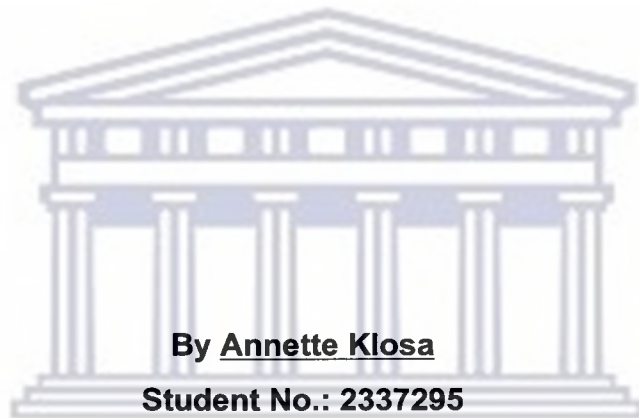


***“The duties of states under international and constitutional law to secure rights of access to water and to protect water sources in situations of armed conflicts”***

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(International Law & Human Rights)**



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## Acronyms

CEDAW	Convention on the Elimination of Discrimination Against Women
CESR	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
ECE	European Commission of the United Nations for Europe
ECEL	The European Council of Environmental Law
ENMOD	Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICWE	International Conference on Water and the Environment
IHL	International Humanitarian Law
IUCN	The World Conservation Union
NATO	North Atlantic Treaty Organisation
NGO	Non Governmental Organisation
UDHR	United Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children Fund
WGIP	Working Group on Indigenous Populations
WHO	World Health Organisation
WSSD	World Summit on Sustainable Development

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## 1. Introduction

### A. First part of the thesis

#### **I. Problem statement**

Water is the basis of our life and without it human beings cannot live for more than a few days. Nearly every function of our body depends on sufficient water. It is for this reason that the lack of access to clean water has a major effect on people's health. Contaminated water, whether consumed or used for cooking purposes, can be detrimental to a person's health. In 2000, the World Health Organisation (WHO) estimated that 1.1 billion people did not have access to sufficient water supply (80 per cent of them are living in rural areas), needing at least 20 litres of safe water per person per day and that an estimated 2.4 billion people were without sanitation.<sup>1</sup> Furthermore, an estimated 2.3 billion people suffer from diseases linked to water each year.

According to the United Nations World Water Development Report, seven billion people in 60 countries could face water scarcity by 2050.<sup>2</sup> In just 20 years, the report predicts that the average supply of water per person worldwide will have dropped by one-third, affecting almost every nation and especially those on the economic edge of poverty. Fresh water accounts for only 2,7% of the earth's water, of which less than half a percent is surface water, to be found in lakes and rivers.<sup>3</sup>

*"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."* With these words, the United Nations Committee on Economic, Social and Cultural Rights (CESCR or the Committee) took the historic step of declaring a human right to water for personal and household use in General Comment No. 15 on the Right to Water, which it adopted in November 2002. But does a human right to water really exist since the General Comment is not legally binding?

Secondly, this study aims at looking at the effects of privatisation of water, especially with regard to the growing sector of privatisation of water in the developing world. For many in the developing world, gaining access to clean and

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<sup>1</sup> According to WHO, The Global Water Supply and Sanitation Assessment 2000, available at: [www.who.int/water\\_sanitation\\_health/Globassessment/Global1.htm#Top](http://www.who.int/water_sanitation_health/Globassessment/Global1.htm#Top)

<sup>2</sup> available at: [www.freshwater2003.org](http://www.freshwater2003.org).

<sup>3</sup> Kiss, A. & Schelton, D. 1991. *"International Environmental Law"*; p. 202.

affordable water can be a daily struggle. In most countries in North America and Europe, there are water taps in every household and people take it for granted that water will flow when they turn the tap. This is not the case in the developing world. In Ghana for example, 78% of the urban poor have no regular access to tap water, compared with 53% of the total population.<sup>4</sup> Inadequate water and sanitation contributes to 70% of diseases in Ghana.

Water privatisation is however also a condition introduced by the World Bank towards many developing countries like Ghana and South Africa for obtaining credits, and it remains an absolute condition amongst the Bank, the IMF and also recently aid agencies such as USAID, Britain's DFID, Germany's GTZ and the EU as a donor agency. The availability of clean and fresh water is one of the most important issues facing humanity today and will be increasingly critical for the future, as growing demands outstrip supplies and pollution continues to contaminate rivers, lakes and streams.<sup>5</sup>

## **II. Points of departure**

In the first part of this mini-thesis, I will explore the legal national and international instruments by analysing if there is a human right to water. I will demonstrate that there are many treaties, which deal implicitly and explicitly with a human's right to water. On the other hand, I will show that there is not a single one which guarantees a human right to water in a legally binding way and I will establish the importance and necessity of recognizing a human right to water. The position which I develop maintains that the recognition of an explicit human right to water would assist in preventing long debates about the existence and the scope of this subject and encourage the international community to translate such a right into specific international and national obligations.

Thus, based on my finding on the present scope of a human right to water, I will examine to what extent the human right to water is justifiable and how states are obliged to fulfil a minimum guaranteed water requirement.

With regard to these findings I will critically investigate the privatisation of water and the consequences thereof. As water becomes an increasingly scarce commodity,

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<sup>4</sup> Report of the international fact-finding mission on water sector reform in Ghana; available at: <http://www.citizen.org/documents/factfindingmissionGhana.pdf>.

<sup>5</sup> UNDP, Millennium Development Goals; available at: <http://www.undp.org/mdg>.

global corporations, many governments and international financial institutions such as the World Bank, argue that water should be allocated through market related mechanisms. They argue that good water quality is to be achieved through privatisation of water, because private companies are more likely to work more economically than the state.

I will show that in most cases, an increase in the price for water is the first step of privatisation. I will then argue that privatization does not necessarily mean to have negative consequences. The state may privatize water services and allow user fees as long as essential water is affordable for everyone. This means that a minimum amount of water has to be guaranteed by the state. As long as this minimum is not guaranteed, I will argue that a state violates international law, although an explicit human right to water does not exist.

## **B. Second part of the thesis**

### **I. Problem statement**

The second part of my mini-thesis will concentrate on the relation between water and conflict and the duties of states to protect water sources in situations of armed conflict under international law. Armed conflicts all over the world, e.g. in Africa, the Balkans, the Middle East and recently in Iraq were and are responsible for enormous suffering of the civilian population after disruption to the water supply.

Water has never been the only reason for armed conflicts, but water facilities are often the target in order to weaken the enemy. The civilian population is, however, the most vulnerable when it comes to disruption of the water supply. The 20th century is characterised by more than 50<sup>6</sup> events that are related to water and conflict and further water related conflicts can be expected.

The events of 11<sup>th</sup> September 2001 have demonstrated how vulnerable countries are to any form of attacks. In this regard, water facilities offer a particularly vulnerable target. A terrorist attack on water supply facilities could cause immense suffering to the civilian population. It is therefore questionable, how international and national law can deal with terrorism and which duties states have in order to combat and prevent terrorism.



## **II. Points of departure**

In this part of the thesis, I examine the connection between human rights and international humanitarian law. I argue that during armed conflicts there is a fundamental connection between human rights and humanitarian law. I will show that international humanitarian law and the corresponding institutions have become central to the protection of human rights. By using different examples I will demonstrate that internal conflicts as well as classic wars between countries have resulted in the destruction of basic infrastructures, including water facilities. In this context I will raise the question if and to what extent international law poses obligations on countries to protect water facilities during armed conflicts. My main focus will be the analysis of a countries duty with regard water facilities during armed conflicts. I will also explore the enforcement mechanisms during armed conflicts and critically investigate the role of tribunals. On the one hand, I will demonstrate their importance by recreating justice and on the other hand I will show their insufficiency as far as they are only able to create justice after incidents, which causes irrevocable damage. The mini-thesis is concluded with an exploration of the threats posed by terrorist attacks. I also explore the legal status for the fight against terrorism and then prove that there is an absence of a comprehensive convention governing the international dimensions of successfully combating the fight against terrorism.

## **C. Methodology**

As a primarily source for my research I will use various international and national treaties. Therefore I will explore books and the Internet to get these texts. Furthermore I will examine international journals, law books and case law to present the different opinions and views on different problems. I will compare the different international instruments with each other and try to demonstrate their positive and negative sites.

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<sup>6</sup> See the water conflict chronology created by Gleick, P.H. from the Pacific Institute; available at: <http://www.worldwater.org/conflict.htm>.

## **2. Duties of states under international and constitutional law to secure rights of access to water**

### **A. Duties of states under international law in general**

States' rights and duties have developed and emerged as a result of many centuries of interstate relations and practise. The rules that legally bind states conduct may be found in international treaties, international custom, as evidence of a general practice accepted as law, general principles of law recognised by civilised nations, decisions of international courts and legal doctrine of the most qualified publicists of the various nations.<sup>7</sup> International Treaties and international custom are the primary sources of international law. The decisions of international courts and arbitral tribunals, and legal doctrine are used as subsidiary sources.<sup>8</sup> International law has a wide reach and is more properly defined as law that deals with the conduct of states and of international organisations, and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.<sup>9</sup>

Many of the existing rules of international law have their roots in international customs. International custom is a legal rule that has evolved from the practice of states. It is not always easy to say what the practice of states is but it is clear however, that a practice does not become a rule of customary international law merely because it is widely followed. The practice must rather comply with the "opinio juris"- a conviction that the rule is obligatory. Both conduct and conviction are required before it can be said that a custom has become law.<sup>10</sup>

To achieve legal security many customary rules have been codified. As a result today, international treaties have replaced customary law and general principles. Customary law however is often used only to fill a gap. Treaties become the primarily source of international law. More than 3600 international agreements, bilateral and multilateral, that deal with water related issues are known. International treaties and conventions are the most important source of international law. In the case of a dispute, treaties and conventions are the primary

<sup>7</sup> See Art. 38 (1), Statute of the International Court of Justice; available at: <http://www.un.org/law/icc>.

<sup>8</sup> Kiss, A. & Schelton, D. 1991. "*International Environmental Law*"; pp. 107.

<sup>9</sup> Buergenthal, T. & Maier, G.H. 1990. "*Public International Law In A Nutshell*"; pp. 2.

<sup>10</sup> Birnie, P & Boyle, A. 2002. „*International Law & the Environment*“ pp. 16.

evidence of international law as they are given precedence when in conflict with a provision of customary law.

Conventions lay down binding international norms for states' interaction, thus fulfilling quasi-legislative functions in the international area. Special cases of international treaties are 'framework conventions'. In general, a framework convention is intended to establish a set of principles, norms, goals and formal mechanisms on the issue, rather than to impose major binding obligations on the parties.<sup>11</sup> The parties to the convention are free in their choice of means to convert the provisions into state practice. In addition, they are given enough scope to take into account both domestic interests and exceptional features of the region.

The international law of treaties has been codified to a large extent in the Vienna Convention on the Law of Treaties (1969). The convention defines a treaty as "an international agreement concluded between States in written form and governed by international law..."<sup>12</sup>. Treaties become legally binding only after a series of specific actions by the states that are party of them.

## **B. Access to water as a human right**

### **I. Human rights, concepts and principles**

#### **1. The principle of states' sovereignty**

States' conduct is primarily characterised by the principle of states' sovereignty and equality of states. It is the basic constitutional doctrine of the law of nations. For a long time human rights were part of the "reserved domain" of states that is a matter, which was not, in principle, regulated by international law. The principal corollaries of the sovereignty and equality of states are:

- a jurisdiction, prima facie exclusive, over a territory and the permanent population living there;
- a duty of non-intervention in the area of exclusive jurisdiction of other states;
- and the dependence of obligations arising from customary law and treaties on the consent of the obligor.<sup>13</sup>

<sup>11</sup> Heintze, H.J. 1997. "Wasser und Völkerrecht" In: Barandat, Jörg [ed.]: *Wasser - Konfrontation oder Cooperation: Ökologische Aspekte von Sicherheit am Beispiel eines weltweit begehrten Rohstoffs*, pp. 294.

<sup>12</sup> Vienna Convention on the Law of Treaties, Art. 2(1)(a); text available at: <http://www.un.org/law/ilc/texts/treaties.htm>.

<sup>13</sup> Brownlie, I. 1998. "Principles of Public International Law", p. 289.

Thus states' conduct includes considerable liberties in respect on internal organization and the disposal of territory. Although states conduct towards the individual, towards his own citizens, is characterised by the principle of states' sovereignty, states are not free to do whatever they wish. In all cases the states' exercise of the power is conditioned by the law, which includes all forms of law.

States' sovereignty is still one of the main principles in international law, but is no longer absolute. States' sovereignty has become limited by rules of international law. And the Permanent Court of International Justice recalled in this respect that "*the jurisdiction of a State is exclusive within the limits fixed by international law -- using this expression in its wider sense, that is to say, embracing both customary law and general as well as particular treaty law*"<sup>14</sup>. Therefore, state sovereignty must be interpreted in view of, and combined with, general principles of international law such as the general prohibition of abuses of rights, proportionality, respect of other States' sovereignty, due diligence, "*minimum standards of civilisation*", etc. In other words, sovereignty is not -- and has never been -- an unlimited power to do all that is not expressly forbidden by international law<sup>15</sup>. It can only be defined as the very criterion of States, by virtue of which such an entity "*possesses the totality of international rights and duties recognized by international law*"<sup>16</sup> as long as it has not limited them in particular terms by concluding a treaty.

