HISTORICAL EVOLUTION OF RIGHT TO WATER

2.1 Value of Water:

“Rahiman Paani Raakhiye, Bin Paani Sab Soon;
Paani Gaye Na Ubere Moti, Manus, Choon.”

These lines were written by the poet Abdur Rahim Khankhana, one of the nine gems of Akbar’s court. Rahim says, water is most important as without water, there is no wealth (pearls), life or earth.

Water is called “The Elixir of Life”. This is, indeed, the name which the Indian Nobel Laureate, C. V. Raman, has given it in his celebrated essay of the same name. The earth comprises two thirds of water and one third of land. Water is essential for all living beings. There can be no life without water.

Human beings, animals and all kinds of plants all need water. Much of the beauty of the earth is because of the presence of plenty of water on it. The main sources of water are rain, rivers, lakes and underground water, besides seas and oceans which are the main store-houses of water. Rains are caused by clouds. This rain helps the forests to grow which in turn also cause rain. Rain also feeds the rivers. The rivers mainly get replenished with the melting of snow on the mountains.

Man’s misery in the absence of the availability of drinking water is thus highlighted by the renowned supernatural English poet, S. T. Coleridge in his celebrated poem, The Rime of the Ancient Mariner.

“Water, water everywhere
When all the boards did shrink;
Water, water everywhere,
But not a drop to drink.

Man should manage water properly. Much of rain water goes waste. We should build large tanks and reservoirs for irrigation and drinking purposes, particularly in areas where canals cannot be constructed because of the stony and difficult terrain.

Now research has shown that water can serve a useful purpose in maintaining good health and in increasing longevity. As present, there is great awareness among the masses about
the necessity of pure drinking water. So, mineral water of many brands is sold in bottles at exorbitant rates in the market. Much of this water is spurious. So, we should be very careful while purchasing such a bottle.

A bottle of mineral, water should be purchased only from an authorized dealer who is a reliable one. Thus the overwhelming importance of water for various purposes such as drinking, washing, bathing, irrigation, etc. cannot be underestimated. Water is life. It nourishes us. It cleans us and sustains us. Put simply, water is you. In a Value of Water Campaign started in America, A studies shows:

The average American uses 176 gallons of water per day—that’s 64,240 gallons a year. 40% of water in America is used to produce the food we eat and the beverages we drink. How is water used in your home? On average, 17% goes toward showering, 27% is used by the toilet, your faucet drains 15%, your clothes washer another 22%, miscellaneous needs take up 5%, and those pesky leaks steal another 14%. If drinking water and soda pop cost equally, your water bill would skyrocket more than 10,000%.1

2.1.1 Water and the Environment:

70 percent of the Earth is water. From seas to lakes, to rivers and creeks, water is everywhere. Valuing water means valuing our future. 349 billion gallons of freshwater are withdrawn every day in the United States. 41 percent of that water (143 billion gallons) is used to produce thermoelectric power; another 37% goes to irrigation. 4% of US energy is used for transporting, treating, and pumping water. More than one-third of all counties in the lower 48 states will face higher risks of water shortages by mid-century as a result of global warming.2

2.1.2. Water and the Economy:

Water is the lifeblood of our economy. We rely on it for manufacturing, energy production, to transport materials across the globe, and more. One-fifth of the US economy would grind to a halt without a reliable and clean source of water. 46% of water consumed in America is used to produce the manufacturing products we buy. 1 to 3.68—the water jobs multiplier. Every job we create in the water sector helps add another 3.68

2. Ibid
jobs in the national economy. 1 to 6—every $1 spent on infrastructure improvements in the US generates $6 in returns.³

2.1.3. **Water and the Community:**

Water connects us. Water is a ride on a boat. Water is a sprinkler, making children laugh with joy. Water brings families and friends together in countless ways. 22,284—the number of gallons used per day by schools based on an evaluation done of schools in the Tampa Bay region. The San Antonio Zoo uses approximately 2 million gallons of water a day to care for the animals. The National Hockey League collectively uses more than 300 million gallons of water each season—it takes 12,500 gallons to make ice for each rink. Sixty-one percent of Americans rely on lakes, rivers, and streams as their source of drinking water. The other 39% rely on groundwater—water located underground in aquifers and wells.⁴

2.2. **Social Justice and the Historical Development of Water Rights:**

2.2.1 **Western Perspective:**

“If water were our chief symbol for property, we might think of property rights—and perhaps other rights—in a quite different way. We might think of rights literally and figuratively as more fluid and less fenced-in; we might think of property as entailing less of the awesome Blackstonian power of exclusion and more of the qualities of flexibility, reasonableness and moderation, attentiveness to others, and cooperative solutions to common problems.”⁵

It is with this classic quote of Carol Rose that David Schorr begins his chapter summarising the contemporary debates on property rights in relation to water in the new book. M Graziadei and L Smith (eds), *Comparative Property Law: Global Perspectives* (2017).⁶ David is a Senior Lecturer at Tel Aviv University, Israel and after reading this chapter, I became interested in his own contribution to the water rights debate.

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3. Ibid
4. Ibid
In *The Colorado Doctrine*, David investigates the historical development of the prior appropriation doctrine of water rights, commonly associated with the western states of America. The traditional view of the evolution of this doctrine is that the riparian rights doctrine of the eastern states, which entitles all landowners along a river to reasonable use of the water, was unsuited to the arid climate of the west. Therefore, a “first in time, first in right” system of water rights was created under which rights are obtained through use and earlier users are preferred to those coming later. The water rights are severable from landownership and transferable. For some law and economics scholars, the evolution of the prior appropriation doctrine is explained due to the high value of water in the dry climate and the necessity of a private property regime to ensure maximum utilization of this valuable natural resource. As a result, the history of prior appropriation is often used as evidence of the superiority of private property over a common property regime for scarce resources.

David challenges this traditional view by digging deep into archival material from the mid to late 19th century in Colorado. Using this material, he shows that the ideology prevalent in 19th century western America was stanchly set against speculation and corporate ownership. The development of prior appropriation, where water rights are restricted by actual use and made transferable was, David argues, motivated by principles of distributive justice rather than economic efficiency and wealth maximization. Due to this finding, David argues that property regimes are often more nuanced and complicated than a strict distinction between private property and commons. He shows that the prior appropriation theory in Colorado grew from a system of public property and provided private rights to water which were transferrable in order to try and ensure as wide a distribution of rights among actual users as possible.

The findings contained in *The Colorado Doctrine* have interesting parallels in Scotland. The water rights regime in Scotland developed between the mid 17th and mid 18th centuries. Advocate, judge and jurist, Lord Kames was at the centre of this development and established the theory that as water is among the res communes, or communal things, it is out with ownership and open to all humankind. Everyone has a right to appropriate a portion of water. If a landowner diverted a river, this would be depriving those downstream of their public right to appropriate the water and landowners were therefore prohibited from diverting the rivers running through their lands. This

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obligation on landowners was then developed by the courts into a correlative right held by landowners against any interference with the flow of a river. Landowners are allowed to take water for primary purposes, such as drinking, washing and cooking, but no other interference with the material flow is allowed. David’s argument regarding the inaccuracy of a strict divide between common and private property regimes is therefore demonstrated by the Scottish regime which derives from a system of commons but with the result that no one is entitled to use water for secondary purposes, such as agricultural or industrial purposes, unless they obtain agreement from the landowners along a river or they are in the position of having a river wholly contained within their own land.

