facilities in specific situations (e.g., in places of detention; in crisis and emergency settings; and, sometimes, when populations are too poor to afford such services).

In a systematic review of the CESCR’s concluding observations concerning water and sanitation between 2003 and 2018, Satterthwaite found that the Committee referred to the rights to water and sanitation in the concluding observations following about 68% of the country reviews. The CESCR was especially concerned about the issue of equality and non-discrimination in access to water and sanitation.¹³¹ Further, the Committee has expanded its focus of concern from the household to include schools, workplaces, and prison facilities. The Committee also examined environmental concerns, mentioning mining and extraction as specific threats to water in many countries. Finally, although there have been calls for the use of quantitative data in the review of states’ performance under the ICESCR, the Committee made use of quantitative data in a relatively small portion of its state reviews concerning water and sanitation (about 22%).

Concerning non-discrimination and equality, during the past eighteen years, the CESCR has commonly recommended that states take steps to ensure that specific groups have equal access to water and sanitation. In this connection, the Committee has specifically mentioned,

127. *See id.* at 376.

128. *See id.* at 361–65.

129. *See id.* at 362–63.

130. *See id.* at 364 (quoting and citing Sub-Commission Guidelines Principle 1.2).

131. *See* Margaret L. Satterthwaite, *The Seductions of Quantification Rebuffed? The Curious Failure of UN Treaty Bodies to Engage Human Rights Data*, in *FESTSCHRIFT IN HONOR OF SALLY MERRY* (P. Alston, ed., forthcoming 2021) (manuscript at 16) (on file with author).

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inter alia, women,¹³² migrants (including refugees,¹³³ asylum-seekers,¹³⁴ migrant workers,¹³⁵ internally displaced persons,¹³⁶ and “illegal immigrants”¹³⁷), persons with disabilities,¹³⁸ Indigenous peoples,¹³⁹ homeless persons,¹⁴⁰ those living in informal settlements¹⁴¹ and rural areas¹⁴², smallholder farmers and agro-pastoralists,¹⁴³ religious and ethnic minorities (including Roma,¹⁴⁴ Bedouins,¹⁴⁵ the Amazigh population of Libya,¹⁴⁶ nomadic herders¹⁴⁷),

132. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Niger, ¶¶ 17, 58, U.N. Doc. E/C.12/NER/CO/1 (June 4, 2018).

133. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Lebanon, ¶ 8, U.N. Doc. E/C.12/LBN/CO/2 (Oct. 24, 2016).

134. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Ukraine, ¶ 49, U.N. Doc. E/C.12/UKR/CO/5 (Jan. 4, 2008).

135. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Viet Nam, ¶ 14, U.N. Doc. E/C.12/VNM/CO/2-4 (Dec. 15, 2014).

136. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Iraq, ¶ 47, U.N. Doc. E/C.12/IRQ/CO/4 (Oct. 27, 2015); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Kenya, ¶ 11, U.N. Doc. E/C.12/KEN/CO/2-5 (Apr. 6, 2016).

137. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Italy, ¶ 10, U.N. Doc. E/C.12/1/Add.103 (Dec. 14, 2004).

138. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Central African Republic, ¶ 11, U.N. Doc. E/C.12/CAF/CO/1 (May 4, 2018).

139. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Canada, ¶ 43, U.N. Doc. E/C.12/CAN/CO/6 (Mar. 23, 2016).

140. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Chad, ¶ 27, U.N. Doc. E/C.12/TCD/CO/3 (Dec. 16, 2009).

141. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Brazil, ¶ 33, U.N. Doc. E/C.12/1/Add.87 (June 26, 2003); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Thailand, ¶ 27, U.N. Doc. E/C.12/THA/CO/1-2 (June 19, 2015).

142. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Chile, ¶ 27, U.N. Doc. E/C.12/CHL/CO/4 (July 7, 2015).

143. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Niger, ¶ 17, U.N. Doc. E/C.12/NER/CO/1 (June 4, 2018).

144. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Serbia and Montenegro, ¶ 30, U.N. Doc. E/C.12/1/Add.108 (June 23, 2005); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Slovenia, ¶ 21, U.N. Doc. E/C.12/SVN/CO/2 (Dec. 15, 2014). Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Montenegro, ¶ 22, U.N. Doc. E/C.12/MNE/CO/1 (Dec. 15, 2014). Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Greece, ¶ 33, U.N. Doc. E/C.12/GRC/CO/2 (Oct. 27, 2015).

145. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Israel, ¶¶ 16, 27, U.N. Doc. E/C.12/1/Add.90 (May 23, 2003).

146. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Libyan Arab Jamahirya, ¶¶ 18, 35, U.N. Doc. E/C.12/LYB/CO/2 (Jan. 25, 2006).

147. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Mongolia, ¶ 8, U.N. Doc. E/C.12/MNG/CO/4 (July 7, 2015).

prisoners and other detainees,¹⁴⁸ as well as “underprivileged and marginalized individuals and groups.”¹⁴⁹ Expanding its focus beyond only the household, the Committee expressed concern about access to water, sanitation, and hygiene in schools,¹⁵⁰ workplaces,¹⁵¹ and places of detention.¹⁵² Following the adoption of the CESCR’s *Statement on the Right to Sanitation* in 2010, the Committee began to refer to the statement in its concluding observations on the issue of sanitation.¹⁵³ The CESCR also expressed concern about the impact of large-scale development and industrial projects¹⁵⁴ and extractive industries¹⁵⁵ on the rights

148. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Yemen, ¶¶ 18, 37, U.N. Doc. E/C.12/1/Add.92 (Dec. 12, 2003); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Kyrgyzstan, ¶ 18, U.N. Doc. E/C.12/KGZ/CO/2-3 (July 7, 2015).

149. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Paraguay, ¶ 24, U.N. Doc. E/C.12/PRY/CO/4 (Mar. 20, 2015).

150. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Rep. on the Thirty-Sixth and Thirty-Seventh Sessions, ¶ 481, U.N. Doc. E/2007/22 and E/C.12/2006/1 (2007); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Sri Lanka, ¶ 36, U.N. Doc. E/C.12/LKA/CO/2-4 (Dec. 9, 2010) (expressing concern about lack of “water, sanitation and electricity facilities” in rural schools); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Djibouti, ¶ 35, U.N. Doc. E/C.12/DJI/CO/1-2 (Dec. 30, 2013) (calling on the state to ensure water and sanitation services are available in schools).

151. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Dominican Republic, ¶¶ 51–52, U.N. Doc. E/C.12/DOM/CO/4 (Oct. 21, 2016) (discussing the lack of water and sanitation in rural areas and substandard housing at sugarcane encampments); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re South Africa, ¶¶ 37–38, U.N. Doc. E/C.12/ZAF/CO/1 (Nov. 29, 2018) (expressing concern about lack of water and sanitation for mineworkers and the dangers this poses, especially to women workers).

152. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Ukraine, ¶¶ 26, 49, U.N. Doc. E/C.12/UKR/CO/5 (Jan. 4, 2008); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Kyrgyzstan, ¶ 18, U.N. Doc. E/C.12/KGZ/CO/2-3 (July 7, 2015).

153. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Yemen, ¶ 26, U.N. Doc. E/C.12/YEM/CO/2 (June 22, 2011); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Cameroon, ¶ 29, U.N. Doc. E/C.12/CMR/CO/2-3 (Jan. 23, 2012); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Mauritania, ¶ 29, U.N. Doc. E/C.12/MRT/CO/1 (Dec. 10, 2012); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Romania, ¶ 20, U.N. Doc. E/C.12/ROU/CO/3-5 (Dec. 9, 2014).

154. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Mexico, at 2, 3, U.N. Doc. E/C.12/MEX/CO/4 (June 9, 2006) (expressing concern about the impact of planned hydroelectric dam on the rights of Indigenous peoples to water); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Kazakhstan, ¶ 35, U.N. Doc. E/C.12/KAZ/CO/1 (June 7, 2010) (expressing concern about impact on water of industrial waste).

155. *See, e.g.*, Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Argentina, ¶ 9, U.N. Doc. E/C.12/ARG/CO/3 (Dec. 14, 2011) (expressing concern about the exploitation of lithium on the right to water of Indigenous peoples); Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Peru, ¶ 22, U.N. Doc. E/C.12/PER/CO/2-4 (May 30, 2012) (expressing concern about the impact of extractive industry activities on the right to health and water).

to water and sanitation. The Committee has begun to address the human rights impacts of climate change as well, including on the right to water.¹⁵⁶

Some elements of the rights to water and sanitation are among the rights most amenable to quantification. Despite this—and despite the CESCR calling on states to provide relevant data—the Committee itself refers to water and sanitation data relatively rarely.¹⁵⁷ Out of more than 100 country reviews between 2003 and 2018, the CESCR referred to quantitative indicators only fifteen times in relation to water and/or sanitation. It cited a specific statistic only twenty-two times. Satterthwaite concludes that the Committee has not articulated a clear set of criteria for indicators or tied norms to specific indicators, nor has it articulated a clear set of recommendations for disaggregation beyond generic exhortations to “disaggregate by prohibited grounds of discrimination” or mention of specific groups.

2. The Rights to Water and Sanitation under the CEDAW

It is unsurprising that the rights to water and sanitation are explicitly protected in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which was completed in 1979 and is now one of the most widely ratified treaties in the world.¹⁵⁸ After all, women and girls are acknowledged worldwide to shoulder disproportionately the burden of collecting and managing household water.¹⁵⁹ Further, women are the most common household caregivers, frequently responsible not only for cooking and cleaning, but also for family hygiene.¹⁶⁰ Women of reproductive age also need access to

156. See, e.g., Comm. on Econ. Soc. & Cultural Rts., Concluding Observations re Cabo Verde, ¶ 8, U.N. Doc. E/C.12/CPV/CO/1 (Nov. 27, 2018) (noting with concern the impact of droughts caused by climate change).

157. The quantitative findings in this paragraph are further explained in Satterthwaite, *supra* note 131, at 21.

158. Off. U.N. High Comm’r Hum. Rts., Convention on the Elimination of All Forms of Discrimination Against Women (June 20, 2016), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en (listing 189 States Parties to CEDAW).

159. Jay P. Graham, Mitsuaki Hirai & Seung-Sup Kim, *An Analysis of Water Collection Labor Among Women & Children in 24 Sub-Saharan African Countries*, 11 PLOS ONE 1, 1 (2016); and Press Release, UNICEF, Collecting Water Is Often a Colossal Waste of Time for Women and Girls (Aug. 29, 2016), <https://www.unicef.org/press-releases/unicef-collecting-water-often-colossal-waste-time-women-and-girls>.

160. Georgia L Kayser, Namratha Rao, Rupa Jose & Anita Raj, *Water, Sanitation & Hygiene: Measuring Gender Equality and Empowerment*, WHO (May 14, 2019), <https://www.who.int/bulletin/volumes/97/6/18-223305/en/>.

hygiene and materials for menstrual health and childbirth.¹⁶¹ Women and girls face intersectional discrimination when they are also members of groups that experience institutionalized, historical, and ingrained discrimination and marginalization.¹⁶² Research has found that the experience of water and sanitation insecurity is highly gendered—women and girls often find their physical security, mobility, and ability to attend school or work outside the home impacted by their access to reliable and adequate water, sanitation, and hygiene.¹⁶³

CEDAW includes rights aimed at responding to these gendered burdens and sex-specific needs. The treaty contains broad prohibitions on discrimination against women in all fields, and includes provisions concerning spheres where women and girls commonly experience discrimination and inequality, including public life, government service, education, employment, health care, and the family. Article 14 addresses “the particular problems faced by rural women,” setting out steps that states must take to eliminate discrimination and ensure the equality of rural women. Specifically, Article 14(2)(h) guarantees rural women “adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.” The CEDAW Committee has been a leading voice in defining and advancing not only formal equality for women, but also substantive gender equality, in which the effect of state action or inaction is assessed against the goal of ensuring equality in fact and in result, such that even formally identical treatment may constitute discrimination when its effect is to impair the rights of girls or women.¹⁶⁴

In its General Recommendation 34 on the Rights of Rural Women (“GR 34”), released in 2016, the CEDAW Committee emphasized that “[t]he rights of rural women and girls to water and sanitation are not only essential rights in themselves but also key to the realization of a wide range of other rights, including rights to health, food, education

161. For discussion, see Inga T. Winkler & Virginia Roaf, *Taking the Bloody Linen out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 *CARDOZO J.L. & GENDER* 1 (2014).

162. Kathleen O’Reilly & Robert Dreibelbis, *WASH and Gender: Understanding Gendered Consequences & Impacts of WASH in/Security*, in *EQUALITY IN WATER AND SANITATION SERVICES* 80, 83–84 (Oliver Cumming & Tom Slaymaker eds., 2018).

163. *Id.* at 83–85.

164. CEDAW Comm., General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on Temporary Special Measures, ¶¶ 8–14 (2004), [https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf) (demonstrating the CEDAW Committee’s embrace of substantive equality).

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and participation.”¹⁶⁵ The Committee made clear that this right includes access to water for personal and domestic uses, as well as for irrigation and in educational and health facilities. The Committee observed that the disproportionate burden many women and girls carry in fetching water places girls’ education in jeopardy and exposes them to security risks.¹⁶⁶ GR 34 also emphasized the importance of sanitation, underlining that women and girls must have sanitation and hygiene facilities that enable them to safely manage their menstrual hygiene.¹⁶⁷ This issue was also emphasized in the CEDAW Committee’s General Recommendation 36 on the Right of Girls and Women to Education, in which the Committee emphasized that states must remove the

... barriers to the successful completion of school faced by girls from the age of menarche. Lack of an enabling school environment, including: inadequate gender segregated water and sanitation and hygiene (WASH) facilities, untrained or unsupportive staff, lack of appropriate sanitary protection materials and lack of information on puberty and menstrual issues, contribute to social exclusion, reduced participation in and focus on learning and decreased school attendance.¹⁶⁸

In its General Recommendation 37 on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, the Committee noted that women and girls “are disproportionately impacted by a lack of available, affordable, safe and accessible drinking water” and that women—urban and rural—should be ensured equal rights to “adequate housing, drinking water, sanitation,” as well as “water for domestic use and for food production.”¹⁶⁹ The Committee has since recommended that states adopt measures—including steps

165. CEDAW Comm., General Recommendation No. 34 on the Rights of Rural Women, ¶ 81, U.N. Doc. CEDAW/C/GC/34 (Mar. 4, 2016) [hereinafter CEDAW, *General Recommendation No. 34*].