## 2. Historical overview

In order to understand human rights today, one has to go back in history. Human rights is a concept that has been constantly evolving throughout human history. Customs, religions, philosophy and law have helped to develop human rights throughout the ages. One of the first examples of a codification of laws that contain references to individual rights is the tablet of Hammurabi<sup>17</sup> that was created about 4000 years ago. This document protects the people from arbitrary persecution and punishment.<sup>18</sup> It was in ancient Greece where the concept of human rights began to take a greater meaning than the prevention of arbitrary persecution. Human rights became synonymous with natural rights. Natural law is law that reflects the

<sup>14</sup> PCIJ, Advisory Opinion, Nationality Decrees Issued in Tunis and Morocco, Series B, N° 4, p. 24.

<sup>15</sup> See however PCIJ, Judgment, Lotus case, Series A, N° 10, p. 18.

<sup>16</sup> ICJ, Advisory Opinion, Reparation for Injuries Suffered in the Service of the United Nations, ICJ Rep. 1949, p. 180.

<sup>17</sup> The Avalon Project at Yale Law School: Babylonia Law – The Code of Hammurabi by the Rev. Claude Hermann Walter Johns, M.A. Litt.D. from the Eleventh Edition of the Encyclopedia Britannica, 1910-1911. Available at: <http://www.yale.edu/lawweb/avalon/medieval/hammpre.htm>.

natural order of the universe, essentially the will of the gods who control nature.<sup>19</sup> One of the best examples of Greek literature with regard to human rights, is Sophocles' *Antigone*. Antigone defies Creon's order and buries her dead brother by replying that she acted under the laws of the gods. This idea of natural rights continued in ancient Rome, where the Roman jurist Ulpian<sup>20</sup> believed that natural rights belonged to every person, whether they were a Roman citizen or not.

The next fundamental philosophy of human rights arose from the idea of positive law. Thomas Hobbes, (1588-1679) saw natural law as being very vague and open to vast differences of interpretation. The idea was to translate vague concepts of rights derived from nature into specific written laws, which would provide concrete protection for the rights of the individual within the larger framework of society.

The scientific and intellectual achievements of the 17<sup>th</sup> century encouraged again a belief in natural law and universal order; and during the 18<sup>th</sup> century, the so-called Age of Enlightenment, a growing confidence in human reason and in the perfectibility of human affairs led to its more comprehensive expression. Particularly to be noted is John Locke, who was among the first philosophers and political publicists to articulate rights as an integrated element in the concept of a comprehensive political system.<sup>21</sup> Locke argued in detail, that certain rights self-evidently pertain to individuals as human beings because they existed in the state of nature before humankind entered civil society; that chief among them are the rights to life, liberty and property. In his view, humankind surrendered to the state only the right to enforce these natural rights not the rights themselves; and that the state's failure to secure these reserved natural rights, gives rise to a right to responsible, popular revolution.

Among the great precedents in the recognition and protection of specific human rights are documents such as the British Magna Carta (1690-91), the American Declaration of Independence (1776), and the French Declaration of the Rights of Man and the Citizen (1779). Initially, the rights of man were, literally, only the rights of white men. It took a long time before other than whites were beneficiaries of

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<sup>18</sup> The problems with Hammurabi's code were mostly due to its cause and effect nature, it held no protection on more abstract ideas such as race, religion, beliefs, and individual freedoms.

<sup>19</sup> Plato: *"The Republic"*.

<sup>20</sup> Roman Law: available at:

<http://www.legacy.encarta.msn.com/encnet/refpages/RefArticle.aspx?refid=761552522&para=3#p3>

<sup>21</sup> Locke, J.: *"Two Treatises of Government"*, originally published in 1689.

rights. Other important precedents are found in the anti-slavery movement of the early nineteenth century and in humanitarian laws such as those spelled out in the Geneva Convention of 1864 which protected medical installations and personnel during war, and the Hague Convention of 1899 which established humanitarian rules for naval warfare.

### 3. UN and human rights

With the horrors of the Second World War in mind, the founders of the UN built into the organization's purposes and structure a strong emphasis on human rights. They believed that protecting human rights would provide freedom, justice and peace for all people. According to the Charter of the United Nations, one of the primary functions of the organization is to promote human rights. The preamble of the UN's basic document, the Charter of the United Nations (UN Charter), declares that:

*"We the peoples of the United Nations determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom..."*<sup>22</sup>

The UN Charter allowed the UN to set up a number of bodies to discuss and take action on human rights question and to draft new standards. The most important of these Charter-based bodies is the Commission on Human Rights (CHR), the Sub-commission on the Promotion and Protections of Human Rights and the Third Committee of the General Assembly. The most important body for indigenous peoples is the Working Group on Indigenous Populations (WGIP).

The shocking reality about millions of innocent victims, caused by the systematic killings during the second world war, lead to the first achievement in the field of human rights: the adoption of the Universal Declaration of Human Rights (UDHR)<sup>23</sup> on 10 December 1948. The UDHR was adopted by consensus. The purpose was to provide protection to all human beings, regardless of who they were and where they lived. Today, the General Assembly's declaration on human rights is

<sup>22</sup> UN Charter is available at: <http://www.un.org/aboutun/charter>.

recognized as the basis of human rights and freedoms. The UDHR<sup>24</sup> contains the whole range of human rights, the civil and political rights as well as the economic, social and cultural rights, within one consolidated text.

#### **4. Civil and Political Rights (CPR) and Economic, Social and Cultural rights (ESCR)**

The United Nations Commission on Human Rights started to draft conventions on human rights, which would be legally binding on the states ratifying them. The aim was to draft one convention that included all rights. The western states, however, requested to draft two conventions. The reason was, that CPR were considered to be absolute and immediate, whereas ESCR were held to be programmatic, to be realized gradually, and therefore not a matter of rights.<sup>25</sup> Additional to that, it was believed that civil and political rights were "free" in that sense that they did not cost much.<sup>26</sup> The implementation of ESCR, in contrast, was held to be costly since they were understood as obliging the state to provide welfare to the individual.

That is, why the Commission divided the rights contained in the UDHR into two separate international covenants, one on civil and political rights (CCPR) and the other one on economic, social and cultural rights (CESCR).<sup>27</sup> It was expected that states, which did not want to undertake the obligations arising from ESCR would be willing to ratify an instrument, which obliged them only to respect rights, such as the political rights than rather to take positive steps.

The Covenant on Social, Economic and Cultural rights is the basis treaty for social and economic rights. It was adopted by the General Assembly in Res. 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976. It is the bedrock of the international normative regime for socio and economic rights. Although two covenants had been drafted, the General Assembly emphasized in a resolution, adopted in 1950 the interdependence and indivisibility of CCPR as well as CESCR.<sup>28</sup>

<sup>23</sup> General Assembly resolution 217 A (III) of 10 December 1948.

<sup>24</sup> UDHR is available at: <http://www3.itu.int/udhr/lang/eng.htm>.

<sup>25</sup> Vierdag, E.W. 1978. "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights"; Netherlands Journal of International Law, Vol. 9; pp. 103.

<sup>26</sup> Bossuyt, M.1975. "La distinction juridique entre les droits civil et politiques et les droits économiques, sociaux et culturels"; Revue des droits de l'homme, Vol. 8 ; pp. 789-791.

<sup>27</sup> General Assembly resolution 543 (VI) of 5 February 1952.

<sup>28</sup> General Assembly resolution 421 (V) of 4 December 1950.

Apart from the Covenant, there are many different international human rights treaties that deal with socio and economic rights. Their aim, however, was primarily to specify certain rights of some groups of people such as women<sup>29</sup> or children<sup>30</sup>. Additional, new instruments, such as the Declaration on the Rights to Development<sup>31</sup>, have introduced concepts that had not been part of the thinking of the drafters of the 1948 Universal Declaration.

The principal UN body concerned with economic, social and cultural rights is the Committee on Economic, Social and Cultural Rights (CESCR), established in 1987 to monitor the compliance of states parties with their obligations under the Covenant. The question whether states are obliged to comply with the Covenant and if the rights in the list of the CESCR are real rights, or rather a statement of aspiration or goals will be discussed after the evaluation of the human right to water.

## **II. Water in the human rights system**

It is questionable if access to water is a human right in the system of internationally recognized human rights. Internationally recognized human rights are those included in the International Bill of Human Rights or those elaborated on in subsequent instruments adopted by the UN General Assembly. The International Bill includes the UDHR, the CCPR and the CESCR. The International Bill of Human Rights has since been extensively elaborated through the adoption of numerous conventions and declarations, both at the universal level and at the regional level.

### **1. Explicit support for the right of access to water in global human rights instruments**

#### **a. CEDAW**

Among the global legally binding instruments water is explicitly mentioned in the Convention on the Elimination of All Form of Discrimination against Women (CEDAW<sup>32</sup>). CEDAW poses obligations on states' parties to eliminate discrimination against women, particularly in rural areas to ensure that women:

<sup>29</sup> Convention on the Elimination of All Forms of Discrimination against Women; Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979; available at: <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>.

<sup>30</sup> Convention on the Rights of the Child; ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entry into force: 2 September 1990; available at: <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

<sup>31</sup> Available at: <http://www.unhchr.ch/html/menu3/b/74.htm>.

<sup>32</sup> CEDAW available at: <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>.



*“enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and **water supply**, transport and communications.”<sup>33</sup>*

As it is usually women who collect water, they are the most in danger to be physically injured or attacked while carrying heavy loads. Not only are spinal injuries the result of collecting water at distant sources, but also negative impacts on the whole family are inevitable. It is obvious that households who do not have to travel to collect water have more time for economic activity, food preparation, child-care and education. To include water in the CEDAW emphasises the growing concern about the uneven burden traditionally placed on women in developing countries.

Although water is explicitly mentioned in the CEDAW, the main purpose of the convention remains the struggle against women's discrimination and not to ensure access and availability of fresh-water. Even if women enjoy the same adequate living conditions as men, their right of access to water is not guaranteed by this convention. The only thing that is guaranteed is gender equality.

#### **b. Convention on the Rights of the Child**

The Convention on the Rights of the Child<sup>34</sup> explicitly includes water in its provisions. Children shall enjoy the highest attainable standard of health in order to:

*“combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and **clean drinking-water**, taking into consideration the dangers and risks of environmental pollution...”<sup>35</sup>*

Compared to the CEDAW, the Convention on the Rights of the Child emphasises, however, more the health aspect and hence water quality. The convention primarily points out the recognition of the connections between resources, environment and human health. It does not give to a child a right of access and availability of water.

<sup>33</sup> Art. 14(2)(h) of the CEDAW.

<sup>34</sup> Convention on the Rights of the Child available at: <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

<sup>35</sup> Art. 24(2)(c) of the Convention on the Rights of the Child.

Although the convention does not ensure the right of access and availability of water and its primary aim is to combat disease, it takes water as a compelling precondition of life and health.

**c. Geneva Conventions and their Additional Protocols**

Additional to the above mentioned, The Geneva Conventions and their Additional Protocols explicitly recognize a right to water, but such a right focuses only on drinking water. The right to drinking water is found in:

Geneva Convention III (1949): Art. 20, 26, 29 and 46

Geneva Convention IV (1949): Art. 85, 89 and 127

Additional Protocol I (1977): Arts. 54 and 55

Additional Protocol II (1977): Arts. 5 and 14<sup>36</sup>

As the Convention is developed for the amelioration of the condition of the wounded and sick during armed conflicts, its influence remains limited on armed conflicts.

On the other hand one can argue, that if water shall be available, accessible and protected during armed conflicts then it should be taken for granted that these provisions should also apply during peace times. It could be therefore argued that the international community considered access of a right to water and its availability of drinking water as self-evident.

**2. Implicit support for the right of access to water in global human rights agreements**

**a. Universal Declaration on Human Rights, 10 December 1948 (UDHR)**

The UDHR<sup>37</sup> notes in Art. 25 that:

*"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing..."*

As water is a fundamental element to obtain a standard of living adequate for health and well-being, it seems obvious that water is implicitly included as one of the component elements without the right to a standard of living adequate for health and well-being is not possible to achieve. The fact that the UDHR also includes rights that must be considered less fundamental than a right to water, such as the right to work, to rest and leisure, support even more the conclusion that

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<sup>36</sup> see these articles in Appendix I.

Art. 25 was intended to implicitly support the right to a basic water requirement. As a General Assembly resolution, the Declaration is not binding per se. However, its most fundamental provisions are generally thought either to have passed into customary international law, or to constitute an authoritative interpretation of relevant U.N. charter provisions, or both.<sup>38</sup>

On the other hand, while the provisions of the Declaration which are now considered binding include many so-called "liberty rights" – that is, "*rights not to be treated in certain ways, or not to be interfered with*"<sup>39</sup> – it is questionable if they include what have been referred to as "welfare rights" – "*rights which guarantee freedom to have various things that are regarded as necessities*"<sup>40</sup>. The right to an adequate standard of living (Article 25 UDHR) falls into the "welfare rights" category, thus casting doubt upon its status as a binding obligation.

