

# Chapter 4

## Water as a Human Right in the Global South: Ethical, Legal and Sociopolitical Dimensions

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**Abstract** This chapter seeks to elucidate the scope and limitations of the international recognition of the human right to water, and the course that States must follow in order to fulfill the commitments they have assumed. It analyzes the links among the human right to water, water security, and environmental justice, given that the existence of a water crisis that requires a human-oriented approach and solution has been recognized. The chapter is divided into three parts: the first discusses the water crisis and its relation to water security and the human right to water, while the second focuses on the ethical and legal dimensions of the human right to water and postures that favor, or oppose, its recognition. Finally, the third part focuses on the sociopolitical dimension of the human right to water; that is, the role of the State in complying with and/or violating this right, and the defensive actions taken by civil society in Latin American countries (*i.e.*, those in the Global South).

**Keywords** Human right to water • Water security • Environmental justice • State • Latin America

### 4.1 Introduction

Important advances in the recognition of human rights have been made internationally from the mid-twentieth century to the present, in particular regarding rights considered second- and third-generation, which include the conception of water as essential for life, human wellbeing, food production and development. However, it was only with the political recognition of the social and environmental impacts of the dominant economic model –*i.e.*, the water crisis– that advances could be made in conceiving the right to water as expressed in General Comment 15 of the United Nations' International Covenant on Economic, Social and Cultural Rights, approved

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in 2002. That recognition derived from the idea of development, which implies a more comprehensive perspective of the right to water, one that protects individuals, communities and social groups. This notion is not restricted to supplies of drinking water and sanitation issues, but also recognizes the importance of water for food production, the functioning of ecosystems and peoples' development.

In addition, it is important to highlight the role of social movements and civil organizations in the defense of water from the international pressures of transnational organisms like the World Bank, which conceive water as an economic asset valued as a commodity, and so seek to advance towards its privatization and the assignment of property rights to end-users (eg. households, services, agriculture, industry). Particularly noteworthy in the movement to have water recognized as a human right was the leadership of the Bolivian government (in the aftermath of the social struggles that opposed the privatization of water in Cochabamba and Altos-La Paz) at the Fourth World Water Forum held in Mexico in 2006, and later at the United Nations (UN). The resolution was finally approved by the UN's General Assembly in July 2010; thus recognizing the rights to drinking water and sanitation as essential for the full enjoyment of life and the exercise of all other human rights. Nations and international organizations were summoned to provide financial resources and propitiate increased technological capacity and transference in and to developing countries to provide populations with affordable access to drinking water and sanitation.

At the international level, this constitutes a significant improvement because signing countries were formally committed to adopting concrete, gradual measures to make the human right to water a reality. To achieve this goal, nations must design strategies that include: the necessary legal reforms of their constitutions and corresponding water legislation to recognize this right; the application of public policies and programs to provide drinking water and sanitation; and the assignment of technological and financial resources for the projects and infrastructure required. Once ratified, compliance is compulsory and no backward steps are accepted except in extraordinary situations, such as economic crises or political instability, when States that require it may receive international aid. Moreover, violations of water rights through omission or commission must be processed judicially to impose admonishments or sanctions for non-compliance.

In light of the foregoing, this chapter seeks to elucidate the scope and limitations of the international recognition of the human right to water, and the course that States must follow in order to fulfill the commitments they have assumed. It analyzes the links among the human right to water, water security, and environmental justice, given that the existence of a water crisis that requires a human-oriented approach and solution has been recognized. The chapter is divided into three parts: the first discusses the water crisis and its relation to water security and the human right to water, while the second focuses on the ethical and legal dimensions of the human right to water and postures that favor, or oppose, its recognition. Finally, the third part focuses on the sociopolitical dimension of the human right to water; that is, the role of the State in complying with and/or violating this right, and the

defensive actions taken by civil society in Latin American countries (*i.e.*, those in the Global South).<sup>1</sup>

## 4.2 The Water Crisis, Water Security and Human Rights

The water crisis is associated with processes of urbanization and demographic dynamism, as well as economic growth and industrialization, all of which generate greater demands on water and have profound repercussions on the availability and quality of both surface water and groundwater. It is also associated with social inequality in rural and urban areas that leads to limited access to drinking water and sanitation, especially for the poorest and most marginalized sectors of the population.

But this crisis also involves more intense competition for the use of water, which generates conflicts over control among social, economic and political stakeholders, all of whom have different valuations of this resource. Some sectors see water as a shared asset of high social, cultural and ecological value; others perceive it as an economic good (commodity) that is subject to private ownership and market laws, while still others see it as a political resource, a source of power and control. In many cases, such conflicts cross national borders to generate diplomatic and political tensions at the international level.

Complicating this scenario is the reality of environmental degradation (deforestation, water pollution), the loss of ecosystem services related to water (recharge of aquifers, flood control), alterations in patterns of precipitation, and the occurrence of extreme events (droughts, flooding) due to global climate change. Therefore, increasing vulnerability of both populations and ecosystems can be foreseen as a consequence of climate change, since there will be greater uncertainty in water availability, alterations of agricultural cycles, and irreversible ecological degradation.<sup>2</sup>

But this is also associated with deficient governance, revealed in the incapacity of States to resolve the demands and conflicts over water that involve populations and economic activities, from the local to the transnational level. This can be explained by the weakness of existing juridical and institutional frameworks, and by financial and technological restrictions that impede the adequate management of this resource.

In response to the water crisis associated with such global processes as climate change, economic globalization, urbanization and governance, several visions have

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<sup>1</sup>The Global South largely corresponds to the **Third World**: defined as the poorer, less-developed region of the world.