166. *Id.* ¶ 82.

167. *Id.* ¶ 85.

168. CEDAW Comm., General Recommendation No. 36 on the Right of Girls and Women to Education, ¶ 30, U.N. Doc. CEDAW/C/GC/36 (Nov. 16, 2017).

169. CEDAW Comm., General Recommendation No. 37 on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, ¶ 72(a), U.N. Doc. CEDAW/C/GC/37 (Feb. 7, 2018).

to protect the right to water—to ensure women’s rights in the context of climate change in Australia, Fiji, and Cabo Verde.¹⁷⁰

In reviews of state implementation, the CEDAW Committee frequently recommends that states “guarantee” rural women, and often specific groups of rural women access to adequate water and sanitation (e.g., Garifuna women in Guatemala,¹⁷¹ Indigenous women in Argentina,¹⁷² women heads of household in Kenya,¹⁷³ poor rural women in Equatorial Guinea¹⁷⁴). While the explicit protection of the right to water in the Convention is framed as a substantive right owed to rural women, the protective framework created by the treaty makes clear that all women and girls have a right to equal access to water and sanitation, and that states need to take affirmative steps to dismantle de jure and de facto discrimination in all areas of life, including access to water, sanitation, and hygiene—whether in the household, in education facilities, in medical settings, or in detention facilities. In its General Recommendation 24 on Women and Health, the Committee underscored that sanitation and water are “critical for the prevention of disease and the promotion of good health.”¹⁷⁵ In its General Recommendation 27 on Older Women and Protection of their Human Rights, the CEDAW Committee noted that denial of older women’s “right to water, food and housing is part of the everyday life of many poor, rural older women,” and called on states to ensure older women can access water and sanitation.¹⁷⁶

In a decision concerning the individual case *Abramova v. Belarus*, the Committee made clear that confinement of a woman prisoner in a cell where the toilet was visible to male guards constituted sexual harassment

170. CEDAW Comm., Concluding Observations on the Fifth Periodic Report of Fiji, ¶ 53, U.N. Doc. CEDAW/C/FJI/CO/5 (Mar. 14, 2018); CEDAW Comm., Concluding Observations on the Eighth Periodic Report of Australia, ¶30(c), U.N. Doc. CEDAW/C/AUS/CO/8 (July 25, 2018); CEDAW Comm., Concluding Observations on the Ninth Periodic Report of Cabo Verde, ¶¶ 37, 39, U.N. Doc. CEDAW/C/CPV/CO/9 (July 30, 2019).

171. CEDAW Comm., Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Guatemala, ¶¶ 40–41, U.N. Doc. CEDAW/C/GTM/CO/8-9 (Nov. 22, 2017).

172. CEDAW Comm., Concluding Observations Concerning Argentina, ¶¶ 40–41, U.N. Doc. CEDAW/C/ARG/CO/7 (Nov. 25, 2016).

173. CEDAW Comm., Concluding Observations Concerning Kenya, ¶ 42, U.N. Doc. CEDAW/C/KEN/CO/7 (Feb. 2, 2011).

174. CEDAW Comm., Concluding Observations on the Sixth Periodic Rep. of Equatorial Guinea, Adopted by the Comm. at its Fifty-Third Session, ¶ 40, U.N. Doc. CEDAW/C/GNQ/CO/6 (Nov. 9, 2012).

175. CEDAW Comm., CEDAW General Recommendation No. 24: Article 12 of the Convention (Women & Health), ¶ 28, U.N. Doc. A/54/38/Rev.1 (1999).

176. CEDAW Comm., General Recommendation No. 27 on Older Women and Protection of Their Human Rights, ¶¶ 24, 49, N. Doc. CEDAW/C/GC/27 (Dec. 16, 2010).

and therefore discrimination under CEDAW.¹⁷⁷ In a decision concerning an inquiry into violence against First Nations women and girls in Canada conducted pursuant to the Optional Protocol to CEDAW, the Committee called on the state to ensure access to sanitation and safe drinking water for Indigenous communities.¹⁷⁸

3. The Rights to Water and Sanitation under the CRC

The Convention on the Rights of the Child (CRC) was completed ten years after CEDAW, in 1989, and today it is almost universally ratified, with the United States as the sole U.N. member state not a party.¹⁷⁹ The CRC's protection of the rights to water and sanitation is important both because of the near-universal nature of ratification and because water and sanitation are crucial to children's lives and health.¹⁸⁰ As with CEDAW, the rights to water and sanitation are both explicitly and implicitly protected by the Convention. Article 24.2(c) explicitly recognizes that "the provision of adequate . . . clean drinking-water" is essential to the health of the child. As Winkler has noted, this is not comprehensive guarantee of right to water—instead, the focus is on "water quality and other health-related aspects."¹⁸¹ The right to water is also implicitly recognized in Article 27.1's guarantee of the right to an adequate standard of living, and in Article 6.1 on the right to life, both of which the Committee on the Rights of the Child have interpreted to include the right to water.¹⁸² In its General Recommendation 15 on the Right to Health, the Committee has also emphasized that both water and sanitation "are

177. CEDAW Comm., Communication No. 023/2009, U.N. Doc. CEDAW/C/49/D/23/2009 (Sept. 27, 2011) (stating that having to use the toilet without a proper separation between it and the rest of the cell amounted to an "unjustified interference with [petitioner's] privacy [and] constitutes sexual harassment and discrimination within the meaning of articles 1 and 5 (a) of the Convention").

178. CEDAW Comm., Report of the Inquiry Concerning Canada of the Committee on the Elimination of Discrimination Against Women Under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 218(c), U.N. Doc. CEDAW/C/OP.8/CAN/1 (Mar. 30, 2015).

179. U.N. Commission on Human Rights, Convention on the Rights of the Child., U.N. Doc. E/CN.4/RES/1990/74 (Mar. 7, 1990).

180. B.F. Arnold & J.M. Colford Jr., *Treating Water with Chlorine at Point-of-Use to Improve Water Quality and Reduce Child Diarrhea in Developing Countries: A Systematic Review and Meta-Analysis*, 76 AM. J. TROPICAL MED. & HYGIENE 354, 354 (2007) (explaining that "[t]he annual burden of diarrheal disease is estimated at 3.5 billion episodes and results in 1.8 million deaths in children worldwide . . . [studies] suggest that between 20% and 35% of diarrhea episodes may be prevented by improved drinking water").

181. WINKLER, *THE HUMAN RIGHT TO WATER*, *supra* note 1, at 56.

182. WINKLER, *THE HUMAN RIGHT TO WATER*, *supra* note 1, at 56 n.115.

essential for the full enjoyment of life and all other human rights,” making clear that states cannot escape this obligation through privatization of water services.¹⁸³ In its General Recommendations, the Committee has emphasized the importance of access to water for young children,¹⁸⁴ children in street situations,¹⁸⁵ migrant children,¹⁸⁶ and children deprived of their liberty;¹⁸⁷ water and sanitation for children in educational and recreational facilities¹⁸⁸ and for Indigenous children;¹⁸⁹ the right of children to be free from violence when fetching water;¹⁹⁰ and the importance of water and sanitation to children’s rights to rest, leisure, play, and recreation.¹⁹¹ However, the Committee has not been systematic in addressing the rights to water and sanitation in its General Recommendations, failing to include them in reference to children with disabilities,¹⁹² children in juvenile justice,¹⁹³ unaccompanied and separated children,¹⁹⁴ and children

183. U.N. Comm. on the Rts. of the Child, General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24), ¶ 15, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013).

184. U.N. Comm. on the Rts. of the Child, General Comment No. 7 (2006) Implementing Child Rights in Early Childhood, ¶ 27(a), U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006).

185. U.N. Comm. on the Rts. of the Child, General Comment No. 21 (2017) on Children in Street Situations, ¶ 51, U.N. Doc. CRC/C/GC/21 (June 21, 2017).

186. U.N. Comm. on the Rts. of the Child, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration, ¶ 40, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017).

187. U.N. Comm. on the Rts. of the Child, General Comment No. 24 (2019) on Children’s Rights in the Child Justice System, ¶ 95(g), U.N. Doc. CRC/C/GC/24 (Sept. 18, 2019).

188. U.N. Comm. on the Rts. of the Child, General Comment 4: Adolescent Health and Development in the Context of the Convention on the Rts. of the Child, ¶ 13, U.N. Doc. CRC/GC/2003/4 (July 1, 2003).

189. U.N. Comm. on the Rts. of the Child, General Comment No. 11 (2009), Indigenous Children and Their Rights Under the Convention, ¶ 25, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009).

190. U.N. Comm. on the Rts. of the Child., General Comment No. 13 (2011), The Right of the Child to Freedom from all Forms of Violence, ¶ 34, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011).

191. U.N. Comm. on the Rts. of the Child, General Comment No. 17 (2013) on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (art. 31), ¶ 58 (c), U.N. Doc. CRC/C/GC/17 (Apr. 17, 2013).

192. U.N. Comm. on the Rts. of the Child, General Comment No. 9 (2006), The Rights of Children with Disabilities, U.N. Doc. CRC/C/GC/9 (Feb. 27, 2007).

193. U.N. Comm. on the Rts. of the Child, General Comment No. 10 (2007), Children’s rights in Juvenile Justice, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).

194. U.N. Comm. on the Rts. of the Child, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside their Country of Origin, U.N. Doc. CRC/GC/2005/6 (Sept.1, 2005).

with HIV/AIDS.¹⁹⁵ Despite these oversights, the CRC has frequently addressed access to water for children during the state review process, calling on states to ensure “safe drinking water” for all children,¹⁹⁶ rural children,¹⁹⁷ Indigenous children,¹⁹⁸ as well as those impacted by, *inter alia*, poverty, contamination by farming,¹⁹⁹ mining,²⁰⁰ and climate change.²⁰¹ The Committee also frequently calls on states to ensure that children have access to sanitation at home, in school,²⁰² and in healthcare facilities.²⁰³ In sum, the widespread nature of ratification and the broad protections under the CRC mean that the rights to water and sanitation are recognized—at least for children—in almost every country on earth.

4. The Rights to Water and Sanitation under the ICCPR

In recent years, the Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights (ICCPR), has made clear that key elements of the rights to water and sanitation are protected by the Covenant. In 2019, the Human Rights Committee explained that Article 6’s guarantee of the right to life, read in conjunction with Article 2’s duty to ensure Covenant rights, translates into an affirmative “duty to protect life”²⁰⁴ including through measures to “ensure access without delay by individuals to essential goods and

195. U.N. Comm. on the Rts. of the Child, General Comment No. 3 (2003), HIV/AIDS and the Rights of the Child, U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003).

196. *See, e.g.*, U.N. Comm. on the Rts. of the Child, Concluding Observations: Democratic People’s Republic of Korea, ¶ 45, U.N. Doc. CRC/C/PRK/CO/4 (Mar. 27, 2009).

197. *See, e.g.*, U.N. Comm. on the Rts. of the Child., Concluding Observations on the Second Periodic Report of Cote d’Ivoire, ¶ 45, U.N. Doc. CRC/C/CIV/CO/2 (July 12, 2019).

198. *See, e.g.*, U.N. Comm. on the Rts. of the Child., Concluding Observations on the Combined Second to Fourth Periodic Reports of Brazil, ¶¶ 55–56, 65, U.N. Doc. CRC/C/BRA/CO/2-4 (Oct. 30, 2015).

199. *See, e.g., id.* ¶¶ 65–66.

200. *See, e.g., id.* U.N. Comm. on the Rts. of the Child, Concluding Observations on the Fifth Periodic Report of Mongolia, ¶¶ 34–35, U.N. Doc. CRC/C/MNG/CO/5 (July 12, 2017).

201. *See, e.g.*, U.N. Comm. on the Rts. of the Child, Concluding Observations on the Initial Periodic Report of Tuvalu, Adopted by the Committee at its Sixty-Fourth Session, ¶ 55, U.N. Doc. CRC/C/TUV/CO/1 (Oct. 4, 2013).

202. *Id.*

203. *See, e.g.*, U.N. Comm. on the Rts. of the Child, Concluding Observations on the Combined Third to Fourth Periodic Reports of Indonesia, ¶ 48, U.N. Doc. CRC/C/IDN/CO/3-4 (July 10, 2014).

204. U.N. Human Rights Comm., General Comment No. 36, Article 6: Right to Life, ¶ 21, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) (“The duty to take positive measures to protect the right to life derives from the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2 (1) when read in conjunction with article 6, as well as from the specific duty to protect the right to life by law, which is articulated in the second sentence of article 6.”).

services” including—explicitly—water and sanitation.²⁰⁵ This right is much more restrictive than the right protected under the ICESCR—it only includes the “minimum survival requirements,”²⁰⁶ not the more affirmative elements needed for full flourishing protected by the ICESCR. However, the Human Rights Committee has also found water and sanitation to be inherent in some other rights, including Article 10 on deprivation of liberty, Article 7 on protection against torture and cruel, inhuman or degrading treatment, Article 17 on the right to be free from arbitrary interference in the home, and Article 27 on protection of the rights of minorities.

In a series of individual cases decided in the last decade under the Optional Protocol to the ICCPR, the Human Rights Committee has made clear that those deprived of their liberty must be provided with access to water and sanitation, and must be held in decent hygienic conditions.²⁰⁷ Similarly, the Human Rights Committee has occasionally cited the lack of water and/or the conditions of toilets or washing facilities in finding that poor conditions of confinement, taken together with abusive treatment, can amount to a violation of Article 7.²⁰⁸

In a case concerning the rights of a Roma community in Bulgaria, the Human Rights Committee found that water shut-offs without provision of alternative housing amounted to forced evictions in violation of the right to be free of arbitrary interference with the home.²⁰⁹ In another decision concerning access to water for a specific community,

205. *Id.* ¶ 26.