The Universal Declaration of Human Rights is first of all a remarkable synthesis of political-civil and economic-social rights.<sup>41</sup> Furthermore, welfare rights became part of one of the most important legally binding agreements: The Convention on Economic, Social and Cultural Rights. That is why one could argue that welfare rights must be part of customary law when they are even codified in a legally binding way. Especially the rights like the right to work, to social security and to an adequate standard of living, including: food, clothing and housing are the core rights of the CESCR. Therefore it is easy to conclude that "welfare" rights, as they are part of the legally binding CESCR, have the status of a binding obligation.

Additional the Declaration declared the will of the people to be the basis of the authority of government. The will of the people is obviously to have a right to water in order to survive. To which degree these rights, included in the ICESCR are justiciable, is going to be discussed later. The most important is that one can argue that "welfare rights" are codified in a legally binding instrument and thus pose obligations on states.

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<sup>37</sup> GA Res.217 A (III).

<sup>38</sup> Steiner H.J.; Alston P. in: "*International Human Rights in Context*"; pp. 141.

<sup>39</sup> Steiner H.J.; Alston P. in: "*International Human Rights in Context*"; pp. 258.

<sup>40</sup> Steiner H.J.; Alston P. in: "*International Human Rights in Context*"; pp. 258.

<sup>41</sup> Henkin, L.; Neuman, G.L.; Orientlicher, D.F.; Leebron D.W. 1999. "*Human Rights*"; pp. 322.

**b. The International Covenant on Civil and Political Rights (ICPR) 1966**

The work of the United Nations continued by developing binding mechanisms for human rights. One of the most important binding human rights mechanisms is the ICPR. Article 6 of the ICPR states that: *“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”*

It is true that water once again is not explicitly mentioned in the Article but the right to life implies conditions that are necessary to support and to sustain life which could include water as a basic element human being need in order to survive.

Unfortunately civil and political rights are often described as negative rights: they are freedoms, immunities, which a state can respect by abstention or by leaving the individual alone. That is why it is argued that: *“the human right to life per se...is a civil right, and it does not guarantee any person against death from famine or cold...”*<sup>42</sup>

What kind of right to life is it, if the state is not obliged to pursue policies, which are designed to ensure access to the means of survival for all peoples? Apart from this it is not true, that civil and political rights are only negative rights; a number of the rights articulated apply in the criminal process, by which a state may legitimately take liberty and property or even life in punishment, but in those cases the state is required not merely to leave the individual alone but positively to organize itself, by institutions and laws, to assure against arbitrary detention, and to provide due process, fair trial, and humane punishment.<sup>43</sup>

Furthermore, it seems that the recent trend to be to a more expansive interpretation of Article 6. Most notably the Human Rights Committee, established by the Civil and Political Right Covenant, has declared the right to life as the most fundamental human right. It may not be understood in a restrictive sense and, but that its protection requires that states adopt positive measures.<sup>44</sup> The right to life would clearly encompass the right to water as a basis for survival.

On the other hand, it is argued that, the right to life encompasses the other rights (e.g. right to subsistence), but rather than the safeguarding of this foremost right is

<sup>42</sup> Dinstein, Y. 1981. *“The Right to Life, Physical Integrity and Liberty in the International Bill of Rights”*; pp. 114.

<sup>43</sup> Henkin, L.; Neuman G.L.; Orientlicher D.F., Leebron D.W. In: *“Human Rights”* pp. 324.

an essential condition for the enjoyment of the entire range of civil and political, as well as economic, social and cultural rights.<sup>45</sup> One could, however also argue that the right to life does not encompass rights that are conditions for the exercise of the right to life. Since the Covenant on Economic, Social and Cultural Rights imposes significantly lower burdens on governments to affirmatively meet its obligations one have to conclude that the right to life according to Article 6 CPR is a precondition of all other rights and therefore does not include all other rights.

**c. The International Covenant on Economic, Social and Cultural Rights (CESCR)**

**aa. Water related Articles of the CESCR**

Article 11 of the CESCR recognizes:

*"the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions..."*

Water is a fundamental precondition of all these rights guaranteed by the CESCR. The right to food, for example, cannot be achieved without water. Water is not only essential for preparing food but first of all water is essential for farming because almost 70 % of all available freshwater is used for agriculture.<sup>46</sup> Water is also essential for an adequate standard of living, which cannot be realized without a right to water. Furthermore states parties to the Covenant recognize in Article 12: *"...the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."*

More than 3 million people die every year from diseases caused by unsafe water.<sup>47</sup> Even more shocking is the fact that water-related diseases kill a child every eight seconds, and are responsible for 80 per cent of all illnesses and deaths in the developing world.<sup>48</sup> It is beyond any doubt that this right cannot be realized without a right to access to adequate and sufficient water.

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<sup>44</sup> U.N. Doc. CCPR/C/SR.222 para. 59 (1980).

<sup>45</sup> Trindade C. A. A. 1991. *"The Parallel Evolutions of International Human Rights protection and of Environmental Protection and the Absence of Restrictions on the Exercise of Recognized Human Rights"* pp. 52.

<sup>46</sup> International Year of Freshwater 2003 ; facts available at : <http://www.un.org/events/water/factsheet.pdf>.

<sup>47</sup> WHO and UNICEF in: "Global Water Supply and Sanitation Assessment 2000 Report"; available at: [http://www.who.int/water\\_sanitation\\_health/Globalassessment/GlobalTOC.htm](http://www.who.int/water_sanitation_health/Globalassessment/GlobalTOC.htm).

### **bb. General Comments**

In 2000 the United Nations Committee on Economic, Social and Cultural Rights, adopted General Comment 14.<sup>49</sup> on the right to health that provides a normative interpretation of the right to health as enshrined in Article 12. The Committee interprets the right to health, as defined in article 12.1, as: "...an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing..."<sup>50</sup>

The Committee further recognizes in its General comment No. 15<sup>51</sup> from November 2002, that water itself was an independent right. The Committee affirmed that access to adequate amounts of clean water for personal and domestic use is a fundamental human right of all people. The Committee notes that, "*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.*"<sup>52</sup> The Comment is significant in that it means that households can no longer be disconnected from water supplies. An authority enforcing the disconnection of water supply is in violation of international human rights law. This sets an important precedent. The Comment goes on to define water as a social and cultural good, not solely as an economic commodity. The comment also emphasizes that states parties to the International Covenant of Economic, Social and Cultural Rights, have the duty to progressively realize, without discrimination, the right to water. The human right to water entitles everyone to sufficient, affordable, physically accessible, safe and acceptable water for personal and domestic uses.

### **cc. Legal status of the UN Committee's general comments**

In 1988, the Committee began to publish general comments with regard to the articles of the CESCR, with the aim to assist state parties in the fulfilment of their obligations. The aim of the General Comments is to make the experience gained through the examination of states' reports available for the benefit of all states parties. Unfortunately the comments are not legally binding but rather an important

<sup>48</sup> UN press release ; available at : <http://www.un.org/News/Press/docs/2003/sgsm8707.doc.htm>.

<sup>49</sup> E/C.12/2000/4, CESCR.

<sup>50</sup> General comment 14. available at:

<http://www.unhchr.ch/tbs/doc.nsf/0/40d009901358b0e2c1256915005090be?OpenDocument>.

<sup>51</sup> E/C.12/2002/11.

<sup>52</sup> General Comment 15. available at: <http://193.194.138.190/html/menu2/6/gc15.doc>.

source of interpretation.<sup>53</sup> Additional, it is argued that the role played by General Comments in the work of the UN treaty bodies as a whole should not be underestimated.<sup>54</sup> The General Comments have developed into a strong body of jurisprudential insights into the various provisions of the Covenant. The General Comments are therefore to be seen as a means of laying down some solid foundations for the future development of its jurisprudence.<sup>55</sup>

#### **d. Declaration on the Right to Development**

The Declaration on the Right to Development<sup>56</sup> was adopted by the General Assembly resolution 41/128 of 4 December 1986. In Article 8 of the Declaration, it is noted that: *“States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing...”* In interpreting this article, the General Assembly clarified and reaffirmed in its Resolution 54/175 that *“[t]he rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community”*<sup>57</sup>.

### **3. Global environmental agreements**

Water is a social and environmental resource. That is why a right to water cannot be realized without referring to the rights of the environment. Not only do the rights of people, but also the needs of the environment to be taken into consideration when taking decisions with regard to river basins, lakes, oceans and etc. Maintaining a safe water supply for human being means also looking at the ways, how it can be achieved by protecting the environment. Many international environmental law instruments recognize the relation between human being needs and the protection of the environment. The right to a healthy environment has received increased recognition under international environmental law.

<sup>53</sup> Baehr, P.R. 2001; *“Human Rights – Universality in Practice”*; pp. 35.

<sup>54</sup> Alston, P. 1992; *“The United Nations and Human Rights: A Critical Appraisal”* pp.494.

<sup>55</sup> Alston, P. 1992; *“The United Nations and Human Rights: A Critical Appraisal”* pp.494.

<sup>56</sup> Text is available at: <http://www.unhcr.ch/html/menu3/b/74.htm>.

<sup>57</sup> GA/ RES/54/175, 15 February 2000.

**a. Stockholm Declaration (UN Conference on the Human Environment 1972)**

This declaration<sup>58</sup> is one of the earliest environmental instruments that recognizes the fundamental right to “*an environment of a quality that permits a life of dignity and well being*”<sup>59</sup> and emphasizes in Principle 2 that: “*The natural resources of the earth including the air, water...must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.*”

**b. Mar del Plata Action Plan**

The 1977 United Nations Water Conference in Mar del Plata, Argentina, established the concept of basic water requirements to meet fundamental human needs, which was reiterated at the 1992 Earth Summit in Rio de Janeiro, Brazil. The Mar del Plata conference was one of the earliest comprehensive water conferences. The conference statement explicitly recognized the right to access to water for basic needs by emphasizing 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*”.<sup>60</sup>

**c. Dublin Statement**

Experts from a hundred countries and representatives of eighty international, intergovernmental and non-governmental organizations attended the International Conference on Water and the Environment (ICWE) in Dublin, Ireland, on 26-31 January 1992. Scarcity and misuse of fresh water were one of the major concerns, which dominated the conference. It was recognized that, human health and welfare, food security, industrial development and the ecosystems on which they depend, are all at risk, unless water and land resources are managed more effectively than in the past.

Principle 4 of the Dublin Conference on Water and Sustainable Development explicitly reaffirmed the human right to water: “*...it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.*”<sup>61</sup> Within the same principle states parties note that: “*water has an*

<sup>58</sup> Stockholm Declaration available at:

<http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1502>.

<sup>59</sup> Principle 1 of the Stockholm Declaration.

<sup>60</sup> Preamble, United Nations. (1977). Report of the United Nations Water Conference, Mar Del Plata. March 14-25, 1977. No E 77 II A 12, United Nations Publications, New York.

<sup>61</sup> Available at: <http://www.wmo.ch/web/homs/documents/english/icwedece.html#p4>.



*economic value in all its competing uses and should be recognized as an economic good."*

#### **d. Agenda 21**

As a result of the Earth Summit in Rio in 1992, Agenda 21<sup>62</sup> has been adopted. Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment. Agenda 21 is one of the main important non-binding international environmental legal instruments.

Chapter 18 deals with the protection of the quality and supply of freshwater resources. It notes that a right to water entails three elements: access, quality and quantity, including not only a *"general objective ...to make certain that adequate supplies of water of good quality are maintained for the entire population of this planet"*<sup>63</sup>, but also to provide that *"...all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic human needs."*<sup>64</sup> Overall, an integrated approach is promoted throughout the chapter, which emphasizes the three elements of sustainable development as equally important; water is to be viewed as *"a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization."*<sup>65</sup>

#### **e. Programme of Action of the UN International Conference on Population & Development (1994)**

At the conference in Cairo, 179 countries agreed that population and development are inextricably linked, and that empowering women and meeting people's needs for education and health, including reproductive health, are necessary for both individual advancement and balanced development. The conference adopted a 20-year Programme of Action<sup>66</sup>, which focused on individuals' needs and rights, rather than on achieving demographic targets. The Programme of Action emphasizes in principle 2 that *"...People are the most important and valuable resource of any*

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<sup>62</sup> Agenda 21 is available at:  
<http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>.

<sup>63</sup> Agenda 21, Paragraph 18.2.

<sup>64</sup> Agenda 21, Paragraph 18.47.

<sup>65</sup> Agenda 21, Paragraph 18.18.

<sup>66</sup> Programme of Action is available at: <http://www.iisd.ca/linkages/Cairo/program/p00000.html>.