Further, in Scotland, the appropriative rights of landowners were curbed in order to protect water for drinking and washing. In developing this restrictive system, the courts at the time were influenced by the social injustices caused by the Industrial Revolution. Following the migration of people from the countryside to the cities, there was a desperate need for public water supply but the water available was often insufficient and polluted. Many of the new industries in Britain consumed water or left water highly polluted, leaving little clean water remaining for the general population. Lack of clean water was identified as the chief cause of diseases like cholera, typhus and tuberculosis that were rampant across Britain. It was in this context that the right to natural flow developed and that preserving the use of water for domestic purposes might be at the expense of industry seemed acceptable. Lord Swinton in Russell vs. Haig\(^8\) said that “since there are evils, we should admit those only which are necessary: dwelling houses cannot be avoided, but manufactures may…” The argument that manufacturing would be significantly affected if the law developed in this way fell on deaf ears in the courts. In Hamilton vs. Edington & Co\(^9\) it was stated that manufactures “will not be injured by this doctrine, because there is little danger that consent will be refused where an adequate consideration is offered...” Thus, if anyone wished to use water for secondary purposes, the rights would have to be purchased from their neighbours. This incredibly restrictive system of water rights therefore created a barrier to economic development in the interests of social justice.

The connections between the historical development of the water rights regimes in Colorado and Scotland motivated by concerns for social justice provide an interesting contrast to contemporary debates on property law and natural resources which are often

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8. (1791) Bell’s Octavo Cases 338 at 345.
9. (1793) Mor 12824 at 12826-12827.
dominated by economic analysis. As Schorr shows, the picture is often far more complicated than the pursuit of efficiency. This suggests that within the history of water rights, there is evidence, as suggested by Rose, of property being represented not by the despotic right to exclude but instead by a concern for others and cooperation towards solving shared problems.

2.2.2. **Indian Perspective:**

India is a subcontinent surrounded by the Arabian Sea on the West, the Indian Ocean in the South, the Bay of Bengal in the East and Himalayas in the North. It covers about 3 million square kilometers, and includes 29 States and 7 Union Territories. It is home to about 1/6th of the world’s population, more than 1,300,000,000 people.

India is criss-crossed by 12 major river systems. About 85% of the available water is used for agricultural purposes, 8% for domestic purposes and 5% for industry\(^\text{10}\). Its long history can be traced back to the Indus Valley Civilization that emerged on the banks of the river Indus. Over the last 5,000 years, society has evolved under multiple kingdoms. It was often conquered by invaders from other countries, each bringing its own system of governance. Part of this story is recorded in historical accounts and records of visitors to India and part is unrecorded, giving a patchy, incomplete picture of the evolution of water management. Nevertheless, this chapter explores the available information to provide an overview of the key elements of the changes in Indian water law and policy over the centuries, focusing, however, on more recent developments.

In this segment we will discuss the brief history of water law in pre-colonial and colonial India, before moving on to discuss post-colonial water management in the country in coming chapters.

2.2.2.1. **The Pre-colonial History of Water Law:**

The pre-colonial history of water law in India (2500 BCE until sixteenth to seventeenth century CE) can be divided into an analysis of ancient India, and medieval India with the arrival of the Muslims through the Mughals after the sixteenth century. Water law in ancient India evolved slowly from custom, religion and written codes. This

\(^{10}\) FAO Aquastats 2003.
section elaborates briefly on the historical context and then focuses on the evolution of water law.

2.2.2.1 (a) **Historical Context:**

The Indus Valley Civilization flourished around 2500 BCE. Water was vital for the civilization and was used primarily for human personal use and irrigation. The most important structure in the city of *Mohenjodaro* was the Great Bath, which had water channels leading to and from it\(^\text{11}\). Its remains can still be seen today. The Indus Valley civilization gave way to Indo-European invaders who were initially less settled in their lifestyles.

In societies of food gatherers, humans protected their environment because that was their resource base. Trees, groves, and water bodies were seen as sacred. As society evolved, specific trees and ponds were seen less as supernatural and the focus shifted to the earth, fire, wind, water, and sky. *Varuna* was the God of Waters and *Indra* was the God of thunder and rain. This often accompanied agricultural development that led to deforestation and changes in land use and forests then lost their supernatural powers. *Gadgil and Guha* (1992: 79) explain how forests and forest creatures were sacrificed to the sun god in the Mahabharata and see this as a way for the *Pandavas* to convert forestland into agricultural land. Drinking water was obtained from rivers, springs, and artificial wells\(^\text{12}\).

Agriculture was the principal source of employment and fields often required irrigation. Navigation was also a significant use of rivers\(^\text{13}\). Between 500 BCE and 300 CE, the large food surpluses implied no real shortage of water and supported trade development along water channels.

Now this time, *Jainism and Buddhism* were born as contradict religious forces to promote conservation of natural resources.\(^\text{14}\) *Mahavir Jain and Gautama Buddha*, who lived in about the sixth Century BCE, promoted right conduct and belief, and respect for fellow creatures. With the spread of agricultural settlements along the banks of rivers and

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\(^\text{11}\) Majumdar et al. 1978
\(^\text{12}\) *id*:30
\(^\text{13}\) *id*:34
\(^\text{14}\) The Evolution of the Law and Politics of Water edited by Joseph W. Dellapenna, Gupta Joyee, available at https://books.google.co.in/books?id=hV9S2HqxF1EC&pg=PA159&lpg=PA159&dq=At+this+time.+Jainism+and+Buddhism+were+born+as+counter+religious+.
on fertile lands, labour was needed to undertake specific tasks. Food gatherers were incorporated into the settled system of agriculture, through conquest or otherwise, as the lowest castes. Some argue that these lower castes subsequently began to follow Buddhist beliefs with its of ideas of non-violence. After the destructive war of Kalinga, the victorious ruler Ashoka himself embraced Buddhism and preached non-violence and Ahimsa to his people. Ashoka also called on his officers to build reservoirs and plant trees\textsuperscript{15}.

By 400 CE, there was a decline in Buddhism and Jainism and this was accompanied by a decline in agricultural production—possibly because of water shortages, decline in soil fertility, and/or the growth of human population. During the reign of the Gupta’s and thereafter until about the 1000 CE, the lack of resources led once more to worshipping individual animals and trees and a focus on conservation. This was a period of low trade and urbanization. From around the ninth century, the development of new tank technologies and improved dams and canals in South India paved the way for the development of large-scale cultivator agriculture that displaced pastoralism\textsuperscript{16}.