206. WINKLER, THE HUMAN RIGHT TO WATER, *supra* note 1, at 55.

207. U.N. Hum. Rts. Comm., *Kurbanov v. Tajikistan*, ¶¶ 3.7, 7.8, U.N. Doc. CCPR/C/79/D/1096/2002 (Nov. 12, 2003) (lack of water, inoperative sanitation, and horrendous hygiene in detention were among the factors leading Human Rights Committee to find violation of Article 10); U.N. Hum. Rts. Comm., *Giri v. Nepal*, ¶¶ 2.4, 7.3, U.N. Doc. CCPR/C/101/D/1761/2008 (Apr. 27, 2011) (stating that toilet with no water, inadequate drinking water, scarce hygiene resources, and handcuffing that interfered with detainee’s ability to use the toilet were background conditions in case finding violation of Article 10); U.N. Hum. Rts. Comm., *Mwamba v. Zambia*, ¶¶ 2.11, 9.8, U.N. Doc. CCPR/C/98/D/1520/2006 (Apr. 30, 2010) (conditions on death row in Zambia, including being “incarcerated in small and filthy cell without adequate toilet facilities” violated Art. 10).

208. U.N. Hum. Rts. Comm., *Sharma v. Nepal*, ¶¶ 2.1, 6.4, U.N. Doc. CCPR/C/122/D/2364/2014 (May 25, 2018) (finding disappearance, secret detention, and conditions of detention, which included “very limited access to water” and the ability to “only go to the toilet once a day” to amount to violations of Article 7); U.N. Hum. Rts. Comm., *Tripathi v. Nepal*, ¶¶ 3.4, 7.4, U.N. Doc. CCPR/C/112/D/2111/2011 (Nov. 25, 2014) (similar); U.N. Hum. Rts. Comm., *Sehai v. Nepal*, ¶¶ 2.6, 8.3, U.N. Doc. CCPR/C/108/D/1865/2009 (Oct. 28, 2013) (similar).

209. U.N. Hum. Rts. Comm., *Naidenova v. Bulgaria*, ¶¶ 2.1, 10, 15, U.N. Doc. CCPR/C/106/D/2073/2011 (Nov. 27, 2011) (holding that “cutting off the water supply to the Dobri Jeliaskov community could be considered as indirect means of achieving eviction” in violation of Article 17

the Human Rights Committee determined that the government of Peru violated Article 27's guarantee of enjoyment of the cultural life of the community by members of minority groups when it diverted water from the Indigenous Aymara community, harming the ability of the community to raise llamas and alpacas in their traditional manner.²¹⁰ In an important recent decision concerning New Zealand's handling of an individual's claim of refuge from climate-related impacts in Kiribati, the Human Rights Committee recognized that the lack of access to drinking water, as well as other grave impacts of climate change, may—as it worsens in the future—amount to a threat to the right to life under the ICCPR.²¹¹ While this individual case was rejected, the Committee signaled that similar cases may be successful as climate change worsens.²¹² A case by Torres Strait Islanders concerning Australia's failure to protect Islanders' right to life—through its components, including access to water—in the face of climate change, is currently awaiting adjudication by the Human Rights Committee.²¹³

5. The Rights to Water and Sanitation under the CRPD

People with disabilities, as a group, face barriers in accessing water and sanitation at levels higher than the population at large.²¹⁴ This is because facilities are often built without adequate attention to access by people across the spectrum of ability.²¹⁵ The barriers to full access include physical barriers such as heavy hand pumps or narrow entrances to latrines, social and cultural barriers like discrimination against people with disabilities, institutional barriers such as lack of awareness and planning for access, and intersectional barriers faced by people with disabilities who are also affected by other forms of discrimination and marginalization.²¹⁶

because community had continuously lived in the area for 70 years and was not provided with “satisfactory replacement housing”).

210. U.N. Hum. Rts. Comm., *Ángela Poma Poma v. Peru*, ¶¶ 7.1–7.7, U.N. Doc. CCPR/C/95/D/1457/2006 (April 24, 2009).

211. *See* U.N. Hum. Rts. Comm., *Teitota v. New Zealand*, U.N. Doc. CCPR/C/127/D/2728/2016 (Jan. 7, 2020).

212. *See id.*

213. *See* Katharine Murphy, *Torres Strait Islanders Take Climate Change Complaint to the United Nations*, THE GUARDIAN (May 12, 2019), <https://www.theguardian.com/australia-news/2019/may/13/torres-strait-islanders-take-climate-change-complaint-to-the-united-nations>.

214. *See* Wilbur, Gosling & Jones, *Breaking the Barriers*, *supra* note 12, at 157–58.

215. *Id.*

216. *See id.* at 159–60.

To address these issues, the Convention on the Rights of People with Disabilities (CRPD), which was completed in 2006, requires states to “ensure equal access by persons with disabilities to clean water services” as part of its provision guaranteeing an adequate standard of living and social protection for persons with disabilities.²¹⁷ The dual purpose of this provision is to ensure that persons with disabilities enjoy both adequate and non-discriminatory access to water and sanitation.²¹⁸ In practice, this means that water and sanitation providers must take into account the specific requirements of persons with disabilities when designing and implementing water and sanitation services.

Although the treaty has been in force for fewer than twenty years, the Committee on the Rights of Persons with Disabilities has reviewed the steps taken by numerous states parties to ensure equal access to water and sanitation to persons with disabilities, frequently recommending that they take additional steps.²¹⁹ The Committee has also focused on the specific barriers facing persons with disabilities in accessing water and sanitation who are members of Indigenous groups²²⁰ or who are “living in rural and remote areas.”²²¹

6. The Rights to Water and Sanitation under the CAT

The prohibition against torture, like the proscription of slavery, is one of the most absolute and plainly non-derogable rules of human rights.²²² The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), concluded in 1984, is widely ratified and contains a definition of torture and obligations

217. G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, at 28 (Jan. 24, 2007).

218. VALENTINA DELLA FINA, RACHELE CERA & GIUSEPPE PALMISANO, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 510 (2017).

219. *See, e.g.*, Comm. on the Rts. of Persons with Disabilities, Concluding Observations Concerning the Philippines, ¶¶ 48–49, U.N. Doc. CRPD/C/PHL/CO/1 (Oct. 16, 2018); Comm. on the Rights of Persons with Disabilities, Concluding Observations Concerning Haiti, ¶¶ 50–51, U.N. Doc. CRPD/C/HTI/CO/1 (April 13, 2018); Comm. on the Rts. of Persons with Disabilities, Concluding Observations Concerning Panama, ¶ 55, U.N. Doc. CRPD/C/PAN/CO/1 (Sept. 29, 2017).

220. *See, e.g.*, Comm. on the Rts. of Persons with Disabilities, Concluding Observations Concerning Guatemala, ¶ 65, U.N. Doc. CRPD/C/GTM/CO/1 (Sep. 30, 2016) (Indigenous groups).

221. *See, e.g.*, Comm. on the Rts. of Persons with Disabilities, Concluding Observations Concerning El Salvador, ¶¶ 57–58, U.N. Doc. CRPD/C/SLV/CO/1 (Oct. 8, 2013) (persons with disabilities in rural areas).

222. MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 2 (2008).

concerning the prevention, investigation, prosecution, and punishment of torture and cruel, inhuman or degrading treatment or punishment.²²³ While the CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for a specified set of purposes, the acts that can constitute torture are not set out in the treaty.²²⁴ Instead, the CAT is meant to be broadly inclusive, and should be read to apply both to acts *and* omissions that have the intended effect.²²⁵ Mistreatment not fulfilling all the elements of this definition—specifically the intent or purpose elements—may nonetheless violate the prohibition on cruel, inhuman, and degrading treatment or punishment set out in Article 16 of CAT.²²⁶ Thus, intentionally depriving detainees of water can constitute cruel, inhuman or degrading treatment, and can rise to the level of torture in some circumstances.²²⁷ Similarly, detention in very poor hygienic conditions—as when detainees do not have access to sanitation—can amount to cruel, inhuman or degrading treatment or punishment.²²⁸

7. The Rights to Water and Sanitation under the ICERD

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted in 1965 and entered into force in 1969.²²⁹ The Convention has since been widely ratified and contains the authoritative international definition of discrimination based on race, as well as an obligation for states to “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.”²³⁰ The Convention specifies a series of steps states must take to end racial discrimination and to ensure “equal enjoyment or exercise of human rights and fundamental freedoms” by all racial and ethnic groups.²³¹ The CERD Committee, which reviews implementation

223. *See id.* at 3–11.

224. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), art. 1 (1984).

225. *See* NOWAK & MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE, *supra* note 222, at 66.

226. *See id.* at 558.

227. *See id.* at 66, 71.

228. *See id.* at 560.

229. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Dec. 21, 1965).

230. *Id.* art. 1 & 4.

231. *Id.*

of ICERD, has identified and condemned discrimination against communities based on race, as well as discrimination against “descent-based communities” who experience rights violations “on the basis of caste and analogous systems of inherited status.”²³² In its 2002 General Recommendation on Descent, the CERD Committee expressed specific concern that descent-based communities defined by caste may experience restrictions or segregation in accessing water.²³³ Similarly, the CERD Committee has stressed the importance of states ensuring access to water for Roma communities²³⁴ and Afro-descendants²³⁵ in various countries. In relation to Indigenous peoples, the Committee has suggested that the right to equality includes protection for not only access to water and sanitation, but also to traditional water resources—a right that extends significantly beyond water for household and personal use.²³⁶

III. THE RIGHTS TO WATER AND SANITATION IN WORLD CONSTITUTIONS

Enjoyment of the rights to water and sanitation cannot be made real through international protection alone. Instead, legal protection at the domestic level is key—whether through a state’s constitution, national framework law, or specific regulations concerning water and sanitation. In research conducted for this Article, twenty-eight out of 191 national constitutions (about 15%) available in major databases of constitutions explicitly protect either the right to water (twenty) or the rights to both water and sanitation (eight) (see Figure 1). None of the constitutions analyzed explicitly protected the right to sanitation but not the right to water. A much broader swathe of constitutions (174, or 91%) can be said to implicitly protect the rights to water and sanitation—though not all of these countries have judiciaries prepared to recognize the rights.

232. Off. of the High Comm’r for Hum. Rts., Comm. on the Elimination of Racial Discrimination (CERD), General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), ¶ 1, (2002), <https://www.refworld.org/docid/4538830511.html>.

233. *Id.*

234. CERD, Concluding Observations on the Combined Eleventh and Twelfth Periodic Reports of Slovakia, ¶ 21, U.N. Doc CERD/C/SVK/CO/11-12 (Jan. 12, 2018); CERD, Concluding Observations on the Combined Second to Fifth Periodic Reports of Serbia, ¶ 22, U.N. Doc. CERD/C/SRB/CO/2-5 (Jan. 3, 2018).

235. CERD, Concluding Observations on the Thirteenth and Fourteenth Periodic Reports of the Dominican Republic, Adopted by the Committee at its Eighty-Second Session (Feb. 11–March 1, 2012), ¶¶ 14, 18, U.N. Doc. CERD/C/DOM/CO/13-14 (Apr. 19, 2013).

236. CERD, Concluding Observations on the Combined Fifteenth and Sixteenth Periodic Reports of Colombia, ¶ 35, U.N. Doc. CERD/C/COL/CO/15-16 (Sept. 25, 2015); see also Daphina Misiedjan & Joyeeta Gupta, *Indigenous Communities: Analyzing Their Right to Water Under Different International Legal Regimes*, 10 *UTRECHT L. REV.* 77, 84 (2014).

ASSESSING THE RIGHTS TO WATER AND SANITATION

The largest proportion of these (161, or 84% of all the constitutions examined) explicitly protect the rights to life, dignity, or the environment, which have been interpreted in numerous countries to include (elements of) the rights to water and sanitation (see Figure 2). A smaller proportion (130, or 68% of all the constitutions examined) explicitly protect the rights to health, housing, or an adequate standard of living, and thus potentially the rights to water and sanitation (see Figure 2).

Constitutions Explicitly Protecting the Rights to Water and Sanitation (N=28)

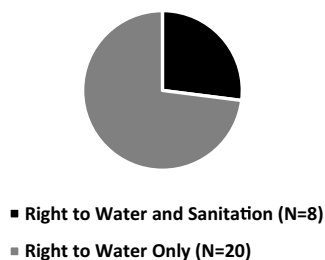


FIGURE 1

Implicit Protection of the Rights to Water and Sanitation in World Constitutions

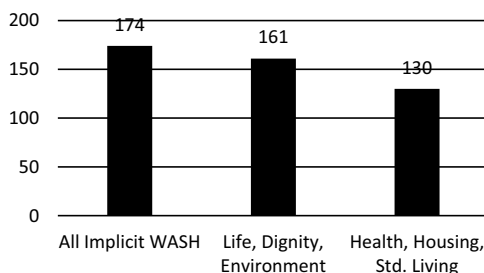


FIGURE 2

A. Constitutional Protection of the Rights to Water and Sanitation

This Section examines constitutional provisions and major cases in a number of countries across various regions. It is intended to give the reader a sense of the breadth and varied impacts of the conditionalization of the rights to water and sanitation, rather than aiming for a comprehensive global analysis. From the perspective of case law, strong jurisprudence does not necessarily emerge in all countries that explicitly protect the rights to water and sanitation in their constitutions. Conversely, the existence of explicit protections for the rights to water and sanitation in constitutional texts is not a prerequisite for strong jurisprudence. Some of the leading cases have come from courts interpreting other rights to implicitly include water and/or sanitation.

Twenty-eight constitutions examined for this Article include a provision explicitly protecting the right to water. Of these, eight constitutions also include a provision explicitly guaranteeing the right to sanitation. As for regional distribution, four of the eight countries where the rights to both water and sanitation are enshrined are in Latin America or the Caribbean (the Dominican Republic, Ecuador, Honduras, and Uruguay); two are in Asia and the Pacific (Fiji and

Nepal); and two are in Sub-Saharan Africa (Burkina Faso and Kenya). Of the twenty countries that include an explicit provision protecting the right to water but not the right to sanitation, four are in Latin America and the Caribbean (Bolivia,²³⁷ Costa Rica, Cuba, Mexico, Nicaragua); two are in Asia and the Pacific (Maldives and Thailand); eight are in Sub-Saharan Africa (the Democratic Republic of the Congo, Ethiopia, the Gambia, Niger, Somalia, South Africa, South Sudan, and Zimbabwe); three are in the Middle East and North Africa (Egypt, Morocco, and Tunisia); and two are in Eastern Europe (Hungary, Slovenia) (see Figure 3).