*nation.... They have the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation."*

**f. IUCN Draft International Covenant on Environment and Development (1995)**

The Draft Covenant, which includes a proposed text of a treaty and detailed commentary, is intended to stimulate consideration of a global instrument on environmental conservation and sustainable development. The covenant recognizes in Art. 19 that "*Parties shall take all appropriate measures to maintain and restore the quality of water, including atmospheric, marine, ground and surface fresh water, to meet basic human needs...*" and "*Parties also shall take all appropriate measures...to ensure the availability of a sufficient quantity of water to satisfy basic human needs and to maintain aquatic systems.*"

**g. Millennium Declaration and Political Declaration of Johannesburg**

The full implementation of Agenda 21, the Programme for Further Implementation of Agenda 21 and the Commitments to the Rio principles, were strongly reaffirmed at the World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa from 26 August to 4 September 2002. The indivisibility of human dignity and a right to water has been included in the Political Declaration of the World Summit on Sustainable Development<sup>67</sup> through the commitment "*to speedily increase access to basic requirements such as clean water, sanitation, adequate shelter...*"<sup>68</sup>

**h. Conclusion**

It is true that all of the above mentioned environmental treaties deal explicitly with the right of human beings to water but they are legally non-binding and thus non enforceable. Thus it is questionable if they have a real impact with regard to the right of access to water. Each of these visionary documents is, however, declaratory in nature and may contribute to the development of what is called "soft" law. These norms are not considered binding on nation-states and the international community until they are adopted through a treaty, directly or indirectly, in the national laws of a country. The soft law approach allows states to tackle a problem collectively at a time when they do not want to be bound too strictly in their freedom

<sup>67</sup> Available at: [http://www.johannesburgsummit.org/html/documents/summit\\_docs.html](http://www.johannesburgsummit.org/html/documents/summit_docs.html).

<sup>68</sup> Para 18, Johannesburg Declaration on Sustainable Development, agreed to at the World Summit on Sustainable Development, Johannesburg, South Africa 26 August – 4 September 2002; text available at: [http://www.johannesburgsummit.org/html/documents/summit\\_docs/1009wssd\\_pol\\_declaration.doc](http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.doc).

of action. Its great advantage over “hard law” is that, its obligations can be formulated in a precise and restrictive form that would not be acceptable in a binding treaty. In evaluating the importance of soft law, account must also be taken of the various ways in which it may, often quite rapidly, be hardened.

One way of course is the incorporation of an initially non-binding norm into a binding treaty. Another is the creation of customary law when states adopt as their practice, acting out of a combination of a sense of legal obligation and in response to some pressures. Still, as has been observed by Birnie and Boyle, ‘soft law’ is of importance concerning customary environmental law, because it “can serve as a focus for the potentially rapid emergence of a more widespread and consistent body of state practice than would otherwise be possible if states were simply left to take their own unilateral actions”<sup>69</sup>. When states act according to “soft law”, it may become “hard law”<sup>70</sup>. And, finally, “soft law” can also be relied on when it comes to determining the *opinio iuris* of a certain state<sup>71</sup>.

Non-binding instruments are strong evidence of international intent and policy that inform the views of states but in particular it should not be assumed that rules and principles derived mainly from soft law have acquired the force of customary law binding on all states. That is why non-binding water related environmental, “soft law agreements”, may be examples of state practice that offer an evidence of the transition towards an explicit right to water. Thus the above mentioned treaties can be seen as a reflection of a process of codification and law-making which will be complete only when supported by the evidence of widespread, representative and consistent state practice.

State practice with regard to a right of access to water, however, can be observed when analyzing the CEDAW and the Convention on the Rights of the Child, where explicit recognition of the connections between resources, the health of the environment and human health is laid down in the conventions.

<sup>69</sup> Birnie, P & Boyle, A. 2002. „*International Law & the Environment*“; pp. 17.

<sup>70</sup> Birnie, P & Boyle, A. 2002. „*International Law & the Environment*“; pp. 57.

<sup>71</sup> See Birnie, P. & Boyle, A. 2002. „*International Law & the Environment*“; pp. 23. - but there is an argument also on this matter, some deny that resolutions constitute *opinio iuris*.

#### 4. Regional agreements

Furthermore, there are numerous regional legal instruments, which reflect a process towards an explicit recognition of a right of access to water.

##### ***a. The European Council of Environmental Law (ECEL) Resolution***

In a Resolution<sup>72</sup> adopted in April 2000, which specifies the content of the right to water, states that the right to water cannot be dissociated from other human rights that have already been recognized and invites Governments to take action to guarantee the right to water for all. The ECEL looked into the question of whether the right to water should be viewed as a human right. It considers that *"the right of everyone to an adequate standard of living"* recognized in article 11 of the International Covenant on Economic, Social and Cultural Rights means that everyone should have access to the water to sustain his or her life.

Moreover, the right to water cannot be dissociated from the right to sufficient food. The right to water is also closely bound up with the right to health recognized in article 12 of the International Covenant on Economic, Social and Cultural Rights. The ECEL Resolution on the right to water emphasizes the relation between human rights and water in recognizing that *"access to water is part of a sustainable development policy and cannot be regulated by market forces alone."*

Art. 1 of the Resolution states, that *"each person has the right to water in sufficient quantity and quality for his life and health."*

The resolutions' legal nature however has rather a soft law nature within the European Union's legislation procedures. Resolutions set out jointly held views and intentions regarding the overall process of integration and specific tasks within and outside the Community. The primary significance of these resolutions is that they assist to give the Council's future work a political direction. As manifestations of a commonly held political will, resolutions make it considerably easier to achieve consensus in the Council, in addition to which they guarantee at least a minimum degree of correlation between decision-making hierarchies in the Community and the Member States.

**b. The European Commission of the United Nations for Europe (ECE) Protocol**

The WHO-UN ECE Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes<sup>73</sup> is the first major international legal approach for the prevention, control and reduction of water-related diseases in Europe. The ECE Protocol specifically states in Article 4<sup>74</sup>, that: *“parties shall, in particular, take all appropriate measures for the purpose of ensuring:*

- *adequate supplies of wholesome drinking water...*
- *adequate sanitation...*”

Furthermore it emphasizes in Art. 5 that: *“...equitable access to water, adequate in terms of both quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion.”* Access to water and sanitation services is reinforced in Art. 6 (1), which provides that: *“the Parties shall pursue the aims of:*

- *access to drinking water for everyone;*
- *provision of sanitation for everyone.”*

According to Article 23, the Protocol will become legally binding once at least 16 countries ratify it. At the moment, the legal status of the protocol is not satisfactory. 36 Countries have signed the protocol and only 8 out of 36 have ratified the Protocol.<sup>75</sup>

**c. Protocol of San Salvador**

The Protocol of San Salvador is an additional Protocol to the American Convention on Human Rights. The San Salvador Protocol reinforces the coverage provided by the Convention in the area of economic, social and cultural rights. Article 11 of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988<sup>76</sup> provides that: *“Everyone shall have the right to live in a healthy environment and to have access to basic public services.”* Water is not specifically mentioned but it is undoubtable that that the term basic public services, which is a very broad one, also includes access to water.

<sup>72</sup> ECEL Resolution, adopted 28 April 2000, published in: Environmental Policy and Law, 30/5 2000.

<sup>73</sup> ECE Protocol was adopted on 17 June 1999 at the Third Ministerial Conference on Environment and Health.

<sup>74</sup> ECE Protocol is available at: <http://www.who.dk/Document/Peh-ehp/ProtocolWater.pdf>.

<sup>75</sup> Status of Ratification of the Protocol on Water and Health available at:

[http://www.unece.org/env/water/status/lega\\_wh.htm](http://www.unece.org/env/water/status/lega_wh.htm)

<sup>76</sup> Protocol of San Salvador available at: <http://www.oas.org/juridico/english/treaties/a-52.html>.

#### **d. African Charters**

There are some legal instruments that are specific to the African region, such as the African Charter on Human and People's Rights<sup>77</sup> and the African Charter on the Rights and Welfare of the Child<sup>78</sup>. After the 1963 summit where African leaders signed the Charter of the Organization of African Unity, they were invited to study the possibility of adopting an African Convention on Human Rights to give full effect to both the Charter of the UN and the Universal Declaration of Human Rights. The African Charter came into force in 1986, and has been ratified by more than forty African states, thus becoming the most widely accepted regional convention. The African Charter on the Rights and Welfare of the Child codifies the responsibilities of the state, community and individual in the protection of the civil, cultural, economic, political and social rights of the child.

The African Charter notes broadly in Art. 24<sup>79</sup> that: "*All peoples shall have the right to a general satisfactory environment favorable to their development*", and the African Charter on the Rights and Welfare of the Child states in Art. 14(1)<sup>80</sup> that: "*Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health*" and Art. 14(2)(c) requires that: "*States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures...*" and "*to ensure the provision of adequate nutrition and safe drinking water*".

#### **5. National Constitutions**

Many countries<sup>81</sup> have provisions related to water and the environment in their constitution, but South Africa is the only country where the right to access to water is embodied in the Constitution. Although South Africa is rich in minerals, it is poorly endowed with ground water and lacks a major aquifer. All of the country's major interior rivers have been dammed, and the region receives a paltry amount of rainfall - 19.6 inches a year - just over half the world's average.

<sup>77</sup> African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986;

<sup>78</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

<sup>79</sup> Text available at: <http://www1.umn.edu/humanrts/instree/z1afchar.htm>.

<sup>80</sup> Available at: <http://www1.umn.edu/humanrts/africa/afchild.htm>.

<sup>81</sup> see appendix II.

The Bill of Rights of the New Constitution of South Africa, adopted in 1994, offers proof of the current development in codifying a human right to water. Section 27 (1)(b) states that: *"Everyone has the right to have access to sufficient food and water"*.<sup>82</sup> Section 27 (2) states that: *"The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights..."*

In order to fulfill the country's obligations under the constitution South Africa passed two new legislative measures. The Water Services Act<sup>83</sup> and the National Water Act<sup>84</sup> came into being.

The Water Services Act provides under section 3 I that everyone has the right of access to basic water supply and basic sanitation. Section 3 II emphasizes the duties of the state. Every water services institution must take reasonable measures to realize these rights.

Under the old apartheid regime, farmers owned water outright as part of their land deed. They could draw an unlimited amount of water not only from the ground, but also from rivers abutting their property. At the end of the Apartheid era in 1994, an estimated 12 million people out of a population of 40 million did not have adequate access to water for the most basic human needs.<sup>85</sup> Under the new Water Act, farmers must now apply for three-year licenses subject to renewal by the Department of Water Affairs.

The new water law puts the government firmly in charge of the country's water, abolished previous riparian rights, made water allocations both temporary and tradable, and required full costs to be charged to all users except for the very poorest. As the Department of Water Affairs determines the mechanisms and criteria for the redistribution of water, it has adopted a policy that guarantees every person at least 25 liters (or 6 gallons) of water per day. President Mbeki announced in September 2000 this policy to provide free basic water, which can be seen as an important step towards the realization of a human right to water. The status of

<sup>82</sup> Constitution available at: <http://www.oefre.unibe.ch/law/icl/sf00000.html>.

<sup>83</sup> Text available at: <http://www-dwaf.pwv.gov.za/Documents/Legislature/wsa97.PDF>.

<sup>84</sup> Text available at: <http://www.polity.org.za/html/govdocs/legislation/1998/?rebookmark=1>.

<sup>85</sup> Marna de Lange, presented at the second world water forum 2000: available at: <http://www.iwmi.cgiar.org/respages/PGW/marna.htm>.

implementation of Free Basic Water by local authorities on 1 July 2001 revealed that approximately 23 million people were being served with Free Basic Water.<sup>86</sup>

#### 6. Weaknesses in the existing systems

As the overview indicates, international law has not clearly defined the access to water as a fundamental human right. The only binding treaties that deal with water are the Convention on the Rights of the child and the CEDAW but even them; they do not, however, define access to water as a fundamental human right. Water is rather one element of many to achieve the conventions' provisions.

Furthermore, the most international instruments, which deal with access to water, are almost all non-binding. Especially non-binding environmental agreements recognize a right to water but they may prove to be inadequate tools to handle the present water problems. They do not provide a sufficient basis for ensuring effective right of access to water.

As a human right to water exists primarily only implicit, individuals don't have a right to claim states that they do not recognize, protect and fulfill the right. Where no right is given, no right can be claimed.

#### **III. Conclusion**

Although there is no explicit international treaty, which guarantees a human right to water, water is an integral part of the existing human rights agreements and a part of the most important environmental agreements. Over 60 constitutions for example, refer to environmental obligations,<sup>87</sup> and consequently to water as an essential part of the whole environment.

Furthermore, water is a crucial element of life without human beings cannot survive for more than a few days. Water may thus be regarded as an integral component of other human rights, such as the right to life, food, housing, adequate standard of living. Some even argue that if the framers of early human rights language had foreseen that reliable provision of a resource as fundamental as clean water would

<sup>86</sup> see Minister of Water Affairs and Forestry : Mr Ronnie Kasrils at: <http://www.dwaf.gov.za/FreeBasicWater/Defaulthome.asp>

<sup>87</sup> Pevato, P.M. 1999. "A Right to Environment in International Law: Current Status and Future Outlook", in RECIEL, vol. 8 issue 3, pp. 315.



be so problematic, it is reasonable to suggest that the basic rights documents would have more explicitly included a right to water.<sup>88</sup>

The European Council of Environmental Law goes even further in stating that there is no reason to create a new human right because the right to water already exists and constitutes an integral part of officially recognized human rights.<sup>89</sup> It has been suggested that water, like air, is so fundamental to preserving a right to life that explicit recognition is unnecessary.<sup>90</sup>

If the right to water already constitutes an integral part of officially recognized human rights, is there still a necessity to create a new human right to water? Would there be any particular advantage for the people who are in need the most? Considering that despite the declaration of a human right to food, there are still 800 million people – 20% of all people in the developing world who are affected by malnutrition and half of the 10.4 million annual child deaths in the developing world are caused by malnutrition<sup>91</sup>, it is questionable if the explicit recognition of a human right to water would be able to change the situation.