<sup>2</sup>According to UN Water (2012: 7): “as water demand and availability become more uncertain, all societies become more vulnerable to a wide range of risks associated with inadequate water supply, including hunger and thirst, high rates of disease and death, lost productivity and economic crises, and degraded ecosystems. These impacts elevate water to a crisis of global concern.”

emerged that attempt to approach this as an issue of national and international security, since human populations, ecosystems and life itself are at risk. In this regard, the Ministerial Declaration of the Second World Water Forum (2000) declared the importance of achieving water security in the face of the looming water crisis through advances designed to overcome the following challenges:

- *“Meeting basic needs: to recognize that access to safe and sufficient water and sanitation are basic human needs and are essential to health and well-being, and to empower people, especially women, through a participatory process of water management.*
- *Securing the food supply: to enhance food security, particularly of the poor and vulnerable, through the more efficient mobilization and use, and the more equitable allocation of water for food production.*
- *Protecting ecosystems: to ensure the integrity of ecosystems through sustainable water resources management.*
- *Sharing water resources: to promote peaceful co-operation and develop synergies between different uses of water at all levels, whenever possible, within and, in the case of boundary and trans-boundary water resources, between states concerned, through sustainable river basin management or other appropriate approaches.*
- *Managing risks: to provide security from floods, droughts, pollution and other water-related hazards.*
- *Valuing water: to manage water in a way that reflects its economic, social, environmental and cultural values for all its uses, and to move towards pricing water services to reflect the cost of their provision. This approach should take account of the need for equity and the basic needs of the poor and the vulnerable.*
- *Governing water wisely: to ensure good governance, so that the involvement of the public and the interests of all stakeholders are included in the management of water resources” (Second World Water Forum 2000).*

In recent years, the notion of water security has been expanded. Here, the concept developed by United Nations Water (UN Water) is particularly relevant in terms of achieving sustainable management of the water cycle to benefit both human wellbeing and ecosystem preservation, because it offers a comprehensive, holistic formulation that links two key dimensions: one human (sustenance, wellbeing, socioeconomic development), the other biophysical (water quality, extreme climatic events, ecosystems). In other words, it entails satisfying basic needs related to water supplies, protecting water quality from pollution, and managing conflicts from the individual to group levels, and from the local to international scales. UN Water (2013) defines water security as:

...the capacity of a population to safeguard sustainable access to adequate quantities of acceptable quality water for sustaining livelihoods, human well-being, and socio-economic development, for ensuring protection against water-borne pollution and water-related disasters, and for preserving ecosystems in a climate of peace and political stability. This definition implies that water is managed sustainably throughout the water cycle and is done so through an inter-disciplinary focus, so that it contributes to socio-economic development

and reinforces societal resilience to environmental impacts and water-borne diseases without compromising the present and future health of populations and ecosystems. Achieving water security requires allocation among users to be fair, efficient and transparent; that water to satisfy basic human needs is accessible to all at an affordable cost to the user; that water throughout the water cycle is collected and treated to prevent pollution and disease; and that fair, accessible and effective mechanisms exist to manage or address disputes or conflicts that may arise. The concept operates at all levels, from individual, household and community, to local, sub-national, national, regional and international settings, and takes into account the variability of water availability over time. (UN Water 2013: 1).

This requires recognizing the fact that water, ecosystems and society are closely-linked, and the importance of protecting the biophysical environment and populations to ensure sustainable development, such that the rights of both humans and nature herself must be protected for the sake of present and future generations.

From an ethical standpoint, water security is linked to the human right to water when emphasis is placed on protecting individuals and groups (and, hence, also human dignity), satisfying essential needs, and guaranteeing water supplies through the sustainable management of ecosystems. In this regard, water security becomes feasible to the extent that countries protect both nature's and society's rights to water, harmonize economic, social and environmental objectives, reorient production and consumption patterns to adhere to a rationality of sustainability, and foster solidarity through international cooperation and compliance based on agreements of global importance (eg. regarding climate change).

It is important to mention that recognizing the human right to water does not guarantee, in and of itself, a solution to the water crisis, nor greater water security in individual nations (UN Water 2013), because the problems associated with water are complex and by no means restricted to a purely legal dimension (eg. social inequalities, governance and globalization).

The formal recognition of a human right to water and sanitation will not in itself alter the realities on the ground, such as water scarcity, polluted wells and rivers, poor governance, a lack of investments in infrastructure, or the prevalence of inequalities. Nevertheless, it has already generated political will, providing a framework for development, conflict resolution, and accountability in the water services sector. (UN Water 2013: 12)

In relation to this we know of several contrasting cases: local initiatives that contribute to achieving water security, though with no explicit recognition of the human right to water; and citizen-based experiences of applying this right that ensure water security by protecting the requirements of the population (Argentina and South Africa, among others). But there are also examples of ecosystem deterioration when priority is given to the demand for water by urban populations and the development of economic activities (eg. irrigation, mining, industry) that affect water security in transboundary regions and watersheds (eg. construction of hydroelectric dams and water transfers between basins).

For purposes of this section, we exemplify only the first case by discussing how one indigenous region in Mexico characterized by high levels of poverty and a severe scarcity of water, achieved greater water security through a process of social participation and organization by the population with the support of NGOs.

The “Water Forever Program” (*Programa Agua para Siempre*) introduced appropriate technologies into a sociocultural and ecological context in the indigenous Mixtec region that led to the restoration of severely degraded watersheds and the generation and harvesting of water to improve supplies for the population and food production for household consumption. This was achieved during a period in which the Mexican State had not yet included the human right to water in its Constitution. The actions performed by this Program contributed to greater water security in the region by satisfying social needs while also respecting the human dignity of the indigenous population.

### 4.3 The Human Right to Water: Ethical and Legal Dimensions

#### 4.3.1 Ethical Dimension

According to Chociey and Adeel (2012: 123), human rights belong to a class of moral rights for they represent the minimum standards of acceptable treatment to which individuals are naturally entitled: “These rights can be taken up within legal frameworks, as legal rights. When this happens, issues of fundamental moral concern become translated into a paradigm where citizens become rights-holders and governments become duty-bearers.”

It is in this sense that the ethical dimension becomes central when referring to human rights, because it implies recognition of all aspects of human dignity; *i.e.*, the rights to life, wellbeing, freedom, self-determination, and development. This includes both individuals and groups since the fundamental human rights are moral rights that take precedence over legal ones (Murillo 2014).