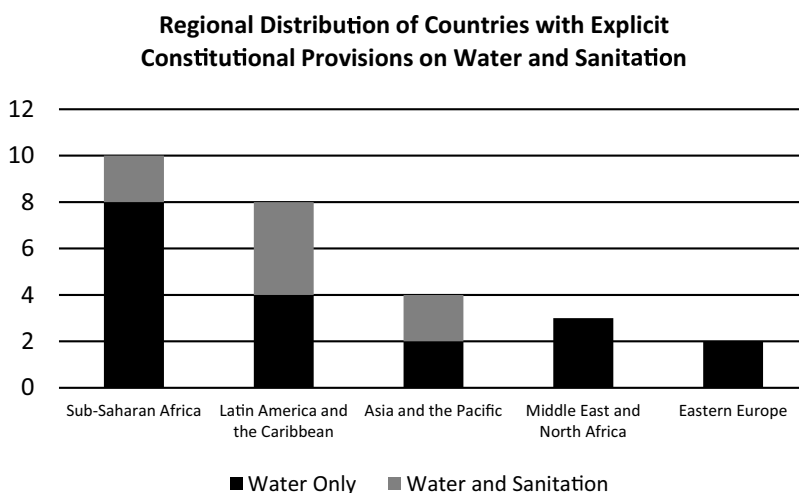


FIGURE 3

1. Explicit Recognition in National Constitutions

The right to water was perhaps first constitutionally enshrined²³⁸ in South Africa’s post-apartheid constitution in 1996.²³⁹ In contrast to decades of brutal racist tyranny and a state that catered to the minority white population, the new constitution boldly proclaimed that “everyone has the right to have access to sufficient food and water”²⁴⁰ alongside other core economic and social rights, and that “the state must

237. While the Constitution of Bolivia does refer to access to sewer services, it is not framed as a right separate from the right to water. See discussion *infra*. For a differing view, see Winkler, *The Human Right to Sanitation*, *supra* note 47, at 1368.

238. See Clark, *supra* note 27, at 249.

239. S. AFR. CONST., 1996, § 27; see also Clark, *supra* note 27, at 249.

240. S. AFR. CONST., 1996, § 27(1)(b).

take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of” the right to water.²⁴¹ Black South Africans had long been forced to live without potable water or sanitation services, and this new promise was seen as essential to building a new democracy. Although there is no explicit right to sanitation in the South African constitution, courts have recognized access to basic sanitation in some cases related to the rights to housing,²⁴² health care, and human dignity and security.²⁴³ However, in the decades since the adoption of the new constitution, advocates have been disappointed as courts have accepted narrow interpretations of the right to water, most strikingly in the 2009 case of *Mazibuko and Others v. City of Johannesburg and Others*.²⁴⁴ In that case, the Constitutional Court held that the right of access to sufficient water does not guarantee state provision of adequate water immediately but instead requires the state to demonstrate that it has taken reasonable legislative and other measures to fulfill the right.²⁴⁵ More specifically, the Court found that the pre-paid water meters installed in the black township of Soweto were not in breach of the applicants’ right to water since they did not *disconnect* water upon non-payment—but only “suspended” it until payment was made. Further, although poor black households were routinely going days and even weeks without water while rich white city-dwellers enjoyed lavish water availability for their pools and gardens at the same prices as poor residents, the court found that the city of Johannesburg was justified in limiting its free basic water to an amount demonstrably insufficient for large households, since it was reasonable to seek cost recovery.²⁴⁶ This decision rejected activists’

241. *Id.* § 27(2).

242. Ibarrola, *Right to Sanitation*, *supra* note 114 (citing *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties* 2011 (4) SA 337 (CC) (S. Afr.) and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and Others* 2008 (3) SA 208 (CC) (S. Afr.); 2008 (5) BCLR 475 (CC) (S. Afr.)).

243. *Beja and Others v. Premier of the Western Cape and Others* 2011 (3) All SA 401 (WCC) (S. Afr.). For an extended discussion, see Jackie Dugard, *The Right to Sanitation in South Africa*, in SOCIO-ECONOMIC RIGHTS - PROGRESSIVE REALISATION? (2016), <http://www.fhr-mirror.org.za/files/1315/1247/0387/Sanitation.pdf>.

244. For the Constitutional Court decision, see *City of Johannesburg & Others v. Mazibuko & Others* 2009 (489/08) (20(3)) ZASCA 592 (Sup. Ct. Appeal) (S. Afr.).

245. Jackie Dugard, Malcolm Langford & Edward Anderson, *Determining Progress on Access to Water and Sanitation: The Case of South Africa*, in THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS, *supra* note 75.

246. See Patrick Bond & Jackie Dugard, *The Case of Johannesburg Water: What Really Happened at the Pre-Paid Parish Pump*, 12 L. DEMOCRACY & DEV. 1, 2, 8 (2008).

attempts to reframe the right to water outside the neoliberal regime of commodification.²⁴⁷ While access to water and sanitation has improved significantly, at least at the aggregate, national level, since the apartheid era, some see the framing of the right—of *access* to water—as “now part of the problem that water justice activists need to confront.”²⁴⁸ The South African Human Rights Commission recently concluded that communities without water “mirror apartheid spatial geography,” largely because “water is viewed mainly as an ‘economic good’ or commodity by government departments and the private sector.”²⁴⁹ Finally, some analysts suggest that although the *Mazubiko* case was a loss on some levels, the case did provide an opening for governmental action to *limit* water use by large-volume users in favor of those simply needing access to basic water in light of looming environmental catastrophe.²⁵⁰

In Uruguay, opposition to commodification was so intense in the early 2000s that a coalition of civil society organizations managed to win a plebiscite adopting a constitutional amendment enshrining both water and sanitation as “fundamental human rights” and prohibiting their private provision in 2004.²⁵¹ Article 47 of the Constitution places water and sanitation in the context of protection of the environment, making it a governmental priority to manage water resources for both current and “future generations” and to punish anyone who “causes grave depredation, destruction or contamination to the environment.” This right has been found to be “fundamental,” requiring continued access to water by prohibiting disconnection from services for non-payment.²⁵² The movement that led to the constitutional amendment in

247. For a discussion of the case as an attempt to de-commodify water, see *id.* at 1.

248. James Angel & Alex Loftus, *With-Against-and-Beyond the Human Right to Water*, 98 GEOFORUM 206, 208 (2019).

249. SOUTH AFRICAN HUMAN RIGHTS COMMISSION, REPORT ON THE RIGHT TO ACCESS SUFFICIENT WATER AND DECENT SANITATION IN SOUTH AFRICA 14 (2014), [https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf).

250. See, e.g., Louis J. Kotze, *Phiri, the Plight of the Poor and the Perils of Climate Change: Time to Rethink Environmental and Socio-Economic Rights in South Africa*, 1 J. HUM. RTS. & ENV'T. 135, 135 (2010). This issue is discussed *infra* in Section IV.

251. See Rachael Moshman, *The Constitutional Right to Water in Uruguay*, 5 SUSTAINABLE DEV. L. & POL'Y 65, 65 (2005); see also Ibarrola, *Right to Sanitation*, *supra* note 114.

252. *Sentencia clara como el agua: Justicia advierte que la OSE no puede cortar el suministro ante el no pago de la tarifa*, EL PAIZ (May 5, 2017), <https://www.elpais.com.uy/informacion/sentencia-clara-agua.html>.

Uruguay is credited with triggering a “ripple” of similar constitutional changes throughout Latin America.²⁵³

This ripple—also described as a “*prise de conscience citoyenne*”²⁵⁴—was felt in Ecuador, where a new constitution adopted by referendum in 2008 recognized both the rights to water and sanitation.²⁵⁵ As in Uruguay, the Ecuadorian Constitution of 2008 requires the state to provide water and sanitation and prohibits the “privatizing of water and sources thereof,” prioritizing human consumption and the sustainability of ecosystems above other uses of water.²⁵⁶ It explicitly forgives any water debts that those living in poverty might have had at the time the new constitution entered into force and makes space for community control of water, specifying that water and sanitation may be provided by either legal entities of the State or communities and that water and sewerage may not be withheld or cut off.²⁵⁷ More radically, the Constitution recognizes the “rights of nature,” referring to the Indigenous concept of “*pachamama*,” which includes “the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.”²⁵⁸ This recognition marked a dramatic rejection of the commodification of nature and natural resources, demanding that things long considered goods must be understood as having their own agency and rights.²⁵⁹

Perhaps the most explicitly anti-neoliberal constitutional protection of the right to water can be found in the Constitution of Bolivia. Adopted in 2009 under the leadership of President Morales, who had been among the leaders of the water wars, the preamble to the Constitution boldly proclaims that “[w]e have left the colonial, republican and neo-liberal State in the past,”²⁶⁰ referring explicitly to the water wars, among other examples of grassroots struggle. Article 16

253. Malcolm Langford, *Privatisation and the Right to Water*, in THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS, *supra* note 75, at 491.

254. Valérie Bernaud, *La Consécration d'un Droit Fondamental à l'Eau est Possible. Étude de Droit Comparé le Démontrant*, 110 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 317, 321 (2017).

255. CONSTITUCIÓN DE 2008 Oct. 20, 2008, art. 12 & 66 (Ecuador).

256. CONSTITUCIÓN DE 2008 Oct. 20, 2008, art. 282, 314 & 441 (Ecuador). Article 318 further makes clear that “any form of water privatization is forbidden.” *Id.* art. 314.

257. CONSTITUCIÓN DE 2008 Oct. 20, 2008, disposición transitoria XXVI [Transitional Article] & art. 314 & 326 (Ecuador).

258. CONSTITUCIÓN DE 2008 Oct. 20, 2008, art. 71–74 (Ecuador).

259. For a discussion, see Verónica Perera, *From Cochabamba to Colombia: Travelling Repertoires in Latin American Water Struggles*, in Sultana & Loftus, *supra* note 72, at 248–49.

260. CONSTITUCIÓN POLÍTICA DEL ESTADO [Constitution] Feb. 7, 2009, pmb. (Bol.).

unequivocally makes clear that “[e]very person has the right to water,” and Article 20(3) specifies that “[a]ccess to water and sewer systems are human rights, neither are the object of concession or privatization.”²⁶¹ These rights are guaranteed alongside provisions requiring the state to ensure the right to “a healthy, protected, and balanced environment” for current and future generations.²⁶² Interpreting the right to water provision, the Constitutional Court has determined that the right to water—and the right to access water services—has both an individual and a collective character, and that these services “must be accessible to all, and in particular to the most vulnerable, marginalized, and unprotected sectors of the population without any discrimination, such as, for example rural populations, peasants, and native and indigenous peoples.”²⁶³ Unfortunately, despite this impressive case law, analysts suggest that the promise of the rights to water and sanitation remain unfulfilled in Bolivia, as despite water coverage rates as high as 90% in 2015—an increase from 83% in 2005,²⁶⁴ “[a]ccess to quality water services [remains] low in poor and marginalized communities, and the lack of meaningful social participation for citizens in water management persists 13 years after the Cochabamba water war.”²⁶⁵

A number of national constitutions were amended in the past fifteen years to recognize the human right to water, or both the rights to water and sanitation. For example, in the Dominican Republic, a new constitution was adopted in 2010 that explicitly recognizes the rights to both water and sanitation.²⁶⁶ The Constitutional Court has since found that although payment may be required for water services, non-payment cannot be the basis for cutting the supply of potable water—upholding one of the key demands of water justice advocates seeking to defeat the commodification of water.²⁶⁷ The Mexican Constitution was amended in 2012 to include an explicit guarantee of “the right of access, provision and

261. CONSTITUCIÓN POLÍTICA DEL ESTADO [Constitution] Feb. 7, 2009, art. 16 & 20(III) (Bol.).

262. CONSTITUCIÓN POLÍTICA DEL ESTADO [Constitution] Feb. 7, 2009, art. 33 (Bol.).

263. Tribunal Constitucional Plurinacional [TCP] [Constitutional Plurinational Court] May 14, 2012, SCP 0176/2012 (Bol.) (informal translation; internal citations omitted).

264. Clark, *supra* note 27, at 253.

265. Madeline Baer, *From Water Wars to Water Rights: Implementing the Human Right to Water in Bolivia*, 14 J. HUM. RTS. 353, 354 (2015); *see also* Clark, *supra* note 27.

266. CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA June 13, 2010, art. 61 (“potable water” and “sanitation services” being part of the right to health), art. 15 (human consumption of water having priority over any other use) (Dom. Rep.).

267. *See* Tribunal Constitucional [Constitutional Court] Mar. 3, 2016, expediente TC/0482/16 § 9(r) (Dom. Rep.).

drainage of water for personal and domestic consumption in a sufficient, healthy, acceptable and affordable manner.”²⁶⁸ This provision has been interpreted to prohibit the cut-off of potable household water supply for non-payment.²⁶⁹ In 2013, the Honduran congress revised the country’s Constitution to explicitly recognize a hybrid right to water and sanitation as part of the right to health, and to make clear that water and sanitation should be “equitable” and “with preference to human consumption.”²⁷⁰

The 2008 Constitution of the Maldives guarantees the right “to clean water” but subjects that guarantee to progressive realization and reasonable measures by the state “within its ability and resources.”²⁷¹ In an almost identical manner, the 2013 Constitution of Fiji promises every person the right “to clean and safe water in adequate quantities” subject to progressive realization.²⁷² While the right to sanitation is not included in this provision, case law supports access to a minimum level of sanitation for detainees as part of their right to be free of inhumane and degrading treatment.²⁷³ The 2015 Constitution of Nepal explicitly protects “the right to access to clean water and hygiene” of all citizens.²⁷⁴ The inclusion of hygiene is significant, as the practice of *chau-padi* (isolation of menstruating girls and women) remains common in some parts of Nepal, despite its prohibition by both case law predating the Constitution and statutory law since.²⁷⁵ In Thailand, the 2017 Constitution includes this aspirational clause: “the State should take

268. Constitución Política de la República de los Estados Unidos Mexicanos, CP, art. 4, Diario Oficial de la Federación [DOF] 5-02-1917, últimas reformas DOF 10-02-2014.a. This provision was added in 2012. See *Another Victory for the Human Right to Water in Mexico*, UNITARIAN UNIVERSALIST SERVICE COMMITTEE (Feb. 8, 2012), <https://www.uusc.org/another-victory-for-the-human-right-to-water-in-mexico/>.