2.2.2.1. (b) \textbf{Hindu Water Law:}

Hinduism is considered a living tradition that expresses universal truth. Each creature is made of parts and is part of the community and the cosmos. Harmony is achieved when human actions or karma match the nature of the human. Human actions are governed by dharma (law and order) that is concretized in the sacred books of the Hindus—the Vedas, which include the Shrutis and the Smritis. The Laws of Manu, within this tradition, provide indications of the water law of the time. Water was considered indivisible. Those who could were obligated to develop water works for the benefit of others. Kings should protect public waters and collect fees for crossing waters. Diversion or obstruction of waters was discouraged and the laws imposed a system of social reprimands and punishments for those who polluted the water or who stole or diverted. Destruction of embankments was illegal. The law encouraged the use of water bodies as boundaries between villages to ensure that as many villages as possible had access to

\textsuperscript{15} Majumdar et al. 1978: 100
\textsuperscript{16} Supra 14
water. Water bodies of enemies, however, could be destroyed in times of war. A water controller was in charge of water administration.¹⁷

A manuscript—Arthashastra (‘The Science of Politics’)—also provides a detailed account of governance in the Kautilian period. This manuscript discusses the use of water for the development of water works, irrigation, and transport, specifying that all water belonged to the king and that users were to pay a water tax to withdraw water from irrigation systems installed by the emperor. The system of taxes was very elaborate. When new tanks and embankments or renovation works were undertaken or when water works were cleaned and made ready for use, there was a 5, 4, or 3-year exemption from taxes. There were limited provisions for private ownership and these included immovable properties such as reservoirs, embankments and tanks, with the owners having the right to sell or mortgage these. Where such tanks were not in use for a period of 5 years, ownership rights lapsed. All those who leased, hired, or shared such a body had the responsibility to maintain them. Private owners were allowed to give waters to other parties through irrigation works in exchange for produce. The taxes that owed to the King were specified in great detail and these were collected by the Chief Superintendent of Crown Lands.

The Arthashastra stated that in irrigating one’s own field, no harm is to be caused to others. It prohibited the release of water from dams without a legitimate reason, the obstruction of the legitimate use of water by others, the obstruction or diversion of the watercourse, and the building of water works on the land belonging to someone else. Where damage was caused to another party as a result of overflowing waters, compensation was owed to the other party. The Arthashastra provides a list of damage types and the corresponding compensation or penalty due. These included the death penalty (death by drowning). Water routes could be used for the purposes of transport and trade and the principle of good neighbourliness was a civic duty.

The Arthashastra explains that there were four sources of law: The Dharma based on truth; evidence provided by witnesses; customs and traditions accepted by the people; and royal edicts adopted by the king. The Arthashastra submits that where a king rules over a territory, he should ensure dharma, and dharma only exists when there is order. Hence, if customs already exist in specific places, the king should allow the continuance of the custom. Once the king makes a rule, however, he should ensure enforcement. The

¹⁷ https://www.uvm.edu/~pbierman/classes/gradsem/2014/India_Water_Compiled.pdf (last visited 12-3-19 at 10am)
Arthashastra elaborates in great detail on foreign policy, but does not say much explicitly about water. It leaves room, however, for treaties to develop joint water works.\(^{18}\)

**2.2.2.1 (c) Islamic Water Law in India:**

From the tenth century onwards, Islamic rulers governed Northern India. Islamic law principles include that water is a gift of God, that no individual or ruler can own water, and that everyone should have access to water. These principles include a right of thirst, which gives humans and animals the right to quench their thirst from any available water point.

The influence of Muslim rule in India on water regulation has not been conclusively ascertained. Islamic rulers refrained from significant intervention in existing arrangements, generally applying Islamic law to the Islamic population while allowing non-believers to follow their own systems. Possibly, the relatively high availability of water in India precluded conflicts with Islamic norms. This may also explain the relative lack of attention towards water regulation during this era.

**2.2.2.1. (d) Colonial Policies and Laws on Water – Government Ownership:**

From the sixteenth century onwards, European colonialism began in India. It accelerated during the industrial revolution in England. Colonization brought three major influences—a transformation from a resource gathering and food production economy into a commodity-oriented economy; a change in long-standing social relations and customs as local social relations became less important and social cohesion declined; and the development of the market and the importance given to wealth. Commercial production became more important than subsistence, exploitation more important than conservation, and the individual more important than the community. While colonization in India was less aggressive than in Africa, the British deforested large tracts in order to access coal and timber and to promote agriculture. The state gradually took ownership of forests and community irrigation and usufructuary schemes were dismantled. Water logging and salinity problems increased and small-scale irrigation schemes broke down leading to impoverishment of the small farmers.

\(^{18}\) *Ibid*
The British introduced the concept of government control over surface waters. In the early stages, legal and administrative changes were motivated by the need for colonial expansion and to amass wealth, the East India Company focused on advancing trade and traffic, and law developed through practice and the judicial process. Until 1857 the British did not interfere with local rules and customs unless it interfered with their policies. The Presidency areas were completely subject to British rule, mofussil areas experienced a plural system of law, and further away local systems of law existed. A few laws were enacted such as the Bengal Regulation VI of 1819 to regulate ferries and the Charter Act of 1833 was an initial attempt to codify the laws in India. Following the 1857 revolution, the British began to consolidate power focusing both on famine relief and the need to maintain the resource base of trade. The British began to invest in and regulate canals and irrigation facilities.

British colonial water law had two main strands. First, control over water and rights to water were regulated through the progressive introduction of common law principles, emphasizing the rights of landowners to access water. For surface waters, riparian rights allow a landowner the right to take a reasonable portion of the flow of a watercourse. For groundwater, landowners had a virtually unlimited right to access water under their holdings. Common law principles, enshrined in the Indian Easements Act\(^\text{19}\) (1882), evolved over time but have substantially survived until the present day. Second, a series of regulatory statutes were enacted, including laws to protect and maintain embankments, to acquire land for embankments, and to entrust the Controller for implementing such laws (e.g., Embankment Regulation 1829; Bengal Embankment Act 1855). Other laws regulated canals for navigation purposes and levying taxes on the users, river conservation, and rules on ferries and fisheries (e.g., Northern India Ferries Act 1878; Indian Fisheries Act 1897). Regulations recognizing local practices and rules in villages were also enacted.

One of the most important enactments was the Northern India Canal and Drainage Act (1873), which regulated irrigation, navigation and drainage. While this Act did not directly assert the state’s ownership over surface waters, it recognized the right of the Government to ‘use and control for public purposes the water of all rivers and streams flowing in natural channels, and of all lakes’ (Preamble). This led to the progressive strengthening of state control over surface water and the concomitant weakening of

\(^{19}\) The Indian Easements Act, 1882 (Act 5 of 1882)
people’s customary rights. This tendency was progressively strengthened. The Madhya Pradesh Irrigation Act, 1931 provided that: ‘All rights in the water of any river, natural stream or natural drainage channel, natural lake or other natural collection of water shall vest in the Government’.