These fundamental rights are born of social demands and struggles for their effective vindication as guarantees that have been sustained throughout history by ethical values (eg. struggles against slavery and colonialism that seek the freedom and self-determination of peoples). Also, the great tragedies that humanity suffered during the twentieth century (world wars, genocides, famines) propitiated transit from a moral to a legal recognition of human rights through binding international agreements that oblige States to incorporate them into their legal frameworks, policies, and national programs. The Universal Declaration of Human Rights proclaimed by the United Nations in 1948 followed these guidelines.

In the case of water, the ethical dimension is associated with human dignity and the right to life, given that the availability of water is a basic need of all individuals and groups. Access to water of adequate quality and in sufficient amounts will make it possible to guarantee human health and wellbeing. In this regard, Gleick (1999) states that the correct approach to the human right to water is to satisfy the basic needs for domestic uses (consumption, personal hygiene, food preparation). Therefore, to lead a dignified life, every person must be included in this

basic condition of a guaranteed minimal availability of water, which means that excluding individuals and groups from this essential right is morally unacceptable, whether it be due to economic, political or cultural factors. Chociejski and Adeel (2012), meanwhile, posit that the right to water is, by definition, a welfare right, while many other authors have argued that access to water is a pre-condition for human dignity (eg. Resolutions of the UN General Assembly and the UN Human Rights Council state this premise explicitly).

Furthermore, Jennings et al. (2009) propose seven ethical principles that must be included in water management: equal respect for human dignity; equity; proportionality; solidarity; the common good; a right relationship or responsible stewardship; and inclusive, deliberative participation. These authors state that achieving human dignity must focus on satisfying the basic needs of promoting human health and wellbeing, a concept closely-linked to human rights.

Similarly, the ethical notion of water leads us to consider social equity and justice in the sense that the human right to water must be ensured for all individuals, especially the poorest and most marginalized sectors in economic, cultural and political terms. This entails international recognition of the fact that millions of people around the world lack the essential requirements of water to satisfy their needs. In addition, this notion justifies the international aid and cooperation that are required, while exhibiting the responsibility of States to resolve a problem that affects human dignity in their respective countries.

It is important to note that the ethical notion of satisfying essential needs must take into account not only present but also future generations, since water is a finite resource that demands adequate conservation and management. Added to this is the high vulnerability of water to global climate change. For these reasons, recognizing the environmental dimension of water and nature is essential for human survival. In the absence of adequate water quality and quantity it is impossible to satisfy the population's requirements for wellbeing and a dignified life. Thus, conservation of ecosystems and ecosystem services related to water are of crucial importance for humanity.

In this regard, there is a case of environmental ethics that is especially interesting as it goes beyond a purely anthropocentric position: the Law of the Rights of Mother Earth in Bolivia. Legislation that defines Nature as a collective subject of public interest, and declares both Her and life-systems (which combine human communities and ecosystems) as titleholders of the inherent rights stipulated in law. Specifically, it establishes the right to preserve the quality and composition of water to sustain life systems; to protect it from contamination; and to renew the life of Mother Earth and all its components (Plurinational State of Bolivia 2010).

Also on the side of environmental justice are the so-called ethical tribunals (eg. the International War Crimes Tribunal or Russell-Sartre Tribunal and the People's Permanent Tribunal). These are spaces created by society where States prove incapable –through omission or commission– of safeguarding the common good and the interests of individuals and communities. Particularly important is the case of The Latin American Water Tribunal, created in 2000 as an autonomous international body that promotes environmental justice by helping to resolve conflicts involving

water in the region. It is based on the principles of co-existence, respect for human dignity, solidarity among peoples, environmental responsibility, and the sacredness of living forms. Its role is essentially didactic as it seeks to raise consciousness and strives to achieve a political and social consensus to transform ethical-environmental values and effectuate change in the dominant paradigms (Avila 2007; Bogantes 2007).

Tribunals of consciousness depend on the strength of moral condemnation and civil demonstrations that defend the fundamental right of Latin Americans to water of suitable quantity and quality. People have a right, above those of corporate and State powers, to the use and protection of their water resources for generations both present and future. Society must make a conscious decision concerning the importance of managing water to ensure social and environmental sustainability, while remaining alert to public or private projects that currently or potentially affect water systems in Latin America (Bogantes 2007).

### 4.3.2 *The Legal Dimension*

Human rights are essential for the development of individuals and constitute an attempt to respond to failures in the economic and political systems responsible for causing unacceptable human misery. In legal terms, these rights are universal, irrevocable, inalienable, indefeasible, undividable, and interdependent, because they share a common status and hierarchy and are mutually complementary.

The terms used to refer to human rights have varied: individual guarantees; natural rights; fundamental rights; economic, social and cultural rights; and political rights, but a distinction is often made between the concept of human rights and individual guarantees in which the former are general, abstract notions, and the latter individualized, concrete ideas that seek to support and protect people.

The Universal Declaration of Human Rights, a non-binding legal document adopted in 1948, was made legally-binding through two separate treaties in 1966: the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). These international instruments not only define economic, social, cultural, civil and political rights, but also establish general principles, criteria and standards.

Human rights are classified in three generations based on the historical context in which they emerged and their social and formal recognition (Sandoval 2001):

- (a) The first generation includes civil and political rights recognized in the second half of the eighteenth century that incorporated the ideals of the French Revolution and U.S. independence, including equality before the law and freedom of thought, conscience and religion.
- (b) The second generation embraces economic, social and cultural rights conquered through the labor movement, nineteenth-century socialist ideas, and the social struggles of the first half of the twentieth century (eg. the 1910 Mexican



Revolution and the 1917 Russian Revolution). They specify the rights to education, food, housing and employment.

- (c) The third generation corresponds to rights that came to be recognized during crucial events that marked the second half of the twentieth century: the internationalization of conflicts, national liberation movements, the non-aligned countries movement during the Cold War, and environmental degradation. They include the right to peace, self-determination, development, and a healthy environment.