Human rights are rights of individuals, not in terms of rights and obligations of states towards other states. Thus by making water a human right, it could not be taken away from the people. Through a rights-based approach, victims of water pollution and people deprived of necessary water for meeting their basic needs would be provided with access to remedies. In contrast to other systems of international law, the human rights system affords access to individuals and NGOs. Furthermore, a formal recognition of such a right would mean acknowledging the environmental dimension, more specifically the water-dependent dimension, of existing human rights. Moreover, a formally recognized right to water would make it increasingly difficult to disregard international environmental provisions that relate to the protection and management of water. The recognition of a right to water could make its implementation more effective and allow for a more speedy and effective development of jurisprudence.

<sup>88</sup> Gleick, P.H. 1999. *"The Human Right to Water"*; In: *The Water Policy* 1 (5) at pp. 487-503.

<sup>89</sup> ECEL Resolution, adopted 28 April 2000, published in: *Environmental Policy and Law*, 30/5 2000.

<sup>90</sup> Gleick, P.H. 1999. *"The Human Right to Water"*; In: *The Water Policy* 1 (5) at pp. 487-503.

<sup>91</sup> WHO report 2003; available at: <http://www.who.int/nut/nutrition2.htm>.

One of the most important benefits of an explicit recognition of a human right to water could thus represent one tool for civil society to hold governments accountable for ensuring access to sufficient, good-quality water. In the event of failure at national level, aggrieved individuals would still have an international avenue of redress through human rights institutions. Human rights treaties have the advantage of relying upon State reporting procedures, inter-State complaints, and individual petitions of complaints, all of which directly or indirectly permit attack or criticism of non-complying states.<sup>92</sup> That is why an explicit recognition of the human right to water would be very important.

The above mentioned international agreements may provide prove for *opinio juris* so that one could consequently argue that a human right to water is already immanent in the international law. It remains however problematic that it is not explicitly codified as a human right. Especially the positivists' school of jurists is of the opinion that there are no rights until they are not codified.<sup>93</sup>

Although water is not explicitly mentioned as a human right, there is no reason not to treat water as a human right. Water is first of all the basis for almost all human rights. Water is a precondition of life in general and as essential as air and food for all human beings. The fact that water is not legally codified as a human right does not mean that it is not a human right. It is important to note that law is not the source of human rights. Human rights are rather fundamental in that they are a natural foundation<sup>94</sup> on which laws can be based on. It is human dignity<sup>95</sup>, which is the source of human rights.

The Helsinki Final Act declares in Principle VII that all human rights and fundamental freedoms derive from the inherent dignity of the human person. It clearly implies that rights are not derived from the state or any other external

<sup>92</sup> D. Shelton, *"Human Rights, Environmental Rights, and the Right to Environment"*, Stanford Journal of International Law, vol.28(1) Stanford Law School (1991), at 134.

<sup>93</sup> One of its most important representatives of the positivists' school was H. Kelsen; see: H. Kelsen in: *"Reine Rechtslehre"*.

<sup>94</sup> St. Thomas Aquinas, for example, identifies the rational nature of human beings as that which defines moral law: *"the rule and measure of human acts is the reason, which is the first principle of human acts"* (Aquinas, ST I-II, Q.90, A.1). On this common view, since human beings are by nature rational beings, it is morally appropriate that they should behave in a way that conforms to their rational nature. Thus, Aquinas derives the moral law from the nature of human beings.

<sup>95</sup> References to human dignity are to be found in almost all resolutions and declarations of international bodies, such as: Preamble of the Charter of the UN; UDHR Article 1; CCPR Article 10; CDESCR Article 13; ILO Declaration of Philadelphia; UN Declaration on the Elimination of Discrimination against Women.

authority. Drawing upon the conception of human dignity and the intrinsic worth of every person, we can extend and strengthen human rights by formulating new rights or construing existing rights to apply to new situations.<sup>96</sup> From this perspective it is easy to conclude, that a human right to water exists because it is a precondition for human's dignity. It is a precondition for human beings to live a life in dignity and to survive.

Unfortunately a human right to water is not very effective if it is impossible to find international consensus on it. At this point one have to distinguish between philosophic foundation of a human right to water and the human right to water in international law. It is the easiest to conclude from the philosophical point of view that water should be a human right because of the dignity of all human beings. To get however international consensus in order to codify such a right seems to be very difficult. There is a huge gap between what it is and what should be. Can however only the international opinion alone be the basis of a human right? What is the point of consulting the world opinion, if the world opinion itself includes tyrannical regimes? As law is always dependent on times and places, human rights cannot be based on them alone. The only secure basis for human rights can consequently be the human nature, the dignity of every human being.

From the legal perspective, it is positive to note, that the right to water is getting stronger. There is even a general trend towards the explicit codification of the right to water as we can see in the Convention on the Rights of the Child and the CEDAW. Additional the major regional instruments include a right to water. A further core stone towards the explicit recognition of a human right to water is the Comment of the Committee on Economic, Social and Cultural Rights, referring to article 11 of the International Covenant on Economic, Social and Cultural Rights, which states that: *"The human right to drinking water is fundamental for life and health. Sufficient and safe drinking water is a precondition for the realization of all human rights."*

One of the youngest and progressive constitutions entails a human right to water: the South African Constitution. Its Bill of Rights includes in Section 27 (1)(b) a right to water. The South African Constitution is one of the most modern constitutions in the world and therefore an important contribution towards strengthening an explicit human right to water. Furthermore it entails civil and political rights as well as

<sup>96</sup> Schachter, O. 1983. *"Human Dignity as a Normative Concept"*; In: The American Journal of

economic and social rights. Therefore it is one important step towards demonstrating the importance of both groups of rights and uniting all groups of rights.

Furthermore, from the economic perspective it would be much cheaper to recognize the human right to water and meeting it because, the overall economic and social benefits of meeting basic human needs far outweigh the costs of providing for these needs. It is estimated that water-related diseases cost society \$ 125 billion just in direct medical expenses and lost work time alone, whereas the cost of providing new infrastructure needs for all major urban water sectors would be around \$ 25 to \$ 50 billion per year.<sup>97</sup>

If we thus look on the philosophical ground, economical and the legal ground, we see that a human right to water is not only immanent in the most human rights but also explicitly mentioned in the youngest international treaties, regional agreements and constitutions, like in the South African constitution. One can thus conclude that a human right to water exists but the main challenge remains to codify it explicitly and to define its scope and states' duties deriving from it.

### **C. Justiciability**

Under the presumption that water is a human right, it is still questionable if this right to water would be justifiable. As water is essential to human needs, it would be qualified under the group of economic, social and cultural rights because CESCR aim to ensure the satisfaction of basic human needs, such as food, health, employment, education and thus water.

#### **I. Relation between right and justiciability**

Rights are without a meaning when they cannot be enforced. On the other hand, it is only possible to enforce rights if they exist. Only civil and political rights were seen as "real rights" because they can be protected immediately by law. Whether economic, social and cultural rights are true rights or mere aspirational targets has attracted considerable scholarly debate<sup>98</sup> and discussion among the international community.

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International Law 77; pp. 853.

<sup>97</sup> Gleick, P.H. 1999. "The Human Right to Water"; In: The Water Policy 1 (5); at pp. 487-503.

<sup>98</sup> See the discussion in Steiner, H.J.; Alston, P. 2000. "International Human Rights in Context";

One of the biggest difficulties with regard to economic and social rights lies in the Covenant's progressive clause. Under Article 2 of the CESCR, states parties have to undertake legally binding obligations to take steps to the maximum of their available resources to achieve progressively the full realization of the economic and social rights in that Covenant. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense this language recognizes that poor states are not immediately capable of guaranteeing the same levels of economic and social rights as developed states. That is the reason, why many argue, that economic and social rights are not rights but goals<sup>99</sup> and aspirations of human society, and therefore not issues for the courts but only for the policy process. As they are only desirable goals and aspirations, they are not rights but policy outcomes.

Furthermore it can be argued that, if economic and social rights are so frequently unrealized in a world haunted by extremes of poverty then, there is little point in calling them rights. Therefore positivist school of jurists<sup>100</sup>, since their point of view is, that unless a right can be enforced in a court of law it cannot be considered to be a right at all, see only civil and political rights as rights and therefore enforceable by courts. The lack of precise content and that the international instruments fail to impose specific obligations on states are reasons why social and economic rights are not rights but just goals. But it is the exception rather than the rule that norms of international law can be enforced through courts of law, and there is nothing in principle to prevent a right being an international legal right even if it is not individually justiciable.<sup>101</sup>

Further it is possible to determine the specific content of the right to water by using indicators from outside the legal field. The right to adequate food for example may appear vague to a jurist, but is perfectly clear to a nutritionist. The WHO already articulated what a right to water should entail and therefore it is easy to say what the content of a right to water should be.

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pp. 278.

<sup>99</sup> Vierdag, E. 1978. "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights"; In: 9 Netherlands Yearbook International Law 69; pp. 103.

<sup>100</sup> H. Kelsen in: "Reine Rechtslehre".

<sup>101</sup> J. Hausermann in: Beddard, R. Hill, D.M. 1992. "Economic, Social and Cultural Rights Progress and Achievement"; pp. 52.

Additional, it is not right that the progressive clause of Article 2 of the CESCER does not impose precise obligations of immediate application. For example, Article 2 (2) prohibits discrimination in the enjoyment of the rights protected by the Covenant.

Furthermore, states have core obligations, which means that states have to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant.<sup>102</sup> Additional, states are rather required to: *“...move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all states parties have the obligation to begin immediately to take steps to fulfill their obligations under the Covenant.”*<sup>103</sup>

Another argument that strengthens the right status of social and economic rights is the fact that economic and social rights have the same quality as civil and political rights.<sup>104</sup> They are interdependent and indivisible. The interrelation between the two groups of rights is a fundamental tenet of the United Nations' approach to human rights.<sup>105</sup>

A very good example for the relationship of the both sets of rights is made by Amartya Sen analyzing the incident of famine. Her observation is that famine has never afflicted any country that is independent and where democracy works, including proper elections and opposition parties and where the freedom of expression through an independent press is guaranteed. On the contrary, in countries for example where civil and political rights are not guaranteed, famines are more than likely, as presently the case in Zimbabwe, where people are suffering from famine because of the non-democratic decisions of the government. It is very strange to observe that in these countries, how Sen notes: *“...famine kills millions of people, but it does not kill the rulers.”*<sup>106</sup>

On the other hand, people who are hungry are busier in meeting their basic needs than to fulfill their democratic rights and duties like for example going to elections. Only these two examples demonstrate very well the interdependence between

<sup>102</sup> See General comment No.3 (UN doc. E/1991/23); available at: <http://www.lawhk.hku.hk/demo/unhrdocs/escgc3.htm>.

<sup>103</sup> The meaning of Article 2 and the obligations it imposes were codified in a document known as “the Limburg Principles”; available at: <http://www.shr.aaas.org/thesaurus/instrument.php?insid=94>.

<sup>104</sup> Eide, A.; Krause, C.; Ross, A.; 2001. *“Economic, Social and Cultural Rights”*; pp. 19.

<sup>105</sup> See, for example, UN General Assembly Resolution 32/130.

economic and social rights and civil and political rights. Thus, as civil and political rights are considered to be real rights and they are related to economic and social rights, there is no reason to conclude why social and economic rights should not be real rights.

But the enunciation of rights in law is meaningless unless effective means are also introduced by which the enforcement of these rights might be sought. It thus remains to be seen if social and economic rights and the human right to water is thus justiciable.

## **II. Justiciability of economic and social rights**

The existence of social and economic rights does not necessarily mean that these rights are justiciable. Many argue that, as there is no procedure, like under the International Covenant on Civil and Political rights, which allows individuals to claim their rights, social and economic rights are consequently not justiciable.

Although there is no international right of individual petition in the case of economic, social and cultural rights, it does not necessarily mean that they are not justiciable. Justiciability is more than an individual complaint mechanism. As some argue, justiciability itself cannot be narrowly confined to the court process alone, but is more properly defined as a matter of review processes, and thus of enforcement and implementation.<sup>107</sup>

Furthermore, many problems in the economic, social and cultural rights domain are systemic in nature and better suited to a review resulting in broad recommendations, rather than narrow findings of fault in individual circumstances. Several procedures have been established to supervise state compliance with obligations imposed by international texts, what constitutes a kind of justiciability. The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for a periodic reporting system through which state parties' obligations under the Covenant are supervised. The body responsible for receiving and considering state parties' reports is the UN Committee on Economic, Social and Cultural Rights (CESCR).