Colonial legislation also introduced the division of responsibilities between the centre and the regions/states with regard to water. The Government of India Act (1935) empowered the provinces to take decisions on water supply, irrigation, canals, drainage and embankments, water storage and hydropower. Conflicts between provinces were subjected to the jurisdiction of the Governor General who could appoint a commission to investigate the sufficiently important conflicts.

2.2.3. International Perspective:

Recognition by the world community of the seriousness of the problems facing the water resources sector, and the attempts to address them, including the issue of the right to water, started in earnest in the 1970s, and have continued ever since. In 1972 the United Nations Conference on the Human Environment, held in Stockholm, identified water as one of the natural resources that needed to be safeguarded. Principle 2 of the Stockholm Declaration on Human Environment states that “the natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate.”

Five years later in 1977, the United Nations held the Mar del Plata Water Conference in Argentina. The Conference, devoted exclusively to discussing the emerging water resources problems, issued the Mar del Plata Action Plan, which was designed to address those problems. The Action Plan included a number of recommendations and resolutions, covering a broad spectrum of issues. The


recommendations dealt with various issues including assessment of water resources; water use and efficiency; environment, health, and pollution control; policy, planning, and management; and regional and international cooperation. The resolutions addressed areas such as assessment of water resources, community water supply, agricultural water use, research and development, river commissions, international cooperation, and water policies in the occupied territories. One critical outcome of the Conference was the agreement, as part of the Action Plan, to proclaim the period 1981 to 1990 as the “International Drinking Water Supply and Sanitation Decade” during which governments would assume a commitment to bring about substantial improvements in the drinking water supply and sanitation sectors.22

The debate on the right to water can be traced to this Conference. Resolution II on “Community Water Supply” declared for the first time that “All peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”23 The Resolution went on to restate the universal recognition that availability of water and, to a significant extent, the disposal of waste water, are essential both for life and the full development of man, as an individual and as an integral part of society. To meet this challenge, the Resolution called for full international cooperation, entailing the mobilization of physical, economic, and human resources, “. . . so that water is attainable

22. The Report of the United Nations Water Conference urged that the Decade “. . . should be devoted to implementation of the national plans for drinking water supply and sanitation in accordance with the Plan of Action contained in Resolution II below. This implementation will require a concerted effort by countries and the international community to ensure a reliable drinking water supply and provide basic facilities to all urban and rural communities . . .” (emphasis added). See id., at 14. The United Nations General Assembly did not refer in Resolution 32/158 (adopting the Report of the United Nations Water Conference, see supra n. 14) to the recommendation of the U.N. Water Conference designating the decade of 1981–1990 as the International Drinking Water Supply and Sanitation Decade. However, this matter was addressed by the General Assembly in a later resolution in 1980. Resolution 35/18, adopted by the General Assembly on November 10, 1980, at the 55th Plenary Meeting, after referring to the Mar del Plata Action Plan, proclaimed “the period 1981–1990 as the International Drinking Water Supply and Sanitation Decade, during which Member States will assume a commitment to bring about a substantial improvement in the standards and levels of services in drinking water supply and sanitation by the year 1990.” The Resolution went on to call upon governments to develop the necessary policies, set targets, and mobilize the necessary resources for this purpose. It also called upon the United Nations system and other intergovernmental and non-governmental organizations concerned to continue and, if possible, to increase their technical and financial cooperation with developing countries in order to enable them to attain the targets they have set. The United Nations General Assembly followed up on the matter and issued Resolution 40/171 on December 17, 1985, at its 119th Plenary Meeting, as a middle-of-the-Decade reminder to the states that “significant progress towards meeting the objectives of the Decade by 1990 will require a much greater sense of urgency and priority on the part of Governments and the continued support of the international community.”

and is justly and equitably distributed among the people within the respective countries.”

The Resolution unquestionably represented a milestone, particularly considering the time at which it was issued, a quarter of a century before the United Nations Committee on Economic, Social and Cultural Rights declared safe drinking water a human right. Referring simply to a “right” rather than a “human right,” the Resolution clearly addressed the issues related to the right of access to safe drinking water. As such, The Mar del Plata Water Conference can be considered the starting point for the debate on the right to water, and it has indeed provided the basis for the current discussion on the issue of the human right to water.

The world community’s attempts to deal with water problems continued in a series of conferences that have been held since that time. In January 1992 the International Conference on Water and the Environment was held in Dublin, Ireland, and issued the Dublin Statement on Water and Sustainable Development. Principle 4 of the Dublin Statement proclaims that “water has an economic value in all its competing uses and should be recognized as an economic good.” Yet the Statement clarified that within this principle “it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.” Read together, the Dublin Principles confirmed the right to water at an affordable price. Thus, the right to water does not necessarily mean that water should be provided free of charge. However, the Dublin Principles do not explain the concept of “affordability,” nor do they suggest means through which its content and meaning could be determined.

The Dublin Conference was a preparatory meeting for the United Nations Conference on Environment and Development (UNCED) that was held in Rio de Janeiro, Brazil, in June 1992 (the Rio Summit). Agenda 21 of the Rio Summit, “Programme of Action for Sustainable Development,” included a separate chapter (Chapter 18) on

26. The other three principles state: (i) fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment, (ii) water development and management should be based on a participatory approach, involving users, planners, and policy makers at all levels, and (iii) women play a central part in the provision, management, and safeguarding of water. See id., at 129.
27. See id., 130.
freshwater resources. The overall objective laid down for freshwater resources is “to satisfy the freshwater needs of all countries for their sustainable development.” On the issue of the needs and rights to water, Chapter 18 stated that “... water resources have to be protected, taking into account the functioning of aquatic ecosystems and the perenniality of the resources, in order to satisfy and reconcile needs for water in human activities. In developing and using water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of the ecosystems.” Moreover, Chapter 18 endorsed the Resolution of The Mar del Plata Water Conference that all peoples have the right to have access to drinking water, and called this “the commonly agreed premise.”

The continued realization by the world community of the seriousness of the problems facing water resources resulted in the establishment in 1996 of The World Water Council (WWC) and The Global Water Partnership (GWP). The WWC is supposed to act as a think tank on water resources matters, while the GWP is established as a working partnership among all entities involved in water to support countries in integrated water resources management. Those two institutions led the work that resulted in the holding of the First World Water Forum in Marrakech, Morocco, in 1997, the Second World Water Forum in The Hague, the Netherlands, in 2000, and the Third one in Kyoto, Japan, in 2003. The Marrakech Declaration, which was issued at the end of the First World Water Forum on March 22, 1997, did not go as far as Mar del Plata, Dublin, or Rio with regard to the right to drinking water. It merely recommended “action

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29. See id., paragraph 18.8, at 167. Being a conference on “Environment and Development,” it is not surprising that the issue of “ecosystem” was equated with human “basic needs.”
33. For the proceedings of the First World Water Forum see Water, the World’s Common Heritage—Proceedings of the First World Water Forum, Marrakesh, Morocco, (Mohamed Alt- Kadi, Aly Shady & András Szöllösi Nagy, eds., Elsevier 1997). The different documentation on this Forum spells “Marrakech” sometimes as “Marrakesh.” One of the outcomes of the Marrakech meeting was the establishment of the World Commission for Water in the 21st Century (WCW), which was entrusted with preparing a global vision for water, and presenting it at the Second World Water Forum. The WCW prepared and presented its vision in a report entitled “A Water Secure World.” See infra n. 259.
to recognize the basic human needs to have access to clean water and sanitation.”