Significantly, the right to water is included in all three generations, since in conditions of inequality it is impossible to guarantee a population's access to water, just as it is impossible to produce sufficient food or supply dignified housing. The same occurs when ecosystems are degraded, as it becomes impossible to enjoy the services they provide in relation to water.

As a result, the notion of the right to water is implied in international legal instruments that are binding on States, including the Geneva Convention for Humanitarian Treatment of Civilians during Wars (1949), the International Covenant on Economic, Social and Cultural Rights (1966), the Committee on the Elimination of Discrimination against Women (1979), and the Convention on the Rights of the Child (1989). Particularly noteworthy is General Comment 15 of the ICESCR (2002) which attempts to specify the human right to water (UN Economic and Social Council 2002; Scanlon et al. 2004).

In addition, non-binding international declarations and programs related to water have been issued since the 1970s: the Mar del Plata Action Plan on Water Development and Management that was adopted at the UN Water Conference in March 1977; Agenda 21 and the Rio Declaration on the Environment and Development, adopted at the UN Conference on the Environment and Development in June 1992; and the Habitat Agenda, adopted at the second UN Conference on Human Settlements in June 1996.

It is important to note that by signing and ratifying such International Resolutions, States are compelled to gradually introduce the legal and institutional changes necessary to design and apply public policies that propitiate compliance with this right in their countries. In this regard, the failure to implement change is not treated as a violation of human rights but, rather, as a sign that the State needs to be encouraged and exhorted to take actions to ensure compliance. At the same time, once these resolutions and their associated commentaries have been signed and ratified, any regression in respect for the rights stipulated therein is considered unacceptable (Gutierrez 2007).

#### **4.3.2.1 General Comment 15 of the International Covenant on Economic, Social and Cultural Rights Regarding Water**

The right to water was recognized in Articles 11 and 12 of the ICESCR, a multilateral treaty that took effect in 1976 and was ratified by 160 countries. To advance this project and provide support to the ICESCR (through comments), the UN appointed

a Committee on Economic, Social and Cultural Rights (CESCR) made up of members of State parties. The Committee's comments, however, only constitute a non-legal, non-binding regulatory framework that –it is hoped– will be applied progressively in each country (Langford and Khalfan 2007; UN Development Program 2006).

In 2002, the CESCR issued General Comment 15, which confirmed the right to water in the following terms: “Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights” (UN Economic and Social Council 2002).

Despite the reluctance of countries such as the United States, Australia and Saudi Arabia to raise water to the category of a human right, General Comment 15 was accepted by nearly 70 countries in 2003. The European Parliament declared water as a human right and several nations, including the Netherlands and Great Britain, reformed their legislation. In the case of Latin America, Uruguay was the first country to approve a referendum adopting water as a human right and to reform its constitution accordingly (Langford and Khalfan 2007).

General Comment 15 States that water must be treated as a social and cultural good rather than as an economic commodity, and that the exercise of the right to water must be sustainable so that future generations may also enjoy it. However, the notion of the human right to water was simplified to make it more acceptable to most States: “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements” (UN Economic and Social Council 2002).

In addition, General Comment 15 establishes a series of normative aspects that must be complied with to guarantee the human right to water (see Box 4.1).

#### **4.3.2.2 Resolutions of the United Nations General Assembly and the Council on Human Rights Recognizing the Human Right to Drinking Water and Sanitation**

According to Langford and Khalfan (2007), the approach to water as a human right is based on universally-valid legal and normative principles that should lead to: (a) governments giving priority to access to water, especially for the poorest and most vulnerable sectors of the population; (b) assuming water supplies as a right rather than as an act of charity or a commodity; (c) assuring that water supplies do not generate discrimination due to socioeconomic status, culture, race, gender, religious belief, political affiliation, or ideology; (d) consultations with, and participation by, society in decision-making processes, especially regarding access to water, supply systems and conservation; and, (e) greater responsibility by national governments, the international community and the private sector to guarantee access to water.

**Box 4.1 General Comment No. 15. Normative Content Right to Water**

General Comment No. 15 establishes a series of normative aspects of the human right to water, including:

- “the right to maintain access to existing water supplies necessary to the right to water,”
- “the right to be free from interference,” including “arbitrary disconnections or contamination,”
- The entitlement to a “system of water supply and management which provides equality of opportunity” for the enjoyment of the right to water,
- Quality and quantity should be determined by “volumetric quantities and technologies”, but “treated as a social and culture good, and not primarily as an economic good,”
- The attainment of the right to water must be conducted in a sustainable way, “ensuring the right can be realized for present and future generations.”

Furthermore, General Comment No. 15 states that, while “the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances,” including:

- *Availability*: Water supply for individuals must be “sufficient and continuous for personal and domestic uses”, including drinking, personal sanitation, washing clothes, food preparation, as well as personal and household hygiene. The quantity should meet WHO guidelines and certain groups or individuals may need more water in consideration of work, climate and health conditions.
- *Quality*: Water must be safe, defining “safe” as “free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health.” It must also be of an “acceptable colour, odour and taste.”
- *Accessibility*: “Water and water facilities and services have to be accessible to everyone without discrimination,” where accessibility is based on four dimensions, including: physical accessibility, economic accessibility, non-discrimination and information accessibility.

Source: UN Economic and Social Council (2002).

From an integrated perspective, the human right to water is considered a necessary condition for achieving adequate standards of living, since it is essential for survival. However, in order to achieve total enforcement and respect for this right, other human rights must be equally guaranteed; such as the right to health, housing and nourishment; to life and dignity; to freedom from discrimination; to participation; to personal and community integrity; and to development

(UN Development Program 2006; UN Economic and Social Council 2002). In other words:

- (a) Without adequate amounts and quality of water no population can be healthy nor can human life and dignity be respected.
- (b) Without water supplies in localities and houses inhabited by deprived people no guarantee exists of the volume required for survival and discrimination, and social exclusion will be fomented.
- (c) Without water available for food production the elementary dietary requirements of the population cannot be satisfied and self-sufficiency in food becomes vulnerable.
- (d) Without social participation in decision-making regarding access, use and management of water, and without respect for personal and communitarian integrities, the emergence of conflicts will be exacerbated, threatening both human life itself and harmony among peoples.
- (e) Without respect for the environment and development it will be impossible to ensure water availability to future generations.