269. Controversia Constitucional 48/2015, Tribunal Pleno de la Suprema Corte de Justicia de la Nación [SCJN], Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro 41, Tomo I, Abril de 2017, página 428 (Mex.). The Supreme Court referred to the CEDAW and CRC in interpreting the constitutional right to water.

270. See JORGE M. PORTUGUEZ, ESTEFANÍA JIMÉNEZ RODRÍGUEZ & VANESSA DUBOIS CISNEROS, ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, IMPLEMENTACIÓN DEL DERECHO HUMANO AL AGUA Y AL SANEAMIENTO A TRAVÉS DEL PROGRAMA INTERAMERICANO PARA EL DESARROLLO SOSTENIBLE DE LA OEA 43–44 (2019); CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS Jan. 11, 1982, art. 145 (Hond.).

271. CONSTITUTION OF THE REPUBLIC OF THE MALDIVES Aug. 7, 2008, art. 23(a).

272. CONSTITUTION OF THE REPUBLIC OF FIJI Sept. 7, 2013, art. 36(1).

273. Ibarrola, *Right to Sanitation*, *supra* note 114 (citing *State v. Senijeli Boila & Pita Nainoka* (2004) and *Naba v. State* (2001)).

274. CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF NEPAL Sept. 5, 2015, art. 35(4).

275. See Norbert Brunner, Vijay Mishra, Ponnusamy Sakhivel, Markus Starkl, & Christof Tsochhl, *The Human Right to Water in Law and Implementation*, 4 L. 413, 447 (2015) (citing *Bishwakarma v. Government*, [2006] S. Ct. Writ Petition 3303 (Nepal)); Heather Barr, *A Step in the Right Direction on*

actions . . . to provide quality water resources which are sufficient for consumption by the people.”²⁷⁶

Several African constitutions set out specific development objectives for the state that include improving access to water—sometimes using rights language—as governmental goals. For example, the Ugandan Constitution of 1995, in a section concerning the country’s “general social and economic objectives,” specifies that the state shall “endeavour to fulfill the fundamental rights of all Ugandans,” including those to “clean and safe water.”²⁷⁷ This aspirational framing is significantly different from the unequivocal guarantee of specific civil and political rights included in a later section of the Constitution,²⁷⁸ though case law suggests that courts are moving toward finding economic and social rights set out in the objectives section to be justiciable.²⁷⁹ The Gambian Constitution of 1996 promises that the state will “endeavour to facilitate equal access to clean and safe water.”²⁸⁰ The 1995 Constitution of Ethiopia specifies that, “[t]o the extent the country’s resources permit,” the government shall ensure Ethiopians have “clean water.”²⁸¹ Although this framing differs from later constitutions’ rights-based guarantees, at least one scholar has interpreted this provision to encompass an individual right to water.²⁸²

A wave of constitutional reforms in Africa over the past several decades resulted in a series of provisions guaranteeing water—and sometimes also sanitation—as human rights. The Democratic Republic of the Congo added a guarantee to the right to “potable water” in 2006.²⁸³ The Kenyan Constitution of 2010 recognizes the rights “to reasonable standards of sanitation” and “to clean and safe water in adequate

Menstrual Stigma in Nepal But Making Chauṡpadi a Crime is Only a First Step, HUM. RTS. WATCH (Aug. 10, 2017), <https://www.hrw.org/news/2017/08/10/step-right-direction-menstrual-stigma-nepal>.

276. CONSTITUTION OF THE KINGDOM OF THAILAND Apr. 6, 2017, art. 72(4).

277. CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, art. XIV.

278. *See id.* ch. 4.

279. Rose Osinde Alabaster & Lenka Kruc̄okova, *Uganda Country Mapping: The Status of Implementation and Monitoring of the Human Right to Water and Sanitation*, WATERLEX (2015), https://www.swisswaterpartnership.ch/wp-content/uploads/2016/06/WaterLex_Final-Project-Report_UGANDA2015.pdf.

280. “The State shall endeavour to facilitate equal access to clean and safe water, adequate health and medical services, habitable shelter, sufficient food and security to all persons.” CONSTITUTION OF THE GAMBIA Jan. 1997, art. 216(4).

281. CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA Aug. 21, 1995, art. 90.

282. *See* Abiy Chelkeba Worku, *Human Rights Approach to Water in the Ethiopian Context: Legal and Policy Assessments and Challenges*, 6 HARAMAYA L. REV. 1, 12–13 (2017).

283. CONSTITUTION DE LA RE PUBLIQUE DEMOCRATIQUE DU CONGO Feb. 18, 2006, art. 48.

quantities.”²⁸⁴ These provisions were among the bases for the decision in *Osman v. Minister of State*, in which the High Court—referring in part to the ICESCR—found that the forcible eviction of households living in an informal settlement entailed violations of numerous rights, including the rights to water and sanitation.²⁸⁵ Niger’s new Constitution of 2010 includes an individual “right to . . . potable water,”²⁸⁶ and Somalia’s 2012 Constitution similarly enshrines the right to “clean, potable water.”²⁸⁷ Two African constitutions frame the guarantee as a right but make clear that its fulfilment will be dependent on available resources: the Moroccan Constitution of 2011²⁸⁸ and the Constitution of South Sudan of 2011.²⁸⁹ The Egyptian Constitution of 2014 specifies the right to “healthy, sufficient amounts of . . . water.”²⁹⁰ Following intense efforts by civil society, Tunisia also included the right to water in its Constitution in 2014.²⁹¹ The 2013 Constitution of Zimbabwe guarantees all individuals the right to “safe, clean and potable water.”²⁹² This provision has since been interpreted by the High Court to require legal process before water may be shut off for non-payment.²⁹³ The 2015 Constitution in Burkina Faso enshrines the rights to both water and sanitation in an article setting out social and cultural rights.²⁹⁴

In Europe, Hungary’s 2012 Fundamental Law enshrined, for the first time, an obligation for the state to “ensure access to . . . drinking water” as a means of advancing the right to health.²⁹⁵ A few years later, in 2016, Slovenia became the first European Union member state to add the right

284. CONSTITUTION arts. 43(1)(b)–1(d) (2010) (Kenya). For discussion, see Edwin Kanda, John Taragon, Samuel Waweru & Susan Kimokoti, *The Water Act 2002 and The Constitution of Kenya 2010: Coherence and Conflicts Towards Implementation*, 5 INT’L J. DISASTER MGMT. & RISK REDUCTION 31 (2013).

285. Ibrahim Sangor *Osman v. Minister of State* (2011) K.L.R. (H.C.K.) (Kenya), <https://www.globalhealthrights.org/wp-content/uploads/2013/10/Osman-Kenya-2011.pdf>.

286. CONSTITUTION OF THE REPUBLIC OF NIGER Oct. 31, 2010, art. 12; see KLAAS VAN WALRAVEN, *A DECADE OF NIGER: POLITICS, ECONOMY AND SOCIETY 2008–2017* 17, 40 (Brill ed. 2019).

287. “Every person has the right to clean potable water.” PROVISIONAL CONSTITUTION OF THE FEDERAL REPUBLIC OF SOMALIA Aug. 1, 2012, art. 27(1).

288. CONSTITUTION DU MAROC 2011, art. 10 (Morocco).

289. TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN July 9, 2011, art. 35(2).

290. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, art. 79.

291. CONSTITUTION DE LA TUNISIE Jan. 26, 2014, art. 44; see Wahid Ferchichi, *The New Tunisian Constitution: A Reading into the Rights of Future Generations*, HEINRICH-BOLL-STIFTUNG (July 27, 2017), <https://tn.boell.org/en/2017/07/27/new-tunisian-constitution-reading-rights-future-generations>.

292. CONSTITUTION OF THE REPUBLIC OF ZIMBABWE Mar. 16, 2013, art. 77(a).

293. See *Bothwell Prop. Ltd. v Harare*, [2016] H.C. 4446/15 (Zim.).

294. CONSTITUTION OF BURKINA FASO June 2, 1991, as amended on Nov. 5, 2015, art. 18.

295. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY., art. XX.

to water to its Constitution amid concerns about commercialization and unequal access to potable drinking water by the Roma population.²⁹⁶ Article 70A plainly states that “[e]veryone has the right to drinking water,” and requires that water resources will remain a “public good managed by the state” and may not be treated as “a market commodity.”²⁹⁷

2. Implicit Recognition in National Constitutions

Even where there is no explicit guarantee of the rights to water and sanitation in the national constitution, courts in many countries have interpreted other key rights to include such protections. The rights to life, dignity, health, and the right to a healthy environment have all been interpreted in some countries to encompass the rights to water and sanitation. In addition, the rights to non-discrimination and equality, as well as the right to be free from degrading treatment, have often been constructed to include access to water and sanitation for specific populations.

Perhaps the premier early leader on the issue, the Supreme Court of India has—as early as 1980—protected the rights to water and sanitation by interpreting the right to life in the Constitution to include access to clean water and sanitation.²⁹⁸ The Court has found that the government violates the right to water guaranteed under international law and interpreted through the constitutional right to life when not all citizens have access to drinking water, and has found that the state must at times provide water to specific populations.²⁹⁹ While extensive case law exists affirming this right

296. Agence-France Presse, *Slovenia Adds Water to Constitution as Fundamental Right for All*, THE GUARDIAN (Nov. 17, 2016), <https://www.theguardian.com/environment/2016/nov/18/slovenia-adds-water-to-constitution-as-fundamental-right-for-all>.

297. CONSTITUTION OF THE REPUBLIC OF SLOVENIA 2016, art. 70A.

298. See Philippe Cullet, *The Right to Water in Rural India and Drinking Water Policy Reforms*, in THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS, *supra* note 75, at 677 (citing Subhash Kumar v. State of Bihar, AIR 1991 SC 420 (1991) (India)). See also Carlos Bernal, *The Right to Water: Constitutional Perspectives from the Global South*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 277, 278, 283 (Alam, Atapattu, Gonzalez & Razzaque eds., 2015) (citing A. P. Pollution Control Board II v. Prof. M.V. Naidu and Others, 2000 (3) SCALE 354, (2000) Supp 5 SCR 249 (India)). Some cite earlier decisions by lower courts, including the High Court of Kerala, as presaging the Supreme Court’s reasoning to protect the right to water. See, e.g., WATERLEX & WASH UNITED, THE HUMAN RIGHTS TO WATER AND SANITATION IN COURTS WORLDWIDE: A SELECTION OF NATIONAL, REGIONAL, AND INTERNATIONAL CASE LAW 167–68 (2014) (summarizing and citing Attakoya Thangal v. Union of India, (1990) Kerala High Court, <https://indiankanoon.org/doc/1980528/>).

299. See Philippe Cullet, *The Right to Water in Rural India and Drinking Water Policy Reforms*, in THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS, *supra* note 75, at 678–79 (citing Narmada Bachao Andolan v. Union of India (1981) 1 SCR 97).

(one database counts more than 1000 such cases), the Supreme Court has also accepted government limitations and referred to the concept of progressive realization in ensuring availability, accessibility, and affordability of water for household use.³⁰⁰ With respect to sanitation, the Supreme Court has repeatedly found the right to sanitation to be inherent in the right to life given the hazards posed by poor or non-existent sanitation systems.³⁰¹ Case law has focused on the duties of the state to provide toilets for informal settlements,³⁰² to end open defecation and manual scavenging, to advance the dignity of sanitation workers, and to ensure decent facilities in public institutions.³⁰³ For example, the Court has interpreted the right to education to include the obligation on government to ensure both toilets and drinking water facilities in all schools—public and private, rural and urban.³⁰⁴ While the right to water and sanitation have been strongly embraced by the Courts, Indian policy—one focused on the individual right—has, in recent years, shifted toward “efficiency rather than equality,” and from a right toward an economic good.³⁰⁵

In Pakistan, the Supreme Court found the right to water to be inherent in the constitutional right to life in 1994, holding that “[t]he right to have unpolluted water is the right of every person wherever he lives.”³⁰⁶ NGOs argue that the right is also inherent in the Constitution’s provision on promotion of social and economic well-being of the people.³⁰⁷ In *Human Rights Case No. 9*, the Supreme Court ordered repairs when the Karachi Administration Women’s Welfare Society sought relief from

300. See Brunner, Mishra, Sakthivel, Starkl & Tschohl, *supra* note 275, at 425–26.

301. See Sujith Koonan, *Right to Sanitation in India: Nature and Scope*, in *RIGHT TO SANITATION IN INDIA: NATURE, SCOPE AND VOICES FROM THE MARGINS* 1, 6–11 (K.J. Joy & Sarita Bhagat eds., 2016) (discussing, *inter alia*, *Virender Gaur v. State of Haryana*, (1995) 2 SCC 577 (India)).

302. *THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS*, *supra* note 75, at 355 (citing *Municipal Council, Ratlam v. Shri Vardichand & Others* AIR 1980 SC 1622).

303. See Koonan, *Right to Sanitation in India*, *supra* note 301, at 9.

304. See *WATERLEX & WASH UNITED*, *supra* note 298, at 161–63 (describing and citing *Environment & Consumer Protection Foundation v. Delhi Administration & Others*, 2011 (1) SCALE 709 (India)).

305. See Philippe Cullet, *The Right to Water in Rural India and Drinking Water Policy Reforms*, in *THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS*, *supra* note 75, at 690–93.

306. *West Pakistan Salt Miners Labour Union v. Director, Industries and Mineral Development*, (1994) 1994 SCMR 2061 (Pak.).