Furthermore, economic and social rights form one of the most important parts of the normative international human rights body. Economic and social rights have

<sup>106</sup> Sen A.: "Freedoms and Needs" in P. Alston in: "Human Rights in Context"; pp. 270.

<sup>107</sup> Hill D.M. "Rights and their Realisation" in: Beddard, R. Hill, D.M. 1992. *"Economic, Social and Cultural Rights Progress and Achievement"*; pp. 1.

their place not only in the UDHR or in universal and regional general conventions on human rights, but in many countries existing treaties on economic and social rights have also been incorporated into the domestic plane as well.

Additional, there are already courts that take economic and social rights into their decision findings process. The South African courts and the Indian courts for example are increasingly creating a foundation of jurisprudence, moving towards improved protection of human rights.

One notable example is the Grootboom case in South Africa, concerning the forced eviction of squatters, which was a landmark decision establishing a number of important principles: the first was that the justiciability of economic, social and cultural rights could not be determined in abstract. Secondly, the case confirmed the interdependence and interrelatedness of all rights.<sup>108</sup> Thirdly, the court developed the so-called "reasonableness" standard with regard to socio-economic rights, in order to determine whether the State was complying with its obligations under the Constitution, and cited with approval the interpretation of the Committee on Economic, Social and Cultural Rights regarding the obligation of progressive implementation (article 2 (1) of the ICESCR), as set forth in its General Comment No. 3. A housing policy could, therefore, be subjected to the reasonableness standard, thereby taking into consideration housing problems in their social, economic and historical context and the capacity of institutions responsible for implementing the programme.

The Grootboom case is a good example of how the courts could practically enforce even the positive duties imposed by socio-economic rights. Given these developments, it is astonishing that South Africa has still not ratified the Covenant. On the regional level, the adoption of the 1995 Additional Protocol to the European Social Charter<sup>109</sup> is notable with regard to the justiciability of economic and social rights. The Protocol provides for a system of collective complaints on a selection of economic and social rights and thereby confirming the justiciability of economic and social rights.

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<sup>108</sup> Grootboom, para. 23: *"There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [Bill of Rights]"*.

<sup>109</sup> The Protocol is available at: <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/158.htm>.



Even the Inter-American system, especially the San Salvador Protocol, which entered into force in 2000 provides three types of supervisory procedures: periodic reporting, the submission of individual complaints to the Inter-American Commission and the Inter American Court on Human Rights and the formulation of recommendations by the Commission.

In Africa, the African Charter has great potential to protect economic and social rights, as the Charter allows for complaints by individuals, groups, organizations and states concerning the alleged violation of a wide range of human rights. So far, cases concerning economic and social rights, which the African Commission<sup>110</sup> had adjudicated, had been brought forward in conjunction with civil and political rights, which confirmed the interdependence and indivisibility of all human rights in the African human rights protection framework.

These developments demonstrate that there can be protection of economic, social and cultural rights at the regional levels through individual complaints. Therefore economic, social and cultural rights are justiciable.

What remains to be seen is if individual complaints can be developed on the international level. In 1996 a draft Optional Protocol was prepared by the CESCR, which would allow individuals and groups to complain to it against violations of their socio-economic rights. If the Optional Protocol will ever see the light of day, will not depend on the unjusticiability of economic and social rights but on the political will. A concentrated advocacy strategy on all levels, especially with the pressure of NGOs, will be necessary in order to speed up the realization of the Protocol.

### III. Conclusion

Social and Economic Rights are justiciable. Justiciability is not only to be seen in courts decisions, but also in the review process. What is needed is a minimum core content on each of the economic and social rights. The international community has to develop precise contents of rights in order to give states guidelines about the minimum that must be achieved. As the Helsinki Final Act reminds us, human rights derive from human dignity, not justiciability. Justiciability is however important to protect and to enforce human rights. That a human right to water must be protected is not only a matter of law, but also and primarily a matter of humanity.

<sup>110</sup> All decisions taken by the African Commission can be viewed at the homepage of the Minnesota University, Human Rights library; available at: <http://www1.umn.edu/humanrts/africa/comcases/allcases.html>.

## **D. Duties of states to secure rights of access to water**

### **I. International obligations**

Formally acknowledging water as a human right and expressing the willingness to give content and effect to this right, would thus be an effective way of preventing long debates about the existence and the scope of a human right to water and encouraging the international community to translate such a right into specific international and national obligations.

#### **1. Content of a right to water**

In order to define states' obligations with regard to water, the content of the right to water should be defined. Water must be first of all accessible and safe. That is why it is essential that the right to water should give everyone a right to sufficient, safe and accessible water for personal and domestic uses. The term access should also include economic accessibility. The term sufficient and safe refers to both the quality and quantity of water. The given international instruments, as we have seen, ensure only partially the elements of a right to water. As in the above international conventions and other instruments analyzed, all three aspects are rare. Agenda 21 states in its Chapter 18 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 quality equal to their basic needs*". This concept was repeated by the UN Committee on Economic, Social and Cultural Rights in November 2002. Additionally, the Millennium Declaration also recognized that the supply of drinking water includes both quantity and access; it emphasizes the need to: "*stop the unsustainable exploitation of water resources by developing management strategies at the regional, national and local levels...*"<sup>111</sup>

A right to water cannot, however, imply a right to an unlimited amount of water. It is important to note that having a right must mean having the necessary conditions for exercising those rights. Arguably a right is meaningless when it is impossible for the right-holder to exercise it.<sup>112</sup> Resource limitations, ecological constraints and economic and political factors limit water availability and human use. How much water is necessary to satisfy this right has been a long discussed issue in international discussions and human rights literature. These lead to the conclusion

<sup>111</sup> Paragraph 23 of the Millennium Declaration.

<sup>112</sup> Orucu, E. in: Campbell, T. M. Goldberg, D. McLean, S. Mullen, T. 1986. "*Human Rights from Rhetoric to Reality*"; pp. 47.

that a right to water should only apply to “basic needs” for drinking, cooking, and fundamental domestic uses.<sup>113</sup> The quantity of water should correspond to World Health Organizations (WHO) guidelines, which is 20-4- litres per day.<sup>114</sup>

## 2. States' obligations

The active participation of the state is a prerequisite for the attainment of the right to water. That is why governments hold the primary responsibility for ensuring the realization of human rights. On the way to a realization of a human right to water, states have a range of international obligations, which derive from different legally binding and non-binding agreements. The United Nations Charter calls on members to take “joint and several action” to promote *inter alia*:

- *“a higher standard of living...and conditions of economic and social progress and development;*
- *solutions of international economic, social health and related problems;...and*
- *universal respect for, and observance of, human rights.”<sup>115</sup>*

The ESC Committee has emphasized that development assistance and cooperation are issues of human rights: *“in accordance with articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States.”<sup>116</sup>*

The main agreement, which is relevant to a human right to water I will concentrate on, is the CESC. As water is a compelling element of the most important human rights embodied in the CESC, water is to be considered as a human right protected by the CESC. As CESC is legally binding, states parties to the CESC are legally bound by the Covenant. The Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources. Thus states parties to the Covenant have a duty to move as expeditiously and effectively as possible towards the full realization of the right to water.

<sup>113</sup> Gleick, P.H.1966. In: Water International; Vol. 21, pp. 83-92.

<sup>114</sup> See: [www.who.int/inf-fs/en/fact112.html](http://www.who.int/inf-fs/en/fact112.html).

<sup>115</sup> United Nations Charter, Article 56.

With regard to international obligations, states are required, according to Article 2, I and Articles 11, I and 23 of the Covenant, to recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the right to water. States parties are primarily obliged to respect the enjoyment of the right to water in other countries. International cooperation requires States parties to refrain from actions that interfere with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction. According to the Convention on the Law on Non-Navigational Uses of Watercourses, states are required that social and human needs have to be taken into account in determining the equitable utilization of watercourses. Furthermore, states parties are required to take measures to prevent significant harm being caused, and, in the event of conflict, special regard must be given to the requirements of vital human needs.<sup>117</sup>

## II. National obligations

It is the third General Comment that is of the greatest significance with regard to states' duties. It constitutes an explicit statement by the Committee on the nature of states parties' obligations with particular reference to Article 2 I of the Covenant. The Committee notes that the Covenant does impose various obligations, which are of immediate effect. It points out two such obligations in particular: the non-discrimination provisions and the undertaking to take steps. Most importantly of all, the Committee observes that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. This leads it to the conclusion that a state party in which any significant number of individuals is deprived of essential rights such as water is failing to discharge its obligations under the Covenant.

The right to water would therefore mean that everyone might demand access to a certain quantity of water of satisfactory quality to meet his or her basic needs. Access to water does not entail an obligation to connect everyone, regardless of location, to a water distribution network; it only means that every individual should have access to drinking water in his or her neighbourhood or should be authorized to establish a connection with a distribution network.

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<sup>116</sup> CESCR General Comment No. 3.

<sup>117</sup> See Articles 5, 7 and 10 of the Convention; Convention is available at: <http://www.un.org/law/ilc/texts/nnavfra.htm>.

It is, however, important to bear in mind that human beings are responsible for themselves and their own well-being. Human rights do not automatically involve heavy government intervention or imply that individuals can unreservedly demand goods and services from the state. However current international human rights law is a system of state obligations. All human rights, and thus the human right to water, imposes three obligations on states: obligation to respect, to protect and to fulfill.<sup>118</sup>

### **1. Obligation to respect:**

The state must take legislative, administrative and other action progressively to achieve that every human being within its jurisdiction has access to adequate water, to the maximum of its available resources.<sup>119</sup> The obligation to respect requires primarily, that States refrain from interfering directly or indirectly with the enjoyment of a human right. Recognizing a human right to water means, inter alia, that states are refrained from:

- engaging in any practice or activity that denies or limits equal access to adequate water;
- arbitrarily interfering with traditional arrangements for water allocation
- unlawfully polluting water
- limiting access to, or destroying, water services and infrastructure.

### **2. Obligation to protect:**

relates to the duty of the state to regulate the behavior of non-state actors, individuals, groups and enterprises. States are primarily obliged to prevent third parties from interfering in any way with the enjoyment of a human right. Recognizing water as a human right obliges states, inter alia, to:

- adopt the necessary and effective legislative and other measures to restrain third parties from denying access to adequate water and from polluting and inequitably extracting<sup>120</sup> from water resources;

<sup>118</sup> Henkin, L.; Neuman, G.; Orentlicher, D.F. Leebron, D.W.1999; "*Human Rights*"; pp. 314.

<sup>119</sup> See Article 2 of ECESR.

<sup>120</sup> The protection of rights also implies, in the case of international water resources or transboundary basins, an obligation of equitable use by riparian countries through appropriate cooperation mechanisms. See Article 5 of the 1997 UN Convention on the Law of Non Navigational Uses of International Watercourses; available at: <http://www.un.org/law/ilc/texts/nonnav.htm>.

- prevent third parties from compromising equal, affordable, and physical access to sufficient and safe water where water services are operated or controlled by third parties

Irrespective of the form of water service management and the degree of involvement of private companies in the service, the public authorities must exercise control over the operations of the various public or private bodies involved in water service management. This includes, in particular, the financing of works, the quality of the water, continuity of the service, pricing, drafting of specifications, degree of treatment and user participation

### 3. Obligation to fulfill:

The obligation to fulfill is an obligation for a more positive action to facilitate and provide access to adequate water for those who do not have it. States are required to adopt the necessary measures directed towards the full realization of a human right to water.

- The duty to utilize all necessary measures includes also an obligation to adopt a national strategy or plan of action to realize the right to water.
- The strategy should not only be based upon human rights but should also cover all aspects of the right to water, including defining clear objectives and setting targets and the time-frame for their achievement. Furthermore it is necessary, that the strategy establish institutional responsibilities for the process
- Furthermore it is very important that sufficient coordination between the national ministries, regional and local authorities is guaranteed in order to reconcile water-related policies.
- States parties to the Covenant should identify indicators in the national water strategies. These indicators should address the different components of adequate water such as sufficiency, safety, acceptability, affordability and physical accessibility.<sup>121</sup>
- Any persons who have been denied their right to water should have access to effective judicial or appropriate remedies at both national and international levels.<sup>122</sup>

<sup>121</sup> see general Comment 15; para. 53.

<sup>122</sup> See General Comment No. 9 (1998), para.4, and Principle 10 of the Rio Declaration on Environment and Development.

### **E. Privatization of water**

Since the World Water Forum 2000 water is a trade commodity. Some even argue that water is going to be more important than oil. Furthermore it won't take long that water is going to be transported in pipelines like oil.<sup>123</sup> Others argue that water is not at all like oil because water is an infinitely renewable resource as water is located in a natural cycle.<sup>124</sup> Rainwater falls from the clouds on the land, nourishes life, returns through rivers to the sea and evaporates as water back into the clouds. In their opinion, the only problem with water is its location and thus the way of delivery to people. Some places, such as Canada, Austria and Ireland, have more water than they can use, others, such China and the Middle East, have too little. Another difficulty with regard to water is its mismanagement or its wasteful misuse. Lack of adequate water institutions, fragmented institutional structures and excessive diversion of public resources for private gain, have impeded the effective management of water supplies.