In order to advance towards the recognition of the human right to water as a binding obligation for States, in 2006 the UN Sub-Commission on the Promotion and Protection of Human Rights approved guidelines for the fulfillment of the human right to drinking water and sanitation. Also, the UN Development Program acknowledged the importance of recognizing the right to water as a fundamental human right. In 2008, the Council on Human Rights created the mandate of an “Independent expert on the issue of the obligation of human rights related to access to safe drinking water and sanitation” to clarify the scope and content of such obligations (UN World Health Organization 2010).

Later, reports were made to the High Commissioner for Human Rights on issues of human rights related to drinking water and sanitation, as well as by the Independent expert on the question of the obligatory nature of human rights related to access to drinking water and sanitation. Such actions derived in the explicit recognition of the human right to drinking water and sanitation through the binding resolution adopted by the UN Assembly in July 2010 that is obligatory for all signing States (UN General Assembly 2010).

Here, we must mention the role played by certain international NGOs and grass-roots organizations that pressured for the explicit recognition of the human right to water (eg. Declarations at the Alternative World Water Forums in Mexico, 2006 and Istanbul, 2009); as well as the political lobbying by the Plurinational State of Bolivia, which proposed the wording for the international resolution with the backing of 33 other UN members. That measure received 122 votes in favor, and zero votes against, though 41 countries abstained (including the U.S., Canada and the UK).

In Parfy’s words (2011: 907): “...delegates from abstaining countries said that consensus was lacking, that the declaration was premature and in the wrong forum, and that the meaning of such a right in international law was uncertain.” Also Murthy (2013: 103) states: “The abstaining states, such as the United States and Canada, may have been concerned that the right to water and sanitation was not

explicitly tied to rights recognized in the ICESCR. As a result, the General Assembly resolution could be interpreted as creating new rights. Moreover, the General Assembly resolution was silent on the role of non-state actors and privatization..”

This resolution is based on ethical principles that include: recognizing that millions of people around the world do not have access to drinking water and basic sanitation; accepting that these two requirements must be available equitably to achieve overall human rights; the responsibility of States to promote and protect all human rights and treat them in a comprehensive, fair and equitable manner; and the commitment of countries to achieve the Millennium Development Goals regarding the application of measures that reduce the deficits related to drinking water and sanitation. In summary, the resolution has three main points (UN General Assembly 2010: 2–3):

- *“Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights;*
- *Calls upon States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all;*
- *Welcomes the decision by the Human Rights Council to request that the independent expert on human rights obligations related to access to safe drinking water and sanitation submit an annual report to the General Assembly, and encourages her to continue working on all aspects of her mandate and, in consultation with all relevant United Nations agencies, funds and programmes, to include in her report to the Assembly, at its sixty-sixth session, the principal challenges related to the realization of the human right to safe and clean drinking water and sanitation and their impact on the achievement of the Millennium Development Goals.”*

This resolution was expanded by the Council on Human Rights (UN General Assembly 2011) to recognize that the human right to drinking water and sanitation is derived from the right to adequate living standards, and is closely-related to achieving physical and mental health, and to the rights to life and human dignity. In short, it ratifies essential ethical principles concerning the human dimension of the right to water, while emphasizing the need to focus on local and national perspectives in considering this issue, setting aside questions of international watercourse law and all trans-boundary water issues. It also posits a gradual realization of this right: “States have the primary responsibility to ensure the full realization of all human rights, and must take steps, nationally and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realization of the right to safe drinking water and sanitation by all appropriate means, including particularly the adoption of legislative measures in the implementation of their human rights obligations” (UN General Assembly 2011: 3).

Since then, the UN and other international forums have issued additional resolutions designed to strengthen the concept and content of the human right to water in international jurisprudence. Of particular note are the declarations emitted by the UN Human Rights Council in 2012, 2013 and 2014, and by the General Assembly

in 2013. Meanwhile the ministerial declaration of the Sixth World Water Forum, held in Marseilles in 2012, finally recognized the human right to water after attempts at two earlier forums had failed (Mora and Dubois 2015).

For example, the UN Human Rights Council's Resolution dated September 2012 reaffirmed the primordial responsibility of States to guarantee the full effectiveness of all human rights and to implement the economic and technical measures at the national level and through international cooperation required to progressively transform the established right to drinking water and sanitation into a concrete reality. This will demand taking legislative action to fulfill all obligations related to questions of human rights (Mora and Dubois 2015).

In turn, the Resolution of December 2013 of the UN General Assembly stressed the importance of guaranteeing the gradual realization of the human right to drinking water and sanitation in a non-discriminatory manner by progressively eliminating inequalities of access that affect groups which are vulnerable and marginalized for reasons of race, sex, age, incapacity, ethnic origin, culture, religion or national or social origin, or for any other motive (Mora and Dubois 2015).

In legal terms, recognition of the human right to water and sanitation has profound implications for international law due to the many juridical resolutions and instruments that have been emitted by the UN's multilateral organisms and international conferences and summit meetings. As a result of these developments, the human right to water and sanitation has been incorporated into the system of international law as an enforceable right with a binding character; that is to say that countries are obliged to respect it and to generate the legal and political frameworks necessary for its full realization. Moreover, since they form part of international law, individual States have the obligation to respect, protect and apply all human rights within their territories. At present, the tendency is to work towards the universal recognition of this right through gradual changes in each country's legislation, investments in infrastructure for water supplies and sanitation systems, improvements in jurisprudence to better attend to cases of non-compliance or violations, and greater international cooperation between countries in the Global North and South.