307. See *The State of Economic, Social, and Cultural Rights in Pakistan: A Joint Civil Society Shadow Report on Economic, Social and Cultural Rights*, COAL. FOR ALTERNATE REP. ON THE INT’L COVENANT ON ECON., SOC., AND CULTURAL RTS. 34–36 (2017), https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/PAK/INT_CESCR_CSS_PAK_27229_E.pdf.

contamination of drinking water resulting from the use of open storm water drains for disposal of sewage.³⁰⁸ However, analysis shows that the recognition of this right has not routinely translated into clear obligations for state actors.³⁰⁹

While a constitutional right to water has not been fully embraced by the courts in Bangladesh, a widespread arsenic problem—introduced into the drinking water through internationally-financed tubewells—identified in the 1990s and not adequately addressed into the early 2000s, advanced the right as an urgent matter.³¹⁰ While efforts to hold the international actors responsible in the U.K. courts ultimately failed,³¹¹ in 2007, the Supreme Court of Bangladesh found that the Constitution’s provision on the right to life, read in conjunction with the ICESCR’s provisions on the right to health, entails a state obligation to provide safe drinking water, which in turn required immediate action to remedy the arsenic problem.³¹²

European states have moved toward accepting the human right to water, especially as it relates to the EU’s external (foreign aid) relations. EU member states do not, however, take a uniform approach to the right to water inside their borders. Some European states approach water as a public good; others have allowed its commodification; others see water rights as property rights; and some have recognized a human right to water.³¹³ For an example of the latter, the Belgian Constitutional Court determined in 1998 that the right to potable water is inherent in the constitutional guarantee of the right to life with dignity, which itself includes the right to health care, decent accommodation, and a healthy environment.³¹⁴ While potable water and sanitation services are broadly available to the vast majority of those living within EU member states, “physical and equal accessibility for all, and especially for socially disadvantaged groups like poorer households and

308. THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS, *supra* note 75, at 392–93 (citing *Human Rights Case No. 9-K/1992* (unreported judgment)).

309. *See id.* *See also* Sikander Ahmed Shah, *The Right to Water*, DAWN (May 2, 2016), <https://www.dawn.com/news/1255703>.

310. *See* Peter J. Atkins, M. Manzurul Hassan & Christine E. Dunn, *Toxic Torts: Arsenic Poisoning in Bangladesh and the Legal Geographies of Responsibility*, 31 TRANSACTIONS INST. BRITISH GEOGRAPHERS 272 (2006).

311. The U.K. courts threw out a case brought by victims of arsenic poisoning against a firm that carried out research relied upon when installing tubewells that failed to assess the presence of arsenic, finding no relevant duty of care. *See* *Sutradhar v. Nat. Env’t Research Council* [2006] UKHL 33 (U.K.).

312. *Rabia Bhuiyan, M.P. v. Ministry of Local Gov’t & Rural Dev.*, (2007) 27 BLD (AD) 261 (Bangl.).

313. MARLEEN VAN RIJSWICK & HERMAN HAVEKES, *EUROPEAN AND DUTCH WATER LAW* (2012).

314. CC [Constitutional Court], Apr. 1, 1998, n 36/98, ¶¶. B.4.3, B.7.2.

homeless people, but also for those who are travelling, as well as provisions with regard to price setting” are lacking.³¹⁵ The EU itself has not embraced a rights-based approach to regulating water inside the Union.³¹⁶ Instead, while water—including drinking water—has long been a subject of regulation by the EU, these regulations have tended to take a technocratic approach, embracing both public and private provision, and only recently have they included key rights elements like robust citizen participation.³¹⁷ Some scholars argue that, although EU water agreements and human rights conventions do not explicitly recognize the right to water, “the existence of such a right can be deduced from EU law” since the assemblage of human rights and water rights together with EU member states’ human rights obligations functionally cover the key aspects of the human right to water.³¹⁸ Recent efforts by public unions and civil society organizations have focused on advancing the full and explicit embrace of the right to water as applicable inside the EU.³¹⁹ Of course, all EU member states—as well as the broader Council of Europe member states—are subject to the supervision of the European Court of Human Rights (ECtHR), and some are also subject to the findings of the European Committee of Social Rights.

The ECtHR has found some aspects of the rights to water and sanitation to be inherently protected by fundamental civil and political rights included in the European Convention on Human Rights. Specifically, the Court has held that the protection against inhuman or degrading treatment and torture requires that detainees are provided with potable water and basic sanitation³²⁰ and that a state’s failure to protect well water from company pollution could amount to a breach of procedural rights³²¹

315. VAN RIJSWICK & HAVEKES, *supra* note 313, at 49.

316. See EMANUELE LOBINA, COMMENTARY ON THE EUROPEAN COMMISSION’S “STUDY ON WATER SERVICES IN SELECTED MEMBER STATES” (2018).

317. Lovisa Hagberg, *Participation Under Administrative Rationality: Implementing the EU Water Framework Directive in Forestry*, in ENVIRONMENTAL POLITICS AND DELIBERATIVE DEMOCRACY EXAMINING THE PROMISE OF NEW MODES OF GOVERNANCE 123, 123–24 (Karin Bäckstrand, Jamil Kahn, Annica Kronsell & Eva Lövbrand eds., 2010).

318. VAN RIJSWICK & HAVEKES, *supra* note 313, at 25–26.

319. See LOBINA, *supra* note 316.

320. See, e.g., *Marian Stoicescu v. Romania*, App. No. 12934/02, ¶¶ 22–25 (2009), <http://hudoc.echr.coe.int/eng?i=001-93543>; *Tadevosyan v. Armenia*, App. No. 41698/04, ¶¶ 49–59 (2009), <http://hudoc.echr.coe.int/eng?i=001-89969>.

321. See *Zander v. Sweden*, App. No. 14282/88, ¶ 43 (1993), <https://www.informea.org/sites/default/files/court-decisions/COU-157042.pdf>. This case has been followed by numerous similar cases with similar reasoning. See Katharina Franziska Braig, *The European Court of Human Rights and the Right to Clean Water and Sanitation*, 20 WATER POL’Y 282–307 (2018) (citing COUNCIL OF EUROPE, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT (2d ed., 2012)).

or—if severe enough—the right to respect for private and family life.³²² It is striking that—despite intense inequalities in access to water and sanitation for minorities in Europe, especially Roma communities, the ECtHR has been equivocal on the matter of discrimination in access to water and sanitation.³²³ The European Committee of Social Rights has been more active on this front, finding that the right to adequate housing requires access to safe water and sanitation facilities, and that both the right to adequate housing and the right to non-discrimination are breached when marginalized communities are not provided adequate water and sanitation facilities.³²⁴ The Committee has also found that the right to health imposes obligations on states to effectively manage water resources and prevent pollution by industrial waste.³²⁵

The water situation in Israel and Palestine is starkly divided: the majority population in Israel enjoys access to water and sanitation, but those in the occupied territories of Palestine (OPT)—where water is controlled by the government of Israel—face enormous hurdles and most do not have access to sufficient, safe, or affordable water and sanitation.³²⁶ Although the Supreme Court in 2011 cited GC 15 to find a right to water inherent in the right to human dignity protected by Israel’s Basic Law: Human Dignity and Freedom,³²⁷ this decision has not

322. See, e.g., *Tătar v. Romania*, App. No. 67021/01, ¶101 (2009), [http://hudoc.echr.coe.int/eng?i=001-103273](https://www.google.com/url?sa=t&rc=1&q=&esrc=s&source=web&cd=&ved=2ahUKEwj2k9OiyowAhUwc98KHdGCCVQQFjABegQIAhAD&url=https%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%2Fid%3D003-2615810-2848789%26filename%3D003-2615810-2848789.pdf%26TID%3Dthkbhnlzk&usq=AOvVaw2SHqF3V_aL02PM6GHND2yI; Dubetska v. Ukraine, App. No. 30499/03 (2011), <a href=); *Dzemyuk v. Ukraine*, App. No. 42488/02, ¶¶ 91–92 (2014), <http://hudoc.echr.coe.int/eng?i=001-146357>.

323. For a discussion of this issue, see Braig, *supra* note 321, at 297 (finding that the Court has rarely addressed these issues and that relevant case law is “inconclusive and scarce”).

324. *Eur. Roma Rts. Ctr. v. Italy*, Complaint No. 27/2004, Decision on the Merits, EUR. COMM. SOC. RTS., ¶ 35 (Dec. 7, 2005), <http://hudoc.esc.coe.int/eng/?i=cc-27-2004-dmerits-en>.

325. *Int’l Fed’n Hum. Rts. (FIDH) v. Greece*, Complaint No. 72/2011, Decision on the Merits, EUR. COMM. SOC. RTS., ¶¶ 143–54 (Jan. 23, 2013), <http://hudoc.esc.coe.int/eng/?i=cc-72-2011-dmerits-en>.

326. U.N. Secretary-General, *Rep. of the Special Rapporteur on the Situation of Hum. Rts. in the Palestinian Territories Occupied Since 1967*, *Hum. Rts. Situation in the Occupied Palestinian Territory Including E. Jerusalem, with a Focus on Access on Water and Env’t Degradation*, ¶¶ 26–28, 41–55, U.N. Doc. A/HRC/40/73 (May 30, 2019).

327. See Sharmila L. Murthy, Mark Williams & Elisha Baskin, *The Human Right to Water in Israel: A Case Study of the Unrecognized Bedouin Villages in the Negev*, 46 *ISR. L. REV.* 25, 29–30, 32–33 (2013) (discussing CA 9535/06 *Abadallah Abu Massad v. Water Comm’r & Israel Lands Admin.* unreported judgement (June 5, 2011) (Isr.)).

been applied to protect the rights of those living in the OPT. The Court's decision, which held that Bedouin villages that were considered "illegal" under Israeli law were nonetheless entitled to access to drinking water,³²⁸ could have had broad impacts if it were applied to the OPT.

In the United States, Canada, and Australia, the human right to water is not recognized in the national constitutions. Although each of these countries boasts near-universal access to water and sanitation at the aggregate level, the reality is more complex, with Indigenous, ethnic minority, and unhoused populations experiencing significant obstacles. The human right to water is not recognized by the Constitution or courts of the United States, and the United States has not ratified the ICESCR. While a recent federal court decision found, concerning the right to water, that "[a] right of this nature is not rooted in our nation's traditions or implicit in the concept of ordered liberty,"³²⁹ Murthy has argued that "access to water for drinking, hygiene, and sanitation could be protected under the right to life" in the U.S. Constitution.³³⁰ Such a right would advance growing cries for justice from water rights advocates³³¹ fighting shut-offs for non-payment in cities, Native Americans asserting their rights to water as Indigenous peoples, and underserved and marginalized communities (such as unhoused people, Black communities, poor rural white communities, and immigrant communities in unincorporated *colonias*) who seek the potable water and sanitation services that majority communities take for granted.³³² Thus far, such arguments have met with little success in the federal courts.³³³ With little hope of a broad embrace of the rights to water and sanitation by the federal government, advocates have organized state and local strategies to legislate protection of the right,³³⁴

328. *See id.*

329. *In re City of Detroit*, 841 F.3d 684, 700 (6th Cir. 2016).

330. Sharmila L. Murthy, *A New Constitutive Commitment to Water*, 36 B.C. J.L. & SOC. JUST. 159 (2016), <http://lawdigitalcommons.bc.edu/jlsj/vol36/iss2/2>.

331. *See generally* Kevin Murray & Sara Kominers, *The Human Right to Water in the United States: A Primer for Lawyers and Community Leaders*, THE PROGRAM ON HUM. RTS. & GLOBAL ECON. (2015), <https://www.northeastern.edu/law/pdfs/academics/phrge/water-primer.pdf>.

332. *See* DIG DEEP & US WATER ALLIANCE, CLOSING THE WATER ACCESS GAP IN THE UNITED STATES: A NATIONAL ACTION PLAN (2020), http://closethewatergap.org/wp-content/uploads/2020/03/Dig-Deep_Closing-the-Water-Access-Gap-in-the-United-States_DIGITAL_compressed.pdf.

333. For example, following a legal challenge concerning water shut-offs in Detroit, a federal District Court affirmed an earlier holding by a U.S. bankruptcy court, which had found that "there is no constitutional or fundamental right . . . to affordable water service." *In re City of Detroit*, 841 F.3d at 699.

334. Inga Winkler & Catherine Coleman Flowers, "America's Dirty Secret": *The Human Right to Sanitation in Alabama's Black Belt*, 49 COLUM. HUM. RTS. L. REV. 181, 204, 224-25 (2017).

with California’s Water Code’s declaration of a right to “safe, clean, affordable and accessible water” serving as an inspiring example.³³⁵

The human right to water and sanitation are not recognized as such under Canadian law, though the province of Quebec has recognized the right to water via statute, and more than 150 municipalities have passed declarations recognizing the right.³³⁶ Although Canada has ratified the ICESCR, the government of Canada long opposed recognition of the right in international fora, concerned that other states might seek to extract some of Canada’s abundant fresh water,³³⁷ but finally signaled its embrace of the right in 2012.³³⁸ While access to water and sanitation is touted as being nearly universal in Canada, “the water supplied to many First Nations communities on lands known as reserves is contaminated, hard to access, or at risk due to faulty treatment systems.”³³⁹ Water justice advocates and First Nations representatives have called on the government of Canada—which has pledged to improve water for First Nations significantly by 2021³⁴⁰—to implement the human right to water in full and without discrimination.³⁴¹

In Australia, there is no constitutional recognition of the human right to water. The country has ratified the ICESCR and the Attorney General’s Office advises the public sector that the right is relevant in Australia.³⁴² However, as Van Koppen has written, “the water rights of minority indigenous peoples [have been] weakened or completely

335. CAL. OFF. ENV’T L. HEALTH HAZARD ASSESSMENT, *THE HUMAN RIGHT TO WATER IN CALIFORNIA* (2019), <https://oehha.ca.gov/water/report/human-right-water-california>.

336. *Human Right to Water*, OUR LIVING WATERS, https://www.ourlivingwaters.ca/human_right_to_water (last visited Nov. 17, 2020).

337. See Cristy Clark, *Why Didn’t Australia Support the Human Right to Water?*, ABC NEWS (Aug. 1, 2010), <https://www.abc.net.au/news/2010-08-02/35644>.

338. *Canadian Recognition of Human Rights to Water and Sanitation Must be Followed by Action*, AMNESTY INT’L (June 12, 2012), <https://www.amnesty.ca/news/news-item/canadian-recognition-of-human-rights-to-water-and-sanitation-must-be-followed-by-acti>.