That is why many argue that water privatization is the best way to deal with water. On the other hand, where water has been privatized, water prices increased dramatically and even water cut-offs were experienced. The black townships in Fort Beaufort had seen an increase in service charges by 600 percent between 1994 and 1996, due to privatization.<sup>125</sup>

If access to water is a fundamental human right, how safe is it to put the supply of water in the hands of the private sector?

#### **I. What are prepayment meters?**

Privatization of water is often closely related to the installation of prepayment meters. Especially in Africa, prepayment meters stand for privatization. Prepayment meters are used, where water was privatized in order to control payment for water. Governments and companies favor these devices because they ensure the collection of water fees and cut administrative costs. Prepayment meters are metal meter boxes with a slot for a plastic card and a water tap below. The device requires consumers to pay for water before consumption by purchasing a prepaid card. Consumers can then draw water from the meter by inserting the prepaid card into the meter and collecting the water in a portable container. As service is delivered, the balance is adjusted, and the remaining credit displayed. Service is

<sup>123</sup> Barlow, M. & Clare, T. 2003. "*Blaues Gold. Das globale Geschäft mit dem Wasser*" pp. 336.

<sup>124</sup> A survey of water in: *The Economist*, July 2003.

<sup>125</sup> [http://www.afrol.com/News2002/sa024\\_water\\_private.htm](http://www.afrol.com/News2002/sa024_water_private.htm).

automatically terminated if the payment balance is depleted until the consumer can pay again.

Prepayment meters are predominantly used in South African municipalities including, Thabanchu, Mossel Bay, Ladismith and Cape Town. Prepayment meters can also be found in Namibia, Swaziland, Tanzania, Brazil, Nigeria, and Curacao.<sup>126</sup> The devices were previously used in the United Kingdom (U.K.) until they were declared illegal in 1998 for public health reasons.

## **II. Impacts of prepayment meters on health**

As the prepayment meters function like a water tap, they do not give water when the prepaid card has not been introduced because the tap is closed. The non-payment is consequently related to a water cut-off. In South Africa alone there have been 10 million such cuts since commercialization started in 1994.<sup>127</sup> According to a study conducted in the KwaZulu-Natal in 2002 the conversion of nine, previously free water, communal standpipes to pre-payment meters, in the Ngwelezane/Empangeni municipality, resulted in many households being denied clean water supply. The conversion was equivalent to a water cut-off. In these areas, water cut-offs increased the vulnerability of communities to water borne diseases such as cholera. After the installation of prepaid meters in the KwaZulu Natal province, 113,966 people were infected with cholera, of which 259 died, between August 2000 and February 2002.<sup>128</sup> In contrast, during the previous two decades, from 1980 to 2000, only 78 people died of cholera.

## **III. National obligations with regard to privatization of water**

Water is the basis of our life. Without water, human being will not survive. Access to safe and sufficient water is a human right under international law, and under some national constitutions. That is why water cut-offs are violating the human right to water. The installation of prepayment meters, especially in South Africa, has shown that the poorest are the most vulnerable when it comes to privatization of water. As they often cannot afford to pay the new prices, water cut-offs are increasing.

The Free Water Policy implemented by the South African government since July 2001 was not a solution to the growing problem. The scheme's free allocation of

<sup>126</sup> <http://www.citizen.org/cmep/Water/conferences/articles.cfm?ID=8210>.

<sup>127</sup> [http://www.afrol.com/News2002/sa024\\_water\\_private.htm](http://www.afrol.com/News2002/sa024_water_private.htm).

<sup>128</sup> <http://www.citizen.org/cmep/Water/conferences/articles.cfm?ID=8210>.



6000 litres of water per household per month does not even meet basic sanitation requirements<sup>129</sup>, given that the average poor household has eight members. It is argued that six liters of free water to the poor will only amount to two toilets flushes per day.<sup>130</sup>

On the other hand, commercializing water supply seems to be absolutely necessary in Africa for improving quality of services and water supply coverage. As many states do not have appropriate means of providing water, privatizing is supposed to be a solution. However, a blind privatization of public water utilities (to attract private capital) will not lead to substantial improvement of services for the rural and urban poor. Without government control, neither public nor private utilities may sustain.

The main problem remains, the immense price increase after privatizing. Water prices in Hungary in 1998 increased by 175 % above the level of 1994 and in the Czech Republic by 39,8 % in 1999. In the UK water and sewerage bills increased by an average of 67 % between 1989/90 and 1994/95, but profit margins in water companies rose from 28,7 % to 36,5 % in the period between 1989/90 and 1992/3.<sup>131</sup> In order to protect its citizens from notorious price increases, many local governments have reclaimed privatized services. Lodz in Poland and Debreceni Vizmu in Hungary for example returned privatized water delivery to state control.<sup>132</sup>

A service accessible to everyone must therefore ensure appropriate water pricing and continuous access to water for all. This calls, in particular, for the following measures:

- Coverage of costs in such a way as to ensure continuity of the service (by fixing the price of water at a level that counterbalances the cost);
- A price that everyone can afford (by introducing special rates or aid measures with an equivalent impact in order to provide a limited quantity of water to the most disadvantaged).

<sup>129</sup> The World Health Organization's daily requirement for water is 20-40 liters a day per person.

<sup>130</sup> De Visser, J. Cottle, E & Mettler, J. 2003. "Realising the right of access to water: Pipe dream or watershed?"; In: Law Democracy & Development; Vol. 7; pp. 43.

<sup>131</sup> De Visser, J. Cottle, E & Mettler, J. 2003. "Realising the right of access to water: Pipe dream or watershed?"; In: Law Democracy & Development; Vol. 7; pp. 42.

<sup>132</sup> De Visser, J. Cottle, E & Mettler, J. 2003. "Realising the right of access to water: Pipe dream or watershed?"; In: Law Democracy & Development; Vol. 7; pp. 42.

The basic financial principle for water distribution through networks is that the cost of the "water service" should "be apportioned in such a way that each person can enjoy the right to water". The price paid for water could thus be adjusted to ensure that each user has access to water in accordance with his or her means. In short, the price of water should be affordable by every consumer. This apportionment of costs among consumers should be conducted "in each corporate body responsible for the water service", for example in distribution companies or authorities. A larger-scale equalization scheme is also possible (at the county, region or State level).

Very specific contract terms and regulatory authority are required to assure any bulk sales follow publicly established standards. Water rights should remain with the public authorities.

#### **F. Conclusion**

The definition and protection of human rights remains one of the major themes of political, philosophical and legal discourse. Access to safe and sufficient water is a human right not only because water is protected by the international law in many ways but because of humanity. The right to water has varying contents, ranging from adequate access to sufficient water for all needs. The state must respect, protect and fulfill that right. The state must ensure that everyone has access to adequate water and must use a variety of legal, administrative and policy instruments to progressively achieve this. The state may privatize water services and allow user fees as long as essential water is affordable for everyone.

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### **3. Duties of states to protect water in situations of armed conflicts**

#### **A. Human rights during armed conflicts**

Human rights and human rights law is designed to operate primarily in normal peacetime conditions, and within the framework of the legal relationship between a state and its citizens. Armed conflicts are an abnormal condition, where human rights do not have the same validity as in peacetime. During armed conflicts the law of war or so-called International Humanitarian Law (IHL) comes into being.

IHL comprises all those rules of international law which are designed to regulate the treatment of the individual – civilian or military, wounded or active-in international armed conflicts.<sup>133</sup> Its provisions govern relations with the enemy: a member of the enemy armed forces is entitled to the protection as a prisoner of war, and the rights of the inhabitants of a territory occupied by an enemy power are protected.<sup>134</sup> The rules are to be observed not only by governments and their armed forces, but also by armed opposition groups and any other parties to a conflict.

The four Geneva Conventions of 1949 and their two Additional Protocols of 1977 are the principal instruments of humanitarian law. IHL concerns primarily the rules governing the actual conduct of internationalized armed conflict (*jus in bello*) and not the rules governing the resort to armed force (*jus ad bellum*).<sup>135</sup>

The term internationalized armed conflict includes war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily intervene in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government.<sup>136</sup>

Traditionally, international humanitarian law has thus sought to regulate the conduct of and damage caused by conflict between rather than within states. It includes treaties as well as customary international law.

<sup>133</sup> Fleck, D.1995. “*The Handbook of Humanitarian Law in Armed Conflicts*”; pp. 9.

<sup>134</sup> Haug, H.1993. “*Humanity For All – The International Red Cross and Red Crescent Movement*”; pp. 508.

<sup>135</sup> McCoubrey, H. 1998; “*International Humanitarian Law*”; pp. 1.

<sup>136</sup> Schindler D. 1982. “*International humanitarian law and internationalised internal armed conflicts*”,

*International Review of the Red Cross*, No. 230; pp. 255.

Unlike human rights law, the law of war allows, or at least tolerates, the killing of human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. It also permits certain deprivations of personal freedom without convictions in a court of law.

Although it is often argued that human rights law has not the same validity during armed conflicts as in peacetime, it does not mean that human rights are not to be respected. One of the fundamental sources and guiding principles of human rights is the principle of humanity. The idea of humanity, however, has become the common denominator of human rights law and of humanitarian law. Although law of war and human rights law stem from different historical and doctrinal roots their common ground remain the principle of humanity.

In addressing conflict with humanitarian law, concepts, human rights law has thus largely deferred to humanitarian law. Theodor Meron, in his Article: "*The Humanization of Humanitarian Law*"<sup>137</sup> shows very well, how human rights law has greatly influenced instruments of international humanitarian law, producing a large measure of parallelism between norms and a growing measure of convergence in their personal and territorial applicability. He goes even further in proving that international humanitarian law and the corresponding institutions have become central to the protection of human rights. The IHL is therefore that part of human rights law which is applicable in armed conflicts and which provides a certain minimum on fundamental human rights.

#### **B. Relationship between water and conflict**

During armed conflicts, water was one of the main targets to attack in order to weaken the enemy throughout the centuries. Water for survival has been either exploited through physical destruction of facilities or by making the facilities unusable through poisoning.<sup>138</sup> As the availability and quality of freshwater resources around the world is decreasing and our climatic future<sup>139</sup> and

<sup>137</sup> See: Meron, T. 2000. *The American Journal International Law*; pp. 239.

<sup>138</sup> Zemmali, A. 1999. *International Humanitarian Law and the Protection of Water. Forum: War and Water*, No. 71, p. 73.

<sup>139</sup> Over the past decade, the number of droughts and floods have increased dramatically as environmental conditions have deteriorated and the global climate has continued to change due to intensified greenhouse gas emissions. See: UNESCO "*People and Planet*"; information regarding World Water Day 2003 at <http://www.wateryear2003.org>.

exponentially increasing populations<sup>140</sup> are uncertain, there is a real cause for concern: water is becoming a matter of international security. In the Middle East and Central Asia, fresh water is likely to become more important than oil.

Many NGOs and other institutions have documented water related conflicts, where enormous suffering by the local population was the result.<sup>141</sup>

I will concentrate on some selected conflicts during the past ten years in order to demonstrate the relationship between water and conflict.

### I. Former Yugoslavia

NATO decided to bomb the former Yugoslavia in March 1995 with the objective of preventing a humanitarian catastrophe in Kosovo. The aim was to resolve the conflict between Serbs and ethnic Albanians, who sought independence or autonomy.

In May 1999, during the continued NATO bombing, fifteen NATO bombs hit water pumps near the northwestern town of Sremska Mitrovica, while Belgrade's water reserves had been cut by 90 percent.<sup>142</sup> As the level of conflict in Kosovo increased, partly in response to the bombing campaign, serious disruption followed. In May 2000, nearly one year after the beginning of the UN mission in Kosovo, water supply in Pristina and major Kosovo towns were functioning intermittently. In August 2001, the Macedonian government reported that fighting continued in the border village of Radusa, with both sides seeking to control the water reservoir that supplies water to Skopje, the nation's capital.<sup>143</sup>

But even before NATO's investigation, water was a target during the Yugoslavian conflict. In 1993, the Peruca Dam, which is situated in Croatia, was intentionally destroyed by the Yugoslavian army.<sup>144</sup>

<sup>140</sup> Population has grown at a significant rate, from 2.5 billion in 1950 to 6.1 billion today, yet the renewable water supply per person has fallen 58%. See: S.L.Postel & A.T. Wolf, "Dehydrating Conflict"; in Foreign Policy Magazine (Sept/Oct. 2000).

<sup>141</sup> See like for example the pages of the ICRC; available at: <http://www.icrc.org>; and the water and conflict chronology, available at: <http://www.worldwater.org/conflictIntro.htm>.

<sup>142</sup> See CNN News from May 24 1999; available at: <http://www.cnn.com/WORLD/europe/9905/24/kosovo.02>.

<sup>143</sup> Fisher, I. 2001. "Uncertain Cease Fire on Eve of Macedonian Pact Signing"; in New York Times, Auf. 13, pp.A8.

<sup>144</sup> See the database of the Pacific Institute for Studies in Development, Environment, and Security; available at: <http://www.worldwater.org/conflictchronologychart.PDF>.