A similar statement was included in the Ministerial Declaration of The Hague, which called for recognition “that access to safe and sufficient water and sanitation are basic human needs.” The Kyoto Ministerial Declaration missed the issue altogether, only stating that “. . . we will enhance poor people’s access to safe drinking water and sanitation.”

The vacillation between declaring water a basic human need or a human right was further highlighted by the General Assembly of the United Nations. In 1999, the General Assembly issued a resolution on “The Right to Development.” The Resolution affirmed the right to development, as established in the Declaration on the Right to Development, as universal and inalienable, and reemphasized that its promotion, protection, and realization are an integral part of the promotion and protection of all human rights. The Resolution reaffirmed that, in the realization of the right to development, inter alia, “the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community.”

This statement, no doubt, is the strongest and most unambiguous in declaring a human right to water, and linking this right to the overall right to development.

The resolutions, declarations, and action plans discussed above are statements of policy that do not possess formal legal enforceability. In this respect, they should be distinguished from the conventions and treaties that are subject to signature and ratification, and that, once in force, are legally binding on the states that have ratified them. Resolutions and declarations are not subject to signing and ratification, and as such

36. Mohamed Aït-Kadi et al., supra n. 26
39. A/Res/54/175 of December 17, 1999 (83rd Plenary Meeting). This resolution should be distinguished from the Declaration on the Right to Development see infra n. 75. One reason as to why the General Assembly issued a resolution bearing, more or less, the same title can be found in Recital 16 of this Resolution, which expressed the concern that “. . . The Declaration on the Right to Development is insufficiently disseminated,” and noted that the Declaration “. . . should be taken into account, as appropriate, in bilateral and multilateral cooperation programmes, national development strategies and policies and activities of international organizations.”
40. Id., paragraph 12. In addition to food and clean water, the paragraph stated that the right to shelter is also a basic human right. Moreover, the paragraph stated that “Health is essential for sustainable development,” and education is “an essential factor for the political, social, cultural and economic development of all people.”
do not create binding effects, though they may provide the impetus for later binding instruments and further the definition of policy and principle in a given area.

A treaty that addresses the issue of water as a human need is the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, which was adopted by the United Nations General Assembly on May 21, 1997.\textsuperscript{42} Paragraph 1 of Article 10 of the Convention on the “relationship between different kinds of uses,” states that in the absence of agreement or custom to the contrary, no use of an international watercourse enjoys priority over other uses.\textsuperscript{43} Paragraph 2 states that “In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to Articles 5 to 7 of the Convention, with special regard being given to the requirement of vital human needs.” Article 5 of the Convention deals with equitable and reasonable utilization and participation. Article 6 lays down the factors relevant to equitable and reasonable utilization, and Article 7 deals with the obligation not to cause significant harm.

Article 10 has a lengthy historical background dating back to the early discussion within the International Law Commission (ILC) before the final parameters of the draft Convention were agreed upon.\textsuperscript{44} Although one of the factors for determining equitable and reasonable utilization in Article 6 of the Convention relates to “the social and economic needs of the watercourse States concerned,”\textsuperscript{45} there was concern within the

\begin{enumerate}
\item The Convention was adopted by a vote of 103 for, and 3 against (Burundi, China, and Turkey) with 27 abstentions. Fifty-two countries did not participate in the voting. For the text of the Convention, see 36 I.L.M. 700 (1997). See also International Watercourses, Enhancing Cooperation and Managing Conflict, 173 (Salman M. A. Salman & Laurence Boisson de Chazournes, eds.) World Bank Technical Paper No. 414, Annex 1, (1998).
\item Article 6 (1) of the Convention states that utilization of an international watercourse in an equitable and reasonable manner within the meaning of Article 5 requires taking into account all relevant factors and circumstances, including:
\begin{enumerate}
\item geographic, hydrographic, hydrological, climatic, ecological, and other factors of a natural character;
\item social and economic needs of the watercourse states concerned;
\end{enumerate}
\end{enumerate}
ILC Drafting Committee about the absence of a priority principle concerning the list of those relevant factors. To address this matter, the Committee in 1991 suggested that, among the factors to be taken into account in solving a conflict between uses, special attention should be given to the supply of water needed to sustain human life, including drinking water or water required for the production of food.\footnote{46} This explanation was accepted by the Working Group, which added the following statement of understanding regarding article 10 (2):

\begin{quote}
In determining “vital human needs”, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.\footnote{47}
\end{quote}

Thus, the \textit{U.N. Watercourses Convention} does not directly address the issue of the human right to water. Rather, it confined its concerns to the issue of “vital human needs,” the meaning and practical implications of which are still difficult to articulate.\footnote{48}

All of the conferences and forums that were held during the 1980s and 1990s issued declarations, resolutions, and detailed action plans aimed at addressing water problems. The most notable of these was the United Nations Millennium Declaration, issued on September 8, 2000. The Declaration was adopted unanimously by the General Assembly of the United Nations, and was signed by the 147 heads of states who attended the Millennium Summit. The Declaration addressed eight \textit{Millennium Development Goals} to be achieved by the year 2015. Those goals include reducing by half the proportion of people without sustainable access to safe drinking water.\footnote{49} \textit{The United Nations Summit on}
Sustainable Development that was held in Johannesburg in September 2002 added a similar goal with regard to basic sanitation.50

In addition to the Resolution on the Right to Development issued in 1999, and the Millennium Declaration issued in 2000, the General Assembly of the United Nations adopted two other resolutions on water resources. In December 2000, the General Assembly issued a resolution proclaiming the year 2003 as the “International Year of Freshwater.”51 The other resolution, “International Decade for Action, ‘Water for Life’ 2005–2015,” was adopted in December 2003.52 After referring to the Millennium Declaration and the Johannesburg Plan of Implementation, the Resolution proclaimed the period 2005 to 2015 as the International Decade for Action, Water for Life, and stated that the period would commence on World Water Day, March 22, 2005.53 The Resolution further stated that the goals of the Decade should include “a greater focus on