339. *Make It Safe: Canada’s Obligation to End the First Nations Water Crisis*, HUM. RTS. WATCH, (June 7, 2016), <https://www.hrw.org/report/2016/06/07/make-it-safe/canadas-obligation-end-first-nations-water-crisis>.

340. U.N. Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, ¶¶ 30–31, U.N. Doc. A/HRC/WG.6/30/CAN/1 (Apr. 3, 2018).

341. See THE DAVID SUZUKI FOUND. & THE COUNCIL OF CANADIANS, *GLASS HALF EMPTY? YEAR 1 PROGRESS TOWARD RESOLVING DRINKING WATER ADVISORIES IN NINE FIRST NATIONS IN ONTARIO* (2017), <https://www.amnesty.ca/sites/default/files/DWA%20report%20-%20Feb%209.pdf>.

342. AUSTL. GOV’T ATTORNEY-GEN.’S DEP’T, *RIGHT TO AN ADEQUATE STANDARD OF LIVING, INCLUDING FOOD, WATER AND HOUSING*, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttoanadequatestandardoflivingincludingfoodwaterandhousing.aspx> (last visited Nov. 17, 2020).

ignored.”³⁴³ While access to water and sanitation is excellent for the majority of Australians, in many Indigenous communities, water is contaminated by heavy metals or pollutants from mining, agriculture and defense sites.³⁴⁴

Courts in numerous countries in Latin America have recognized the rights to water and sanitation. As early as 2002 in Argentina, lower courts have referred to the right to water in finding that water services could not be cut off due to non-payment.³⁴⁵ Regarding the right to sanitation, a court provided temporary relief when lack of sanitation was found to threaten human health or the environment in one 2004 case.³⁴⁶ In 2014, the Supreme Court interpreted the right to health in the constitution to find that access to potable water is an essential, inalienable, and indivisible human right with a collective quality that cannot be commodified.³⁴⁷ The Court has also found that the constitutional right to a healthy environment includes the obligation for the government to protect water resources in an integrated manner, and requires a paradigm shift from the traditional ownership model to encompass policies that take into account both supply and demand in managing this resource for the ages.³⁴⁸ Specifically relying on the right to water, the Court articulated a “right to a water flow that ensures environmental restoration.”³⁴⁹

In Colombia, although efforts to include the right to water as a human right in the Constitution failed,³⁵⁰ addressing the drinking water needs of the population is specified as one of the “social

343. Barbara Van Koppen, *Water Allocation, Customary Practice and the Right to Water Rethinking the Regulatory Model*, in *THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS*, *supra* note 75, at 77.

344. See Nina Hall, *Water: Our Most Basic Human Right*, U. QUEENSL., <https://stories.uq.edu.au/small-change/water-our-most-basic-human-right/index.html> (last visited Nov. 17, 2020).

345. *Usuarios y Consumidores en Defensa de sus Derechos Asociación Civil c Aguas del Gran Buenos Aires SA*, JUEZ DE PAZ 44.453 (2002) ().

346. Ibarrola, *Right to Sanitation*, *supra* note 114 (citing First Civil and Commercial Instance Court (City of Córdoba), 2004, DECISION NO. 500 MARCHISIO JOSÉ BAUTISTA Y OTROS V. SUPERIOR GOBIERNO DE LA PROVINCIA DE CÓRDOBA Y OTROS (Arg.)).

347. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 02/12/2014, “Kersich, Juan Gabriel y otros c. Aguas Bonaerenses S.A. y otros s/ amparo,” *La Ley* [L.L.] (2015-A-413) (Arg.). Note that the Court cited to GC 15 in its decision.

348. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 01/12/2017, “La Pampa, Provincia de el Mendoza, Provincia de si uso de aguas,” *La Ley* [CSJ 243/2014] (50-L) /CSI (Arg.).

349. Ricardo Lorenzetti, *The Conflict over the Atuel River in Argentina*, 48 *Env’t L. REP.* 10220, 10222 (2018).

350. For a discussion, see Verónica Perera, *From Cochabamba to Colombia: Travelling Repertoires in Latin American Water Struggles*, in Sultana & Loftus, *supra* note 72, at 248–49.

purposes” of the state, and the Constitutional Court has developed a robust jurisprudence along several lines.³⁵¹ In the 1990s, the Court identified water as an element of—or intimately connected to—rights explicitly protected in the Constitution.³⁵² In later years, the Court identified a “vital minimum” concerning water that must be guaranteed by the state. In 2004, the Constitutional Court found that persons displaced due to conflict must be ensured safe access to “essential food and potable water” for at least three months.³⁵³ In 2007, the Court referred to GC 15 to interpret the right to water as a component of the constitutional rights to life with dignity and the right to health, finding that access to safe, potable water must be provided to those with vulnerable health conditions despite their inability to pay.³⁵⁴ In 2008, the Court held that the Colombian Constitution implicitly imposes an obligation on the state to adequately supervise sanitation services.³⁵⁵ The Court has also made important findings concerning the rights of specific populations to water, including children,³⁵⁶ detainees,³⁵⁷ and Indigenous peoples, whose collective “right not to disappear” was interpreted in tandem with the right to water for each community member.³⁵⁸ Over time, the Court has made clear that the right to water is fundamental on its own, not requiring derivation from other rights explicitly protected in the Constitution.³⁵⁹ The specific contours of this

351. CONSTITUCIÓN POLÍTICA DE COLOMBIA DE [C.P.] art. 366.

352. See discussion in Bernaud, *supra* note 83, at 317, 319.

353. Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

354. Corte Constitucional [C.C.] [Constitutional Court], abril 17, 2007, Sentencia T-70/07, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

355. Corte Constitucional [C.C.] [Constitutional Court], julio 31, 2008, Sentencia T-706/08, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

356. Corte Constitucional [C.C.] [Constitutional Court], febrero 15, 2010, Sentencia T-091/10, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

357. Corte Constitucional [C.C.] [Constitutional Court], febrero 14, 2013, Sentencia T-077/13, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

358. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, Sentencia T-143/10, Gaceta de la Corte Constitucional [G.C.C.] (¶ 5.4.1) (Colom.) (“cada miembro de los Pueblos Indígenas Achagua y Piapoco tiene el derecho fundamental a consumir agua potable, y los Pueblos por sí mismos tienen derecho a no desaparecer”). See also Corte Constitucional [C.C.] [Constitutional Court], agosto 5, 2017 Sentencia T-302/17, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) (finding that the state must act, in part through ensuring potable water, to ensure that Indigenous children can enjoy survival rates in parity with other Colombian children).

359. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], 25 mayo, 2010, Sentencia T-418/10, Gaceta de la Corte Constitucional [G.C.C.] (Colom.). For a discussion, see Mies Sutorius & Sonia Rodríguez, *La Fundamentalidad del Derecho al Agua en Colombia*, 35 REVISTA DERECHO DEL ESTADO 243 (2015).

independent right has also been clarified over time: in 2011, the Court found that the right to water for human consumption is fundamental, requiring that each person must have access to a minimum of fifty liters of water per day.³⁶⁰

In other countries in Latin America, including in Costa Rica, El Salvador, and Guatemala, over the past several decades courts have interpreted constitutional provisions concerning the rights to life and health to include protections for the right to water. In Costa Rica, the Constitutional Chamber has found—beginning soon after the release of GC 15—that the rights to life and health require timely supply of drinking water,³⁶¹ and that disconnections of household water for failure to pay violate these rights,³⁶² unless alternative access to drinking water is provided.³⁶³ The Court also determined in 2004 that the rights to life, health, and a healthy and ecologically balanced environment were violated when a construction project that could impact groundwater was approved without applying the precautionary principle (*in dubio pro natura*).³⁶⁴ In El Salvador, cases from the Constitutional Court in 2014 and 2016 found that the right to water is implicit in the constitutionally protected right to the environment, interpreted in light of the rights to life and health.³⁶⁵ Similarly, in Guatemala, the Constitutional Court held in 2015 that although it is not explicitly set out in the Constitution, the right to water is in fact protected and must be safeguarded for the development of the national economy, encompassing—citing GC 15—the right of everyone to sufficient, safe, acceptable, accessible and affordable water for personal and domestic use.³⁶⁶ In 2017, the Court found that because the human right to water is

360. Corte Constitucional [C.C.] [Constitutional Court], octubre 3, 2011, Sentencia T-740/11 (Colom.).

361. Sala Constitucional de Costa Rica [SC] [Constitutional Chamber of Costa Rica], 04/01/2003, Resolution No 12903-2003 (Costa Rica).

362. Sala Constitucional de Costa Rica [SC] [Constitutional Chamber of Costa Rica], 04/01/2003, Resolution No 01791-2005 (Costa Rica).

363. Sala Constitucional de Costa Rica [SC] [Constitutional Chamber of Costa Rica], 04/01/2003, Resolution No 15713-2016 (Costa Rica).

364. See WATERLEX & WASH UNITED, *supra* note 298 at 131–35 (describing and citing Comité Pro-No Construcción de la Urbanización Linda Vista, San Juan Sur de Poás c/ Ministerio de Ambiente y Energía y Otros [2004] Corte Suprema de Justicia 2004-01923 (El Sal.)).

365. Sala de lo Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Justice Court], 15/12/2014, Resolution No 513-2012 (El Sal.); Sala de lo Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Justice Court], 14/12/2016, Resolution No 150-2015 (El Sal.).

366. Corte de Constitucionalidad [Constitutional Court], 28/09/2015, File No 4617-2013 (Guat.).

inextricable from a life with dignity as well as being a precondition for the realization of other human rights, a private landowner could not block access by the population to the only source of water for the local population.³⁶⁷ The Supreme Constitutional Court of Peru has approached the right to water in a similar manner, finding in a case from 2006 that access to potable water was inherent in the right to dignity and identifying the “fundamental right to potable water” as an “unenumerated” constitutional right that requires the state to ensure access, quality, and sufficiency.³⁶⁸ The Court has also extended specific protections to Indigenous groups facing threats to water. In a 2014 case, the Court—citing the human right to water, including the 2010 GA Resolution—invalidated an administrative decision to close a water pipeline upon which an Indigenous community depended because they had not been consulted in the decision.³⁶⁹

In Chile, water rights are not considered fundamental human rights, but are instead constitutionally subject to individual ownership and market forces.³⁷⁰ This approach has led to “the speculation and hoarding of water rights,” driving unequal pricing and conflicts.³⁷¹ The results for water justice advocates have been particularly uneven: at times the Supreme Court has rejected rights claims—including the right to a free basic minimum amount of potable water³⁷²—and at other times, it has protected the right to water—as when it has found Indigenous communities’ ancestral rights to water resources to prevail over individual property rights.³⁷³ However, there have been serious setbacks for Indigenous groups, who—despite centuries of colonization

367. Corte de Constitucionalidad [Constitutional Court], 16/05/2017, File No 308-2017 (Guat.).

368. Tribunal Supremo Constitucional [Supreme Constitutional Court], 15/11/2007, File No 06534-2006-PA/TC (Peru).

369. Tribunal Supremo Constitucional [Supreme Constitutional Court], 28/06/2016, File No 10268-2014 (Peru).

370. For a discussion, see Luis Carlos Buob Concha, *The Right to Water: Understanding Its Economic, Social and Cultural Components as Development Factors for Indigenous Communities*, 17 INT’L J. HUM. RTS. 39, 42–45 (2012).

371. *Id.*

372. *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 23 noviembre 2010, “Sergio Olivares Alfaro c. Iris Silva Rojas,” Rol de la causa: 5.319-2010 (Chile).

373. *See, e.g.*, Corte Suprema de Justicia [C.S.J.] [Supreme Court], 25 noviembre 2009, “Dominguez, Alejandro Papic c. Comunidad Indigena Aymara Chuzmiza y Usmagama,” Rol de la causa: 2840-2008 (Chile) (case pending resolution before the Inter-American Court of Human Rights); Corte Suprema de Justicia [C.S.J.] [Supreme Court], 2 agosto 2018, Resolución No. 44.255-2017 (Chile).

and dispossession—must demonstrate, *inter alia*, “uninterrupted historical use” of water resources to regularize their water rights in Chile.³⁷⁴

In Botswana, an important appellate ruling in 2011 protected the right to water by interpreting the constitutional provision concerning inhuman or degrading treatment in the absence of explicit provisions concerning water and sanitation.³⁷⁵ Referring to both GC 15 and the 2010 GA Resolution, the court of appeal found that the right of the Basarwa ethnic group to occupy specific land was meaningless without access to water.³⁷⁶

B. *The Effects of Constitutionalization*

Like all constitutional provisions, the real-world effects of provisions concerning water and sanitation cannot be easily predicted. There is a vibrant debate about whether translating the sometimes-radical claims to water justice into legal provisions is an inherently risky and reductive exercise.³⁷⁷ Even in states that have adopted explicitly anti-neoliberal approaches to water and sanitation like Ecuador and Bolivia, many communities still lack services and face barriers in making their voices heard. A recent examination of right to water efforts in South Africa and Ghana found an “uneven pattern of patchy successes and failures in transforming the human right to water into policy practice.”³⁷⁸

The causal mechanisms behind this mixed picture are widely varied, and though many relevant forces have been identified—however briefly—in this Article, many more have been left out. It is important to note one crucial recent trend in the water sector: a polarization between states—or large urban systems—that have “municipalized” water, returning the sector to the hands of governmental providers, and states that have seen “financialization” emerging as a new iteration of privatization.³⁷⁹ Even though

374. See Elizabeth Jane Macpherson, *Recognizing and Allocating Indigenous Water Rights in Chile*, in *INDIGENOUS WATER RIGHTS IN LAW AND REGULATION: LESSONS FROM COMPARATIVE EXPERIENCE* 190–96 (2019).

375. Sylvie Paquerot, *Le processus de reconnaissance du droit à l'eau à l'échelle internationale et l'enjeu de la légitimité dans la gouvernance mondiale: quelle place pour le droit ?*, 43 *REVUE GÉNÉRALE DE DROIT* 279, 308 (2013).

376. *Mosethanyane v. Att'y Gen. of Botswana*, (2011) Civil Appeal No. CACLB-074-10 (Botswana).