Some authors, such as Pardy (2011, 2012) and Leb (2012), have pointed out that this recognition does not resolve, in the strict sense of this term, problems related to water but, rather, exacerbates others and generates new ones. For example, at the international level countries that suffer water stress could demand support from those that have an excess of water; nations in the Global South could demand greater financial and technological cooperation from countries in the Global North; and in countries that share transboundary basins in which water flows from higher elevations to lower ones, the latter could be affected by measures taken by the former as it seeks to establish this right from a purely local focus. But difficulties could also emerge on the national plane if priority is given to supplying human populations with water by constructing systems that damage ecosystems; if subsidies and other forms of support related to water are given to population sectors that are not necessarily the poorest or most marginalized; or if States receive demands for water that they cannot satisfy due, for example, to drought or low availability. In this regard, Leb (2012) proposes the need for significant advances in international jurisprudence,

including treaties and agreements that clearly define such issues in order to improve water management within and between countries.

Bakker (2007) and Murthy (2013) observe that opposition to the privatization and commodification of water have dominated the discourse of the NGO's and grassroots organizations that promote recognition of water as a basic human right. However, they suggest that this approach to the problem is poorly-framed, because the form of water management (*i.e.*, public *vs.* private) does not determine access to water. There are cases in which private water management –well-regulated by the State– guarantees an adequate service; and others where public management fails to comply with the minimum standards of water quality and quantity for the population. In this regard, Pardy (2011: 909) sustains that:

The dark irony of international water rights is that they could frustrate the very objectives they are intended to achieve. The ideology underlying the campaign for water rights contains two conflicting premises. The first is that governments cannot be trusted to make clean water available. Therefore, norms of international law must be brought to bear upon them. An international right is the means whereby national governments can be held accountable. The second premise is that only governments can be trusted to deal with water, and certainly the private sector cannot. The nature of the proposed rights implies that only governments may provide water, and therefore must do so in the form of water monopolies.

From a positive perspective, recognition of water as a human right constitutes a significant advance to the extent that individual States are capable of generating mechanisms to resolve conflicts, reorient priorities and invest to satisfy the basic needs of populations, and to promote international collaboration and the participation of diverse actors in solving problems related to water. In addition, it is a measure that can constrain the voracity of some actors who seek to commercialize this resource by selling bottled water and privatizing water-supply services, actions that could restrict access by the poorest sectors of the population because of high costs, as occurred in the extreme case of the so-called “water wars” in Bolivia.

Also, recognition enriches jurisprudence by providing formal legal stipulations that protect individuals and groups in cases where their essential human rights are affected, including the right to water (UN World Health Organization 2003). It represents a first step in legal terms, given that States are made responsible for applying and monitoring this right, so that human rights are effectively respected by States and other stakeholders, including transnational corporations. Civil society must also assure fulfillment of the right to water by participating in the consolidation of national legal frameworks, and in the decision-making processes involved in the design and application of public policies and programs regarding water.

#### 4.4 The Human Right to Water: Sociopolitical Dimensions

The system of the United Nations have emitted recommendations that expand the content of the notion of the human right to water and specify the role that States must assume to gradually guarantee compliance at the national level. In this sense,

some countries have effectuated changes in their laws and public policies to enforce this right. But there are other nations where violations of this human right by States and private actors have multiplied. This has propitiated the emergence of social movements that seek environmental justice, especially in the Global South like Latin America, where groups have appeared before national and international instances to demand fulfillment of this human right.

#### ***4.4.1 States and the Human Right to Drinking Water and Sanitation: A Proposal from the United Nations***

As stated by the UN Development Program (UN Development Program 2006) in its Human Development Report, the main challenges of public policy are to provide substance to the notion of water as a human right, and to assume the principles of equity, universality and non-discrimination. Hence, exclusion from water supplies and sanitation based on socioeconomic level, group affiliation, or place of residence would all constitute violations of the human right to water.

According to the United Nations' World Health Organization (2010), due to discrimination, stigmatization, or both, some groups find it especially difficult to exercise their right to water. In order to efficiently protect this right, it is necessary to understand the concrete situation of individuals and groups, especially the most vulnerable ones. States must adopt the necessary positive measures to ensure that certain individuals or groups are not discriminated against through purpose or action. The most vulnerable groups include: the urban and rural poor, women, children, persons with disabilities, refugees and internally displaced persons, and indigenous peoples.

The UN World Health Organization (2010) reiterates the States' primary obligation to protect and promote human rights. These obligations are broadly defined and guaranteed by international human rights treaties that create binding obligations for the States that ratify them. The obligations of States fall into three categories:

- (a) *"The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to water.*
- (b) *The obligation to protect requires States to prevent third parties from interfering with the right to water. States should adopt legislation or other measures to ensure that private actors comply with human rights standards related to the right to water.*
- (c) *The obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to water. States must, among other things, adopt a national policy on water that: gives priority in water management to essential personal and domestic uses."*

The obligation of States to protect human rights includes ensuring that non-state actors do not infringe upon the right to water. Thus, other actors in society (individuals, intergovernmental and non-governmental organizations and businesses) all



have responsibilities in promoting and protecting human rights (UN World Health Organization 2010).

In order to provide a context for the notion of the human right to water and to evaluate the advances made by each country, General Comment 15 of the ICESCR (UN Economic and Social Council 2002) proposed the criteria of availability, quality and accessibility, the latter sub-divided into several indicators (physical, economic, accessibility of information, and no discrimination).<sup>3</sup> These criteria are useful for defining the basic obligations of States regarding the human right to water, which include: guaranteed access to a quantity and quality of water that is sufficient and appropriate for personal and domestic uses and for preventing diseases; and ensuring the right of access to water and to water infrastructure and services without discrimination, above all, for vulnerable or marginal groups.

In cases of violation of the aforementioned criteria, or breaches of basic, specific obligations (as defined by each country), this Comment states that a distinction must be made between a State's inability to fulfill its obligations regarding the right to water and its reluctance to do so. In other words, violations may be due to acts of commission –*i.e.*, direct actions by the State or other entities in the absence of adequate regulation– or to acts of omission, which refer to the failure to adopt appropriate measures to guarantee full enjoyment of the universal right to water, to the absence of a national water policy, or to lapses in enforcing the applicable laws.