(iv) reducing child mortality, (v) improving maternal health, (vi) combating HIV/AIDS, malaria, and other diseases, (vii) ensuring environmental sustainability, and (viii) developing global partnership for development. The goal of reducing by half the proportion of people without sustainable access to safe drinking water is actually part of the seventh goal of ensuring environmental sustainability. The other part of this goal relates to integrating the principles of sustainable development into country policies and programs and reversing the loss of environmental resources. It is worth noting that water is a central element to the first goal of eradicating extreme poverty and hunger, because most poor people live in dry areas, and because water is an essential element for growing food for eradicating hunger. It is also worth noting that water is quite relevant to the fourth goal (reducing child mortality), and the fifth goal (improving maternal health). Indeed, water-related diseases are a major problem, particularly in the developing world, and are thought to have “caused 3.4 million deaths in 1998, more than half of them children. Other estimates are even higher, particularly for diarrhoea.” See William J. Cosgrove & Frank R. Rijsberman, supra n. 2 at 4. The World Health Organization (WHO) and the United Nations Children’s Fund (UNICEF) state that diarrhea has killed more children in the last 10 years than all those lost to armed conflict since World War II, and that a child dies every 15 seconds from diarrhea, caused largely by poor sanitation and water supply. See WHO and UNICEF Joint Monitoring Program on Water Supply and Sanitation, Assessment 2000 Report. In Part IV of the Millennium Declaration, dealing with Protecting Our Common Environment, the parties resolved in paragraph 23 to “stop the unsustainable exploitation of water resources by developing water management strategies at the regional, national, and local levels, which promote both equitable access and adequate supplies.”

50. the Johannesburg Summit, http://www.johannesburgsummit.org. It is unfortunate that the Millennium Development Goal with regard to water missed the issue of sanitation. The Johannesburg Summit has corrected this oversight by adding sanitation to this goal, thus underscoring the importance of integrating water and sanitation. It should also be recalled that the Mar del Plata Water Conference addressed both water and sanitation.

53. The General Assembly of the United Nations decided on December 22, 1992 (A/Res/47/193), “to declare 22 March of each year World Day for Water, to be observed starting in 1993, in conformity with the recommendations of the United Nations Conference on Environment and Development contained in chapter 18 of Agenda 21.” See id., paragraph 1. The Resolution further invited the States “to devote the Day, as appropriate in the national context, to concrete activities such as the promotion of public awareness through the publication and diffusion of documentaries and the organization of conferences, round tables, seminars and expositions related to the conservation and development of water resources and the implementation of the recommendations of Agenda 21.” See id., paragraph 2.
water related issues, at all levels, and on the implementation of water related programs and projects . . . in order to achieve internationally agreed water related goals . . .”

The resolutions emanating from the various water conferences and forums vacillated between treating the issue of access to water as a basic need and as a right, but no attempt was made to define either term, or to distinguish them from one another. The term “need” implies some sense of charity, and represents the recipients as passive beneficiaries, whereas “right” conveys a sense of legal entitlement, which should, in turn, result in a corresponding duty. Of particular note for this Study is the fact that those resolutions and declarations, except the United Nations General Assembly Resolution on the Right to Development discussed above, stop short of an explicit proclamation of a human right to water. The debate on the issue of the human right to water, and how to give effect to it, was heightened in November 2002, with The Committee on Economic, Social and Cultural Rights declaration that “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”

2.3. The Human rights to Water

The foundational human rights documents, including International Bill of Rights—the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on

54. supra n. 45, paragraph 2.
55. Reference should also be made in this connection to two other international conferences. The first is the Water and Sustainable Development International Conference that was held in Paris, France, in March 1998. The Programme of Priority Actions underscored the fact that “water resources are essential for satisfying human needs, health, food production, and the preservation of ecosystems. . . .” For the Programme of Priority Actions, http://www.waternunc.com/gb/dec1fingb.htm. The second is the Ministerial Session of the International Conference on Freshwater that was held in Bonn, Germany, in December 2000. The Ministerial Declaration of the International Conference on Freshwater that was held in Bonn, Germany, in December 2000. The Ministerial Declaration of the Bonn meeting pronounced safe and sufficient drinking water and sanitation as basic human needs. The Bonn Ministerial Declaration, http://www.water2001.de/outcome/MinistersDeclaration/Ministerial_Declaration.pdf. At the regional level, “The Abuja Ministerial Declaration on Water—A Key to Sustainable Development” was issued on April 30, 2002, by the African ministers responsible for water resources in their respective countries, at the end of their meeting in Abuja, Nigeria. The Abuja Declaration stated in paragraph 4 (a) that “An adequate supply of freshwater is the most important prerequisite for sustaining human life, for maintaining ecosystems that support all life, and for achieving sustainable development.” For the Abuja Ministerial Declaration, http://www.thewaterpage.com/Documents/amcow_declaration.pdf. Salman M. A. Salman, the Abuja Ministerial Declaration—A milestone or Just another Statement? 27 water International 442 (2002).
56. Paragraph 2 of General Comment No. 15, infra n. 198.
Economic, Social, and Cultural Rights (“ICESCR”)—did not include specific reference to the human right to water. While multiple UN bodies affirmed the right to water with resolutions and General Comments in the first decade of this century, it was not until the United Nations General Assembly adopted Resolution 64/292 in July 2010 that a high level UN body formally recognized the human right to water. In September of that year, the Human Rights Council quickly followed suit, declaring that the human right to water is legally binding.

March 1977 Mar del Plata UN Water Conference

The Action Plan from the United Nations Water Conference recognised water as a right for the first time declaring that “All peoples, whatever their stage of development and social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs”.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), December 1979

The Convention sets out an agenda to end discrimination against women, and explicitly references both water and sanitation within its text. Article 14(2)(h) of CEDAW provides: “States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: … (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication”. This right has been interpreted not to require equal access to water, but a right to clean water. However, CEDAW’s Article 14, however, only applies to rural women, and is not universally applicable.

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61 Ibid.
63 Id. at art. 14(2)(h).
**Convention on the Rights of the Child, 65 November 1989**

The Convention explicitly mentions water, environmental sanitation and hygiene. **Article 24(1) 66** of the Convention on the Rights of the Child (CRC) addresses water, recognizing the right of the child to the highest attainable standard of health.

**Article 24(2) 67** states:

“States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: …

c) 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; …

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents”

The Convention on the Rights of the Child directly links safe drinking water to health and includes the right to water under the right to health.

**International conference on water and Sustainable Development. Dublin Conference, 1992**

**Principle 4** of the Dublin Conference states that “… it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price”. 68


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66 *Id.* at art. 24(1).
67 *Id.* at art. 24(2).
Chapter 18 of Agenda 21 endorsed the Resolution of the Mar del Plata Water Conference that all peoples have the right to have access to drinking water, and called this “the commonly agreed premise.”


The goal of this document is to provide water security in the 21st Century and to identify the main challenges including: meeting basic needs for access to safe and sufficient water and sanitation, sharing water resources, valuing water, and governing water wisely. It proposes integrated water resources management as a solution, with an emphasis on collective action and inclusion.