377. See Clark, *supra* note 27, at 254–60.

378. Julian S. Yates & Leila M. Harris, *Hybrid Regulatory Landscapes: The Human Right to Water, Variegated Neoliberal Water Governance, and Policy Transfer in Cape Town, South Africa, and Accra, Ghana*, 110 *WORLD DEV.* 75, 85 (2018).

379. Loftus, March & Purcell, *The Political Economy of Infrastructure*, *supra* note 26, at 4 (internal citations omitted).

privatization continues in many places,³⁸⁰ Loftus et al. explain that it “now appears to have been outstripped by a process of remunicipalization,” while “other geographies from Chile, to the United States, and the United Kingdom bear witness to the entrance of new private actors, such as equity and pension funds, targeting water infrastructure ownership for financial super-profits.” These super-profits are siphoned off by global financial elites through a system of financialization “that increasingly loses sight of the needs of citizens” and other erstwhile rights-holders while advancing profits for owners of new financial instruments created for investors in the water sector.³⁸¹

The good news is that aggregate studies have nonetheless found correlations between constitutionalized economic and social rights guarantees and government efforts to fulfill those promises.³⁸² In a recent article, Schiel, Langford and Wilson explore the question empirically, asking whether constitutionalization “matters” in practice for water.³⁸³ Examining 123 countries, they find that “rights alone have little impact on realizing the human right to water” as measured by indicators for access to basic drinking water.³⁸⁴ They conclude that “the concurrent existence of democratic governance is necessary to allow rights to be effective.”³⁸⁵ These more procedural aspects of the rights to water and sanitation have not, until now, been a major focus of efforts to advance these rights. Movements seeking water justice may do well to re-examine the often-ignored rights-based principles of transparency and participation as they work to re-articulate claims in the context of global health crises, radical inequality, and climate change.

The widely varied experience with constitutionalization and rights-claiming demonstrates that there is no easy or uniform answer to the effectiveness question in the water and sanitation arena. In part this is because rights claims, which may have helped individuals and

380. As Langford noted in 2017, “Multinationals continue to promote their role in the sector, particularly in middle-income countries. In developing countries, local private companies have emerged as the new face of privatisation while there has been a steady increase in privatisation in Asia, Europe and the Middle East.” Malcolm Langford, *Privatisation and the Right to Water*, in THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS, *supra* note 75, at 464.

381. Loftus, March & Purcell, *The Political Economy of Infrastructure*, *supra* note 26, at 4 (internal citations omitted); Kate Bayliss, *The Financialization of Water*, 46 REV. RADICAL POL. ECON. 292 (2013).

382. *See, e.g.*, SAKIKO FUKUDA-PARR, TERRA LAWSON-REMER & SUSAN RANDOLPH, *FULFILLING SOCIAL AND ECONOMIC RIGHTS* 128–64 (2015).

383. Rebecca Schiel, Malcolm Langford & Bruce M. Wilson, *Does It Matter? Constitutionalisation, Democratic Governance, and the Human Right to Water*, 12 WATER 1 (2020).

384. *Id.* at 2.

385. *Id.*

communities to articulate rights as against the (territorial) state, have not—on the whole—been effective enough in relation to transnational and international actors—be they private, public, or mixed. Nor have these claims sufficiently “bolster[ed] the ability of [territorial] states to manage the [national] economy in the face of pressure” from international financial institutions.³⁸⁶ Far from being a problem limited to the IFIs, states remain caught in the broader web of the global neoliberalism and—more and more—financialization.

IV. CONCLUSION: RE-EMERGING RADICALIZATION?

In a world of radical inequalities, the right to water may seem an impotent tool for the kinds of change needed. Certainly, transformation will not be planned through water and sanitation sector reforms. However, significant changes have been made through the integration of the rights to water and sanitation into global policy processes such as those driven by the Sustainable Development Goals (SDGs). In a major shift since the MDG era, the SDGs center inequalities, and the WASH goal, targets, and indicators require the elimination of inequalities in access through the achievement of “universal and equitable access” by 2030.³⁸⁷ This evolution was in part driven by close collaboration between human rights experts and development practitioners,³⁸⁸ and this success—even if its promises remain out of reach—is suggestive of both the broader changes that are possible and the limits that remain when using rights frameworks. Such limits and possibilities are especially relevant as the rights to water and sanitation are placed in the context of radical inequalities, global health crises and climate change.

The elimination of inequalities carries with it the ideal of leveling up—in which communities without access to water and sanitation enjoy accelerated rates of progress toward enjoyment of the right as a result of redoubled efforts to focus on closing gaps between rich and poor, urban and rural, ethnic minorities and dominant groups. In some countries, however, it seems apparent that a kind of leveling down—from overconsumption and use by rich elites—may also be necessary to achieve justice in water and sanitation. Despite this, the human rights

386. MADELINE BAER, *STEMMING THE TIDE: HUMAN RIGHTS AND WATER POLICY IN A NEOLIBERAL WORLD* 25 (2017).

387. See U.N. Development Programme, “Goal 6 Targets,” <https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-6-clean-water-and-sanitation/targets.html> (last visited Nov. 17, 2020).

388. For a discussion, see Margaret Satterthwaite, *On Rights-Based Partnerships to Measure Progress in Water and Sanitation*, 20 *SCI. & ENG'G ETHICS* 887 (2014).

community has assiduously avoided engaging in deep discussions about how rights advocates need to envisage not only “floors” below which enjoyment of the rights to water and sanitation may not fall, but also “ceilings” above which redistributive policies may be required. While it is true that the principle of non-retrogression bars simple adoption of measures that might result in clawing back progress on economic and social rights, that is not the end of the story. Governments may justify limits on water use beyond those protected by the rights regime, especially in efforts to ensure non-discrimination and enjoyment of rights by all. Perhaps the best examples of the fault lines in this area come from South Africa, where the possibility of limiting rich, white neighborhoods’ access to water for their lawns, pools, and golf courses was untenable even during the water justice movement in the early 2000s, due in part to the successes of commodification.³⁸⁹ However, the discussion has opened up again in the context of climate change, when Cape Town came perilously close to running out of water in 2017-2018. The government significantly increased water tariffs for “heavy users,” prohibited the use of city water for luxuries such as lawns and swimming pools, and encouraged reduction and reuse. The resulting changes in well-off city dwellers’ consumption and use patterns, in addition to government decisions to shift water allocated for agriculture toward urban residents, as well as needed rains, all averted the crisis—for now.³⁹⁰

Distributive justice is at the heart of broader debates over water in the climate change context, where populations most impacted by the climate crisis are often the ones with the least responsibility for its creation. Climate change is projected to have wide-ranging impacts on access to water and sanitation across the world. The processes now underway are expected to reduce availability and quality of water for many; increase overall water stress; make droughts more frequent and severe; increase aridity; and reduce the availability of freshwater.³⁹¹ Declining water availability is inextricably linked to food insecurity and broader wellbeing, and thus to global migration patterns.³⁹²

389. See Bond & Dugard, *supra* note 246.

390. See Christian Alexander, *Cape Town’s ‘Day Zero’ Water Crisis, One Year Later*, BLOOMBERG: CITYLAB (Apr. 12, 2019, 10:25 AM), <https://www.citylab.com/environment/2019/04/cape-town-water-conservation-south-africa-drought/587011/>.

391. See Mac Darrow, *Climate Change and the Right to Water*, in *THE HUMAN RIGHT TO WATER: THEORY, PRACTICE AND PROSPECTS*, *supra* note 75, at 179–80.

392. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], *GLOBAL WARMING OF 1.5°C: AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE*

Unpredictable changes in precipitation patterns and weather events are also underway, and may have strikingly different effects on populations' ability to obtain accessible, quality water.³⁹³ In some cases, fresh-water may become more abundant—but often be contaminated—while in other places, the incidence and severity of droughts will increase.³⁹⁴ These impacts will of course not be evenly distributed. The Intergovernmental Panel on Climate Change (IPCC) has explained that those in low and middle income countries will be hardest hit, with “[s]mall islands, megacities, coastal regions, and high mountain ranges,” as well as warm-water tropical reefs and Arctic ecosystems, bearing the brunt of the worst impacts.³⁹⁵ Within these spaces and beyond, it will be those groups already marginalized by discrimination, exclusion, and stigma that experience the worst effects of climate upheaval: risk will differ by demographic group, and mitigation and adaptation will also impose disparate impacts.³⁹⁶

As impacts are experienced in the daily lives of marginalized and disempowered groups, those impacted are also often at the frontlines of creative solutions. Singh explains that “these responses generally represent context-based, simple, ‘bottom-up’ approaches which local communities can develop, control, and manage with ease,” and which can be shared across contexts to ensure that “the human right to water can be realized in a climate change regime.”³⁹⁷ However, these bottom-up approaches will only be effective if combined with aggressive redistributive efforts concerning the rights to water and sanitation at the macroeconomic and global levels. Indeed, if reinvigorated and integrated into national and global responses to climate change, the rights to water and sanitation could help blunt the worst impacts by providing substantive guidance, procedural imperatives, and mechanisms for monitoring government, private sector, and intergovernmental climate efforts. As Darrow explains, the human rights framework helps “enable the identification of duty bearers with ascertainable and enforceable duties to prevent, respond or remedy harms caused by Greenhouse Gas

DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY (V. Masson-Delmotte, P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J. B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor & T. Waterfield eds., 2019) [hereinafter IPCC, GLOBAL WARMING OF 1.5°C].

393. See Darrow, *supra* note 391, at 179–80.

394. See *id.*

395. IPCC, GLOBAL WARMING OF 1.5°C, *supra* note 392.

396. See Darrow, *supra* note 391, at 183–84.

397. Nandita Singh, *Climate Change and Human Right to Water: Problems and Prospects*, in THE HUMAN RIGHT TO WATER: FROM CONCEPT TO REALITY 83, 101–02 (Nandita Singh ed., 2016).

(GHG) emissions,” and is relevant to both mitigation and adaptation policies.³⁹⁸ Human rights are mentioned in the Paris Agreement, and the IPCC itself has recognized that rights analysis can help guide choices among possible actions that are “consonant with UNFCCC undertakings in the areas of mitigation, adaptation, finance, and technology transfer”³⁹⁹ as well as the Kyoto Protocol and the Paris Agreement. The “differentiated obligations” approach necessitated by the global process of climate change must be understood in light of the domestic, international, and extraterritorial obligations imposed by human rights law, which can give teeth to even disaggregated obligations through human rights claims before national, regional, and international courts and mechanisms.⁴⁰⁰

In late 2019, five of the U.N. human rights treaty bodies called on states to “adopt and implement policies aimed at reducing emissions, which reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development.”⁴⁰¹ Of course, human rights claims will not, by themselves, achieve climate action. Instead, advocates will do best when advancing both rights and climate action together, drawing on the substantive and procedural guarantees of human rights law in identifying the actions needed by governments, corporations, and international actors to halt calamitous climate processes.⁴⁰²

Ultimately, a technocratic approach to the right to water can make some changes possible by giving policy-makers tools to analyze needed government actions, regulatory imperatives and failures, and the limits of commodification and financialization. However, the kinds of thorough-going changes required in the face of radical inequality, global pandemics, and climate change require creative, contextually relevant, and dogged political action connected to broader social movements for global justice. Recent movements for water justice

398. See Darrow, *supra* note 391, at 178.

399. IPCC, GLOBAL WARMING OF 1.5°C, *supra* note 392, at 340.

400. See Darrow, *supra* note 391, at 185–91. For a discussion of international and extraterritorial obligations, see *supra* text accompanying notes 53–58.

401. U.N. Comm. on the Elimination of Discrimination Against Women, Comm. on Econ., Soc. and Cultural Rts., Comm. on the Prot. of the Rts. of All Migrant Workers and Members of their Families & Comm. on the Rts. of the Child, Comm. on the Rts. of Persons with Disabilities, Joint Statement on “Human Rights and Climate Change” (Sept. 16, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>.

402. Darrow points in particular to the need to insist on human rights impact assessments in the climate context.

demonstrate the possibilities that open when the right to water is articulated alongside broader claims for transformation. For example, the Water Protectors who led opposition to the Dakota Access Pipeline on Lakota treaty territory (close to Native American reservation lands) in the United States, together with activists who joined them, spoke of the right to water as embedded within claims of justice for Indigenous peoples and the earth itself. In 2016, the Chairman of the Standing Rock Sioux Tribe addressed the U.N. Human Rights Council, decrying how the “pipeline threatens our communities, the river, and the earth.”⁴⁰³ The observation that “Water is Life” became a unifying force across Native American nations and beyond, drawing in not only Indigenous peoples but also activists from other communities fighting for their right to water—from U.S. communities like Flint, Michigan⁴⁰⁴—to Palestine.⁴⁰⁵

While the rights to water and sanitation can provide a “floor” below which the state, private actors, and intergovernmental bodies may not go, the choice of immediate demands and claims in any given context cannot be identified by detached lawyers or bureaucrats. Instead, the demands of those concerning needed “ceilings” on luxury, business, and export uses aimed at redistributive water justice should center, and be led by, those most impacted by global, national, and local processes of marginalization and exclusion. Ultimately, justice will always exceed—and must define transformations needed in—the law.

403. *Standing Rock Sioux Chairman takes #NODAPL to the United Nations*, Indian L. Res. Ctr., YOUTUBE (Sept. 20, 2016), https://www.youtube.com/watch?v=dW0d_WsuL0Y&feature=youtu.be].

404. See Kyle T. Mays, *From Flint to Standing Rock: The Aligned Struggles of Black and Indigenous People*, SOC’Y CULTURAL ANTHROPOLOGY: STANDING ROCK, #NODAPL, & MNI WICONI (Dec. 22, 2016), <https://culanth.org/fieldsights/from-flint-to-standing-rock-the-aligned-struggles-of-black-and-indigenous-people>.

405. See Ben Norton, *Palestinians Support Indigenous Dakota Pipeline Protests: “We Stand with Standing Rock,”* SALON (Nov. 18, 2016, 11:05 PM), <https://www.salon.com/2016/11/18/palestinians-support-indigenous-nodapl-protests-we-stand-with-standing-rock/>.