In consequence, the evaluation of compliance with international agreements regarding the design and application of public policies and the assignment of social spending to guarantee the human right to water for the poorest and most vulnerable population sectors (indigenous peoples, subsistence farmers, and residents of marginal neighborhoods in cities), makes it possible to assess each State's acts of commission and omission. However, the failure to comply may result in the Federal Executive Branch, or even the Legislative Branch, becoming permanent violators of human rights for not acting in accordance with law and opposing the norms of an overarching hierarchy (Gutierrez 2007).

It is likely that the UN Council of Human Rights will continue to emphasize the responsibility of States to assure full realization of human rights, while insisting that this achievement must be gradual and accompanied by international aid and cooperation in order to achieve the total realization of the right to drinking water and sanitation. Through these means, States must adapt their legislation to make their commitment in this matter explicit. In addition, it points to the important role of States in planning actions conceived as instruments for promoting human rights, including the right to drinking water and sanitation.

In sum, the Council calls on States to make steady progress towards achieving this right through concrete actions and measures in their countries. Undoubtedly, this is a fundamental starting point for evaluating compliance and the General Assembly calls on States to continuously monitor and analyse progress, assess existing policies and programmes, develop comprehensive plans and strategies, bring existing legislation in line with the human right, to ensure transparency and

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<sup>3</sup> See Box 4.1.

the maximum available resources. Furthermore, States ought to provide a regulatory framework which protects and respects the human right, and to provide legal remedies and access to justice (UN General Assembly 2011: 3–4). These policy goals have been echoed in reports by the Special Rapporteur which also contains specific recommendations for States with regard to their obligation to integrate changes in their public policies and planning and financial strategies to make this right a reality (UN General Assembly 2013: 22) as well as a typology of violations (UN General Assembly 2014: 23). Certain recommendations in this report seek to ensure that violations are not only identified, but can be prevented or remedied with the intention to prevent continuous or systematic violations by States and enforce compliance with this human right in their countries through international monitoring and citizen participation (UN General Assembly 2014: 23–25).

Most recently, the UN General Assembly accepted new commitments that have clear implications in relation to public policies for the next 15 years, and are stipulated in the Post-2015 Development Agenda. One of this Agenda's 17 objectives is directly related to the realization of the human right to water, as it proposes ensuring availability and sustainable management of water and sanitation for all people (UN General Assembly 2015: 18–19). It calls on the global community to:

- *“By 2030, achieve universal and equitable access to safe and affordable drinking water for all.*
- *By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations.*
- *By 2030, improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally.*
- *By 2030, substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water scarcity and substantially reduce the number of people suffering from water scarcity.*
- *By 2030, implement integrated water resources management at all levels, including through transboundary cooperation as appropriate.*
- *By 2020, protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes.*
- *By 2030, expand international cooperation and capacity-building support to developing countries in water- and sanitation-related activities and programmes, including water harvesting, desalination, water efficiency, wastewater treatment, recycling and reuse technologies.*
- *Support and strengthen the participation of local communities in improving water and sanitation management.”*

It is hoped that with the UN's recommendations for the countries that have ratified the resolution on the human right to water, and the commitments assumed through the Post-2015 Development Agenda for the realization of this right, that

States will proceed to modify and align their legislation and public policies in the coming years. In this respect, several countries in the Global North and South have explicitly and formally recognized this basic human right in their constitutions and national laws. Moreover, they have enriched jurisprudence by processing concrete cases leading to resolutions in national and international tribunals.

For example, various Latin American nations – Uruguay, Ecuador, Bolivia, Nicaragua, Honduras, the Dominican Republic and Mexico – have included the human right to water in their constitutions, while others (eg. Paraguay, Honduras, Nicaragua) have enacted laws related to water that explicitly include this right. At the level of the application of jurisprudence, countries like Argentina, Costa Rica, Colombia and Mexico have shown advances in some litigation on violations of the human right to water. It is important to point out that Brazil is the only country in this region that has refused to recognize the human right to water, even abstaining from voting on the Resolution of the UN General Assembly in 2010 (Mora and Dubois 2015).

#### ***4.4.2 Civil Society and the Human Right to Water: Some Examples of Violations and Achievements in Latin America***

Changes in the laws are not sufficient if public policies lack a focus on human rights, or if national plans and programs omit full realization of the human right to water, which entails greater funding and concrete actions that benefit the most vulnerable population sectors. But the same can be said if citizens do not have guaranteed access to the tribunals of justice when violations of their human rights occur, or if they are impeded from participating in decision-making and the construction of public policies or laws.

The situation regarding non-compliance of the human right to water in Latin America is reflected in numerous conflicts over this resource in which affected populations have been forced to recur to both legal defense measures and social mobilizations to demand respect for their essential human rights. Here, the role of States has been contradictory: on the one hand, together with the private sector they foment private projects and financial investments that affect people's human rights (for example, open-pit mining, fracking technique to extract natural gas, large hydroelectric dams); while on the other they sign and ratify international resolutions regarding human rights and modify their constitutions and national legislation.

Unfortunately, in the past decade States have restricted access to justice and respect for law to such an extent that affected populations have been forced to take their cases to international instances, either formal (like the UN), or informal (eg. ethics tribunals). The most critical cases in Latin America have occurred in Mexico, Central America, Brazil, Peru and Chile due to the expansion of open-pit mining by U.S. and Canadian companies that has contaminated springs, rivers, lakes and seas, and affected the lands of indigenous and peasant communities.

Indeed, the establishment of the Latin American Water Tribunal is explained by the increase in conflicts over water in the region and the denial of access to environmental justice. From 2000 to 2016, this Tribunal has held 8 international audiences that have documented almost one hundred cases of such conflicts in Latin America. The most alarming situation is in Mexico, where systematic violations of human rights associated with water and the criminalization of social protests have been identified. In 2012, the National Assembly of Environmental Victims (*Asamblea Nacional de Afectados Ambiental*) presented the Mexican case before that Tribunal, signaling federal government agencies (Ministry of the Environment and the National Water Commission, among others) as those responsible for that country's water crisis. In its non-binding verdict, the Tribunal's jury found the following: the incapacity of the State (executive, legislative and judicial authorities) to establish effective mechanisms of access to environmental justice; and a growing deterioration of the human right to water in the country and the insufficiency of its juridical-political mechanisms to stop it. The Tribunal issued an alert because of the levels of social conflict throughout the country and the absence of instruments of citizen participation to channel it (TLA 2012).