Heads of states gathered in New York in September 2000 reaffirmed UN efforts towards a peaceful, prosperous and just world. They resolved to halve the proportion of the world’s people who are unable to access or to afford safe drinking water, 115 and to eliminate the waste and misuse of water resources.


“We the Peoples” became known as the Millennium Development Report. It is former Secretary General Kofi Annan’s report on the status of the world in the year 2000. Water crises are cited across all six subject areas, each accompanied by an appeal from Annan for state action.


70 G.A. Res. 55/2, ¶ 19 (Sept. 8, 2000).
71 U.N. Secretary-General, We the Peoples: The Role of the United Nations in the 21st Century (Millennium Report of the Secretary-General), The United Nations Department of Public Information (2000).
Recognizing the right to water as an economic and social right and specifying key obstacles to a healthy environment and poverty, this report launches the implementation plan on sustainable development to achieve the millennium development goal of safe drinking water. As a concrete measure, it sets a goal to halve the proportion of people without access to safe drinking water.

General Comment No. 15, 2002

The human right to water approach, however, looks at water from a different angle. Instead of focusing on the use of water by states vis-à-vis other states, the human right to water focuses on the use of water by natural persons, either individually or collectively. The effective implementation of the human right to water will provide natural persons with their right to water in terms of quality, quantity, affordability, and access. This is explained in the definition provided by the Committee on Economic, Social, and Cultural Rights, which defines the human right to water as a right to “sufficient, safe, acceptable, physically accessible and affordable water.”


Following it resolution 55/196 in 2000, which proclaimed the year 2003 the International Year of Freshwater, the UN General Assembly proclaimed the period from 2005 to 2015 the International Decade for Action, “Water for Life.”


The Human Rights Council “Request the Office of the United Nations High Commissioner for Human Rights, taking into account the views of States and other stakeholders, to conduct, within existing resources, a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, which includes relevant conclusions and recommendations thereon, to be submitted prior to the sixth session of the Council”.

This resolution appointed an independent expert on the issue of “human rights obligations related to access to safe drinking water and sanitation.”

**Human Rights Council Decision 2/104, November 2006**

The Political Declaration of the Summit states “We welcome the Johannesburg Summit focus on the indivisibility of human dignity and are resolved through decisions on targets, timetables and partnerships to speedily increase access to basic requirements such as clean water, sanitation, energy, health care, food security and the protection of biodiversity”.

The Programme of Action of the UN International Conference on Population and Development affirms that all individuals: “Have the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation.”

**Convention on the Rights of Persons with Disabilities, December 2006**

Article 28, defines the right of persons with disabilities to an adequate standard of living and states “2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures: (a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs”.

**Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, August 2007**

Following decision 2/104 of the Human Rights Council, the Report from the High Commissioner for Human Rights states that “It is now the time to consider access to safe drinking water and sanitation.”

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77 Available at www2.ohchr.org/english/issues/water/docs/HRC_decision2-104.pdf
78 Available at www.un.org/disabilities/convention/conventionfull.shtml
drinking water and sanitation as a human right, defined as the right to equal and nondiscriminatory access to a sufficient amount of safe drinking water for personal and domestic uses… to sustain life and health”.

Through this resolution, the Human Rights Council decides “To appoint, for a period of three years, an independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation”.

**Human Rights Council Resolution 7/22**

This resolution appointed an independent expert on the issue of “human rights obligations related to access to safe drinking water and sanitation.

In this resolution, the Human Rights Council welcomes the consultation with the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, acknowledges the independent expert’s first annual report and, for the first time, recognizes that States have an obligation to address and eliminate discrimination with regard to access to sanitation, and urges them to address effectively inequalities in this area.

**UN General Assembly Resolution A/RES/64/292, July 2010**

For the first time, this UN Resolution formally recognizes for the right to water and sanitation and acknowledges that clean drinking water and sanitation are essential to the realization of all human rights. The Resolution calls upon States and international organizations to provide financial resources help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all.

**Human Rights Council Resolution A/HRC/RES/15/9, September 2010**

This resolution is a follow-up to General Assembly Resolution 64/292. It affirms and clarifies state obligations to work toward the realization of this right, both in practice

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80 Id. Sec. 2
and in law. It emphasizes the link between discrimination against disadvantaged groups and lack of access to water, and further identifies the right to health, life and human dignity as sources for the right to water. This resolution situates the right to water as deriving from the right to an adequate standard of living. As the right to water is derived from various human rights law instruments, including the ICESCR, CEDAW, and CRC, the resolution reaffirms that the human rights to safe drinking water and sanitation are essential for the full enjoyment of life and all human rights.

**Human Rights Council Resolution A/HRC/RES/16/2, April 2011**

In this resolution, the Human Rights Council decides “to extend the mandate of the current mandate holder as a special rapporteur on the human right to safe drinking water and sanitation for a period of three years” and “Encourages the Special Rapporteur, in fulfilling his or her mandate… to promote the full realization of the human right to safe drinking water and sanitation by, inter alia, continuing to give particular emphasis to practical solutions with regard to its implementation, in particular in the context of country missions, and following the criteria of availability, quality, physical accessibility, affordability and acceptability”.

**World Health Assembly Resolution 64/24: Drinking-Water, Sanitation and Health (May 24, 2011)**

The WHO’s primary decision making organ proclaimed, in this resolution, its adoption of resolutions GA 64/292 and HRC 15/19. It further urged states to make sure that their national health strategies contribute to the fulfillment of the water-and-sanitation-related Millennium Development Goals.

**UN Human Rights Council Resolution 24/18 (September 27, 2013)**

This resolution reaffirms that “the right to safe drinking water and sanitation is derived from the right to an adequate standard of living.” Additionally, the accessible and affordable water and sanitation should be delivered for personal and domestic use, without discrimination.

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83 World Health Organization, Res. 64/24 (May 24, 2011).
UN Human Rights Council Resolution 27/7: The Human Right to Safe Drinking Water and Sanitation (September 25, 2014)\textsuperscript{85}

This resolution adds the right to “sanitation in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity.”

2.4 \textbf{Summary:}

The steady growth in world population, urbanization, and hydrological variability, along with the rampant spread of environmental degradation have all increased the pressure placed on the finite water resources available to mankind. This, in turn, has sharpened the competing demands for water, and prompted a rethinking of, and an extensive debate on, some of the basic issues related to water. The human right to water is one of the core issues of this debate, and has been on the global agenda since the 1970s. However, the resolutions and declarations that have been adopted since that time at the different United Nations conferences and other conferences and forums, have vacillated between declaring water a basic human need and a human right. It is in this context that General Comment No. 15, recognizing a human right to water, has its relevance and importance. Indeed, the Comment has heightened and energized this debate, adding both legal and policy dimensions.