In addition to handing down this decision, the Tribunal recommended that the Mexican State should respect laws, procedures, public policies and daily practices related to access to water and the environment to guarantee this as a fundamental human right and as a shared social good. It also emphasized the need to adapt them to the norms of equity, efficiency and sustainability as demanded by the country's Constitution and the International Treaties it has signed and ratified. It further recommended a review of the system for the procuration of environmental justice and the establishment of jurisdictional organs with full administrative and budget autonomy that would be in charge of tutelage and the application of environmental laws in accordance with the principle of the separation of powers sanctioned by the Constitution (TLA 2012).

It is important to mention that the Tribunal based this verdict on international jurisprudence and the universal recognition of the Human Right to Water and the UN Resolution that recognizes this right. It also referred to earlier verdicts formulated at previous Audiences, like those of 2006 and 2007, where many cases from Mexico were heard (TLA 2012).

Finally, at the level of the United Nations, in 2015 the international organization *France Libertés* presented – in writing – the case of the violation of the human right to water and sanitation in Latin America that resulted from the policies governing extractive activities (UN Human Right Council 2015). That text describes the critical situation in various countries, like Mexico, Guatemala and Honduras, due to their policies that regulate the extraction of minerals and natural gas, activities that affect water resources and the human rights of nearby populations (see Box 4.2). With international law on its side, that group issued a series of recommendations to those States which demand that they comply with, and enforce, the human right to water. It also called on the UN's Special Rapporteurs for the human right to water and indigenous rights to pressure States to respect these rights. It ends its presentation with suggestions as to how to advance in these areas (eg. organizing groups to work with transnational corporations and private companies).

### **Box 4.2 Violation of the Human Right to Water and Sanitation in Latin America: A Consequence of Policies Extractive Activities**

*“With the growing scarcity and depletion of natural resources, businesses have to diversify their zones of exploitation but also their techniques. In this struggle for raw materials, Latin American countries are not an exception and they bear the cost of extreme and expensive methods, also known as non-conventional, such as fracking. In December 2013, Mexico decided to put an end to seventy-five years of state energy monopoly on natural resource exploitation to open the sector to new extractive projects based on non-conventional methods. This leads inevitably to intensive water use, with serious consequences for local communities’ fundamental right to water: contaminated surface and ground water rendering it non-potable, increased water stress, competition between different water uses, serious health issues such as poisoning, skin diseases and malformations.*

*In Mexico (in Sierra Norte de Puebla region), in Guatemala (Petén region) and in Honduras, concessions to extractive industries have been awarded in extensive areas. In these countries, local communities have difficulties in expressing their concerns. They are either completely absent in decision making processes or only involved in late stages, the dialogue remaining between the State and businesses.*

*In Latin America, many civil society organizations get together to mobilise around the harm done to their environment and to defend their fundamental rights in States where governments is in collusion with businesses the extractive industries. We denounce the devastating effects of extractivism, which are worsened by an increasing criminalization of social movements protesting about large-scale industrial projects.”*

Source: UN Human Right Council (2015)

## **4.5 Final Comments**

From an integrated perspective, the human right to water is defined as the responsibility of society to guarantee the satisfaction of basic needs for both present and future generations, without affecting ecosystems and hydrologic systems. This implies that State regulation is necessary to reach the goal, together with the participation of private and social stakeholders and actors. This vision seeks to attain international cooperation and solidarity in order to satisfy these needs in all countries, regardless of their economic, political or religious conditions. It also considers environmental aspects by recognizing that satisfying those needs entails protecting the natural base that supports life on the planet.

It is important to emphasize that satisfying basic needs goes beyond guaranteeing an adequate water supply, for the water available must also be of sufficient quality, and access must be open to all people. Likewise, it includes food production

for subsistence, the appropriate use of irrigation water, and the conservation of aquatic ecosystems (lakes, mangrove forests and rivers where fishing is practiced), democratic water management through social participation in decision-making regarding uses and distribution, and the conservation of water resources and ecosystems. It further entails guaranteeing respect for development modalities, lifeways, and community identities in territories with peasant and indigenous populations where the sustainable use and management of ecosystems and water resources depends on uses and customs that preceded state legislation.

While the integrated perspective on water as a human right is an ideal to be reached by society, in practice it has been simplified to satisfying the basic need for clean drinking water. In other words, the complexity and interconnection of water with development, social wellbeing, health and environmental protection, cultural identity, political participation, and self-determination, has been narrowed to just guaranteeing an adequate water supply to satisfy the essential needs of the population. This simplification allows States to assume their commitment to respect the right to water by creating, reforming or improving laws –political and institutional– and implementing mechanisms of compensation and governmental responsibility to guarantee water to the entire population.

Problems arise when States do not comply with international agreements through acts of omission or commission, and thus become permanent violators of human rights; a situation that currently characterizes most Latin American States (especially Mexico) and is reflected in the diversity and frequency of conflicts over water in this region.

The perspective that stresses the importance of complying with international agreements and resolutions concerning the human right to water and sanitation, and of achieving the Post-2015 Sustainable Development Agenda (eg. ensuring the availability and sustainable management of water and sanitation for all), holds that it is essential for States to assign larger budgets to solve the problems of poverty and social marginality (UN Water 2014). By doing so, advances would be made towards forging respect for such essential and elementary rights as access to water for all people, and States would no longer be permanent violators of international agreements and commitments.

Through social pressure and political lobbying it is possible to reorient the acts of the State towards implementing legal measures and public policies that contribute to resolving the essential problems of the population, such as supplies of drinking water. In this regard, the role of civil society and social movements is essential in remodeling the priorities of States towards defending the collective interest and respecting human rights, and it is in that context that ethical tribunals gain relevance as alternative instances of environmental justice and defense of the human right to water.

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