The underlying thesis of this Study is that there exists in international law today an emerging human right to water. We identify that right in a variety of instruments, both international and domestic. In some of those instruments the right is provided for explicitly, in others implicitly; some are legally binding, and others remain largely aspirational. One conclusion we draw is that there is an evolving relationship between the “parallel” developments at the international and domestic levels, since both exist in a complex interrelationship, and are not mutually exclusive. Rather, they are complementary, such that they can all be viewed as supporting the emergence of a human right to water.

In articulating this thesis we have focused on developments related to the right to water that have occurred at three distinct, though we argue, intertwined, levels. First, and most importantly, are the developments at the level of international conventions. General Comment No. 15 was issued in the context of a legally binding treaty, the ICESCR, and

the human right to water is recognized based on some of its provisions. Other treaties in this context include the Convention on the Rights of the Child as well as the International Convention on the Elimination of All Forms of Discrimination against Women. The second level is the propagation, over the last several decades, of a significant body of soft law on the right to water and on water as a vital need. This body of soft law includes the wide array of resolutions, declarations, and action plans of the different conferences and forums, as well as the resolutions of the United Nations General Assembly. Indeed, the Committee on Economic, Social and Cultural Rights reached as far back as the Universal Declaration of Human Rights and highlighted some of its provisions to argue for the recognition of the right to water. The third level concerns the developments that have occurred in parallel with the latter, at the level of domestic constitutions and legislation in some countries around the world establishing a human right to water.

Taking these levels of development in turn, we should first address General Comment No. 15, which remains the clearest and most explicit recognition of the human right to water in international law. While General Comments by the Committee cannot be said to create or even identify new rights, they are properly viewed as offering more than mere guidance to States Parties to the ICESCR. It is therefore critical to assess the potency of the General Comment in the context of this legally binding instrument that is the ICESCR. The Comment should also be considered in the context of an institutional and procedural setting that gives it special significance and legitimacy. At the institutional setting, the gradual emergence of the Committee on Economic, Social and Cultural Rights from a mere group within the ECOSOC to a full-fledged independent body, akin to the Treaty body under the ICCPR, provides considerable legitimacy and weight to the General Comments this Committee issues. From the procedural and substantive points of view, and in the absence of an authoritative mechanism for settling potential disputes arising from divergent interpretations of the ICESCR’s provisions, and given the dearth of commentary by States as to the meaning of the ICESCR’s provisions, the practice of issuing General Comments has special legal significance and weight.

General Comment No.15 undoubtedly possesses the requisite elements for the recognition and clarification of the human right to water as part of the obligations of States Parties under the ICESCR. Indeed, as a substantive legal matter, the Committee has a duty to explain and elaborate economic, social, and cultural rights under the ICESCR for the States Parties, as well as the global community. This is one of the seminal roles of the Committee, and one of the fundamental purposes of General Comments.
It is worth noting that the General Comment is not limited to simply exhorting the States Parties to realize the right to water, but has grounded the right in three basic principles. The first of these principles is the derivation, or inference, of the right to water from Article 11 of the ICESCR regarding adequate standard of living, including food, as well as from Article 12 of the ICESCR regarding the enjoyment of the highest attainable standard of physical and mental health. The second principle is that of the centrality and necessity of water to other rights under the ICESCR, such as the right to adequate housing and food, and the right to life and liberty. The third principle is the prior recognition of the right in other declarations and resolutions, including those issued at Mar del Plata, Dublin, Rio, and in the Millennium Development Goals. They also include resolutions adopted by the General Assembly of the United Nations, and a number of conventions, including the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, as well as the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses. Prior recognition incorporates references made by the Committee to the right of water in earlier General Comments, such as General Comment No. 6 on the economic, social, and cultural rights of older persons.

The second relevant level of international recognition of the right to water, after the above-quoted conventions, is that of soft law. This would include the different resolutions and declarations that have been adopted since the 1970s at the various United Nations and other conferences. The vacillation of those conferences, between declaring water as a basic human need or a human right, coupled with the fact that as declarations and resolutions these instruments do not possess formal binding effect, has resulted in their practical relevance being weak. Thus, while they undoubtedly have value as soft law, and while they may even have relevance so far as the emergence of principles of customary international law, they lack a clear “line of principle” or legal effect, and accordingly, do not bind per se.

General Comment No.15 has relevance in this connection, too, serving important “soft-law purposes” in addition to its clear legal purposes of direct relevance to the States Parties of the ICESCR outlined above. First, the General Comment offers some significant measures of visibility of the right to water in the wider international context, as well as some definition and precision. This is indeed due to the centrality of water to

86. It is indeed interesting to note the detail and rigor the Committee employed in its attempt to recognize and explain the right to water, which clearly indicates that the Committee has fully recognized the legal and practical implications of General Comment No. 15.
the other rights under the International Bill of Human Rights. In addition, the Comment offers renewed impetus to international organizations and civil society to coordinate and move forward with their efforts to translate soft law commitments at the domestic law level.

Similarly, General Comment No. 15 contributes to international momentum by offering considerable legal and moral support to the global efforts aimed at attaining the Millennium Development Goal related to water. The Comment should also buttress the two General Assembly resolutions on the Right to Development, one of which includes explicit references to the human right to water, as well as the resolution regarding the International Year of Freshwater. It should also strengthen and be strengthened by the General Assembly resolution on “International Decade for Action, ‘Water for Life’ 2005–2015,” which proclaimed the main goal of the Decade as a greater focus on water-related issues in order to achieve the Millennium Development Goal related to water and sanitation by the year 2015. The shortcomings of the Comment discussed earlier, namely the suggestion that affordability could mean providing water free of charge, and the failure to address the issue of users’ participation in the operation, management, and maintenance of water resources, as well as the failure to address the duties of those on whom the right is conferred, should in no way affect the legal or policy value of General Comment No. 15.

A third development that complements the two developments of conventions and soft law instruments, is the emerging recognition of the human right to water in domestic legal contexts in some countries, such as South Africa, Chile, and Armenia. The actions in those countries, such as the guarantee of a certain amount of water, or provision of water stamps, to a certain category of needy people, provide innovative examples of how the human right to water can be reflected in domestic regulatory frameworks. The significance of these domestic legal developments for the recognition and realization of the human right to water is important. First, they mirror, or at least reflect, in a complementary manner, the growing international consensus on the need to take legal action with respect to water resources, with special provision being made for the poor and vulnerable. Second, they are the actions of States effectuating obligations under the ICESCR and other more general “soft” international law commitments. In this regard, they set international precedents and provide general guidance for other states to emulate and replicate.

In conclusion, it is submitted that General Comment No. 15, recognizing a human right to water, provides further evidence that there is an incipient right to water evolving
in public international law today. The General Comment derives this right from certain provisions of the ICESCR, thereby supporting the existence of an obligation on the part of the States Parties to the ICESCR to realize such a right. In this, the Comment buttresses the already voluminous body of soft law declarations and resolutions, as well as a growing number of domestic law provisions related to the human right to water. Perhaps even of greater significance is that General Comment No. 15 arguably heralds the emergence of a principle of international law on the human right to water.