## II. Israel / West Bank

The inhabitants of Israel and the Palestinian Territories share the main sources of drinking water. The largest resource is the Jordan River. Due to the occupation of the Jordan valley by the Israeli army, the Palestinian population on the West Bank is unable to reach the river and cannot use the water for irrigation or human consumption. As most of the Palestinian villagers are not connected to waterworks; people have to rely on water trucks or women, who have to carry water from distant wells for their daily needs.

After the war of 1967 and the occupation of the Palestinian West Bank and Gaza Strip, Israeli military commanders became responsible for the governance of the Occupied Territories. The military commander has the power to withdraw a licence that was previously granted, with no possibility of appeal against his decisions. Meters were placed on the Palestinian wells to limit their capacity. The present Intifada has made matters worse. Due to the Israeli siege of Palestinian towns and villages, the price of water deliveries rose very sharply. A lot of water is lost due to collateral damage by shelling and bulldozing pipelines and other infrastructure by the Israeli army, as reported by the World Bank and UNDP.<sup>145</sup>

The Israeli-Palestinian water conflict can be visualised when we compare figures concerning Israeli and Palestinian water consumption. In the water policy plan, the Israeli government handles an average per capita consumption of 35m<sup>3</sup> for a Palestinian on the West Bank, and 321m<sup>3</sup> for Israelis in Israel and the settlements.<sup>146</sup>

## III. Africa / Somalia

Somalia is located in an extreme water scarce area, where most of the available water resources exist in rivers shared with neighbouring countries and demand for water is increasing due to population and urban growth. Facilities that were previously set up for water supply and irrigation were totally destroyed during the civil war in 1991, which resulted in a complete failure of the water supply system by mid-1995. Neither clanism (tribalism) nor hostility within the Somali society is the

<sup>145</sup> In an UNDP-publication, the damage to water and sewage infrastructure during the period September 2000 to March/April 2002 is estimated at more than \$6,9 million (UNDP, FOCUS, 2, 2002, p. 38).

<sup>146</sup> Deconinck S., "*Israeli water policy in a regional context of conflict: prospects for sustainable development for Israelis and Palestinians?*", December 2002; available at: <http://waternet.rug.ac.be/waterpolicy.htm>

cause of the current conflict, but water is one of the main traditional sources of social conflict in Somali society because of its scarcity.<sup>147</sup> In Mogadishu between 1994 and 1997, there were four major cholera epidemics affecting 55.000 people.

#### IV. Iraq

In August 1990, Iraq occupied illegally Kuwait, which resulted in the first Gulf War. During the War, Allied bombings targeted eight multi-purpose dams, which damaged flood control, municipal and industrial water storage, irrigation and hydroelectric power. Four of seven major pumping stations were destroyed, as were 31 municipal water and sewage facilities (20 in Baghdad), resulting in sewage pouring into the Tigris. Furthermore, surgical strikes during the Gulf War against power supply systems in Iraq resulted in a significant deterioration of drinking water and severe consequences for public health.<sup>148</sup>

Following the Iraqi invasion and illegal occupation of Kuwait in August of 1990, the UN Security Council imposed sanctions on Iraq.<sup>149</sup> Among those, it was not allowed to import pipes as they were classified as potential military material. Furthermore, the sanctions forbid the importation of chlorine, which is needed for filtrating contaminated water. As water remained contaminated, diarrhea and dysentery spread dramatically. Therefore, the sanctions had significant humanitarian consequences for the people of Iraq and were responsible for the death of many children.

During the bombings of Iraq in 2003, which were justified by the United States as a war against terrorism, water shortages were a major concern to the international community. In Baghdad, a city of five million people, several water treatment stations stopped functioning due to bombing or the loss of power supplies. Basra, the second-largest city in Iraq with over 1.3 million people, was the scene of water riots early in the war and was without running water or electricity for two weeks. In desperation, the city's residents broke water pipes and even sewage pipes in a hunt for drinking water.<sup>150</sup>

<sup>147</sup> Abdullahi E. M., "Water:- As a Cultural Issue & a Source of Conflict, a case of Somalia"; available at: <http://www.somwat.com/WatCul.html>.

<sup>148</sup> Aziz, A. 1998. "Iraq: The Water Trategy"; Forum: War and Water; pp. 72.

<sup>149</sup> SC Resolution 661, UN SCOR, 45<sup>th</sup> Sess., 2933<sup>rd</sup> mtg., UN Doc. S/RES/661 (1990).

<sup>150</sup> UNICEF press release from May, 10 2003; available at: [http://www.unicef.org/media/media\\_7107.html](http://www.unicef.org/media/media_7107.html).

## V. Conclusion

Internal conflicts, which derive from internal instability as well as classic wars between states, resulted in the destruction of basic infrastructures, including water facilities. The selected conflicts lead to the conclusion that the civilian population is becoming increasingly vulnerable to the destructive consequences of conflict. This raises the question if and to what extent international law poses obligations on states to protect water facilities during armed conflicts.

### C. States' duties during armed conflicts

#### I. Customary international law / Principles

International law and states' duties originate in the common will of states and are primarily based on treaties but not alone. Customary law can complement treaty law in a number of ways. States that have failed to ratify a particular treaty may still observe the law expressed in the treaty as customary. Over the years, nations began to recognize that conduct during warfare should have limits in order to protect victims of war. Unwritten principles were generally followed by civilized nations and over time these principles rose to the status of customary international law. The law of war became a branch of public international law that governs the conduct of nations during times of armed conflict.

The purpose of the law of war is not to protect water or water facilities, but rather the human population dependent upon it for its survival. Throughout history, the development of international humanitarian law has been influenced by religious concepts and philosophical ideas. Customary rules of warfare are part of the very first rules of international law.<sup>151</sup>

Comment:

For the case that the applicable conventions do not protect water sufficiently, customary law will become important when addressing the issue of the targeting of water facilities by state actors during armed conflicts. The fundamental principles of customary international law applicable to the protection of water facilities are those of, proportionality and military necessity, humanity and discrimination. Furthermore there are some more specific customary rules, like for example prohibition on the use of poison or the prohibition on the destruction of property. These rules have been incorporated mostly into international treaty law. I will therefore examine these rules when talking about specific treaties.

<sup>151</sup> Fleck, D. 1995; *"The Handbook of Humanitarian Law in Armed Conflicts"*; pp. 12.



### 1. The principle of proportionality and necessity

In war, a belligerent may apply only that amount and kind of force necessary to defeat the enemy. Acts of war are only permissible if they are directed against military objectives, if they are not likely to cause unnecessary suffering and if they are not perfidious.<sup>152</sup> Considerations of military necessity cannot, therefore, justify departing from the rules of humanitarian law in armed conflicts to seek a military advantage using forbidden means. Any exceptions to the prescribed behavior for reasons of military necessity shall be permissible only if a rule of international humanitarian law expressly provides for such a possibility.<sup>153</sup>

The principle of proportionality is a fact specific concept requiring that the force employed by the attacker not to be disproportionate to the military advantage sought.<sup>154</sup> The rule of proportionality is a classic example of an instance where a wide measure of discretion is left to the state.<sup>155</sup> The main problem with the principle is therefore its applicability. As it is required to weigh up the relative military advantage against the potential injury to non-combatants or to civilian objects, it appears to be difficult to draw the line between disproportional and military advantage.

### 2. Principle of humanity

The principle of humanity is also known as the “principle of unnecessary suffering and destruction” and proscribes the use of means of warfare which cause unnecessary suffering not justified by legitimate military objectives.<sup>156</sup>

### 3. The principle of discrimination

This principle provides that the means and methods of warfare must distinguish between military and civilian targets.<sup>157</sup> As many wars have shown, it is almost impossible to distinguish always between military and civilian targets. Although the international community and especially the US possess precision weapons, “accidents” occur, where civilians have been military targets. During the new Iraq war for example, many of such accidents happened where civilians died and where even water facilities had been attacked. Although the weapons are supposed to be

<sup>152</sup> Fleck, D. 1995; “*The Handbook of Humanitarian Law in Armed Conflicts*”; pp. 30.

<sup>153</sup> Fleck, D. 1995; “*The Handbook of Humanitarian Law in Armed Conflicts*”; pp. 32.

<sup>154</sup> Roberts, A., Guelff, R. 2000; “*Documents on the Laws of War*”; pp. 10

<sup>155</sup> McDonald, N. & Sullivan S. 2003; “*Recent Development: Rational Interpretation in Irrational Times: The Third Geneva Convention and the “War on Terror”*”; in 44 Harv.Int’l L.J. pp. 305.

<sup>156</sup> Kalshoven, F. 1991; “*Constraints on the Waging of War*”; pp. 29-30. ICRC.

precise, the distance from which they attack makes it impossible to destroy only military targets.

#### 4. Martens Clause

The so-called Martens Clause was developed by the Livonian professor Friedrich von Martens (1845-1909), who was a delegate of Tsar Nicholas II at the Hague Peace Conferences. The clause states that: "In Cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." The clause has been included in the Preamble to the 1907 Hague Convention IV and reaffirmed in the 1977 Additional Protocol I as stated below. The Martens Clause should be treated as a reminder that customary international law continues to apply even after the adoption of a treaty on humanitarian law.

## II. International Conventions

States duties during armed conflicts derive from the International Humanitarian Law. IHL has primarily two branches: The Law of The Hague and The Law of Geneva, bearing the name of Geneva and of The Hague.

### 1. The Law of The Hague

The Law of The Hague was principally the result of The Hague conventions of 1899, revised in 1907. The Law of The Hague<sup>158</sup>, or the law of war properly so-called, determines the rights and duties of belligerents in the conduct of operations and limits the choice of the means of doing harm.<sup>159</sup> The first Declaration, however, to introduce limitations on the use of weapons of war, was the 1868 Declaration of St. Petersburg. It codified the customary principle, still valid today, prohibiting the use of weapons to cause unnecessary suffering. The Annex to the 1907 Hague Convention IV<sup>160</sup>, Article I, sets out the basic qualification of belligerents. It applies to armies, militias and volunteer corps fulfilling the following conditions:

- To be commanded by a person responsible for his subordinates
- To have fixed distinctive emblems recognizable at a distance
- To carry arms openly; and

<sup>157</sup> Roberts, A., Guelff, R. 2000; "*Documents on the Laws of War*"; pp. 10

<sup>158</sup> The Hague Conventions available at: <http://www.lib.byu.edu/~rdh/wwi/hague.html>.

<sup>159</sup> Pictet, J. 1985. "*Development and Principles of International Humanitarian Law*"; pp 2.

<sup>160</sup> Text available at: <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm#art23>.

- To conduct their operations openly and in accordance with the laws and customs of war.

Furthermore, The Hague Convention IV stipulates two prohibitions that are indirectly related to the protection of water resources:

Article 23 states that: "*In addition to the prohibitions provided by special Conventions, it is especially forbidden*

- *to employ poison or poisoned weapons...*" or
- *"to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war..."*

The prohibition against poison referred to above is probably the most ancient prohibition of a means of combat in international law.<sup>161</sup> With the codification of this prohibition a customary rule has been incorporated into an international treaty and is still valid today. Although the provisions do not expressly address the protection of water, the provisions are general in scope and therefore applicable to water. As water can form part of public or private property<sup>162</sup>, it is safe to presume that the prohibition to destroy the enemy's property includes water facilities.

## 2. The Law of Geneva

The Law of Geneva, or humanitarian law properly so-called, tends to safeguard military personnel placed "hors de combat", persons not taking part in hostilities. This law consists of the four Geneva Conventions<sup>163</sup> of 1949 and the two additional Protocols of 1977. The four Geneva Conventions of 1949 were signed by 64 states after the atrocities committed during the Second World War.<sup>164</sup> The law of Geneva is predicated upon the essential ideal of the Red Cross. The International Committee of the Red Cross<sup>165</sup> (ICRC) has been mandated by the international community, via the Geneva Conventions of 1949 and the two Additional Protocols of 1977, to monitor the conformity of parties in conflict to international humanitarian law. The texts of Geneva were developed exclusively for the benefit of war victims.

<sup>161</sup> Since the Middle Ages the use of poison has always been strictly prohibited.

<sup>162</sup> Zemmali, A. 1999; "*International Humanitarian Law and the Protection of Water*" in: Forum: War and Water, No. 71. pp. 76. See also Schmitt, M. 1997. "*Green Was: As Assessment of the Environmental Law of International Armed Conflict.*"; 22 Yale Journal International Law No. 1, pp. 64.

<sup>163</sup> Text available at: <http://www.unhchr.ch/html/menu3/b/91.htm>

<sup>164</sup> Levi, W. 1991. "*Contemporary International Law*"; pp. 182.

<sup>165</sup> For more informations see the status of the ICRC at:

<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/E1B071F72AF9BAB4C1256B66005C48D6>

The Geneva Conventions aim to ensure the minimum conditions for persons protected by the Convention in order to ensure a normal life, as far it is possible. The treatment humane of these people, it is the basis in order to guarantee their life. Water is one of the most important elements, even during the war to ensure the survival of the most vulnerable: civilian people, injured and prisoners of war.

#### **a. Geneva III**

The Geneva III Convention deals with the treatment of prisoners of war. According to this Convention states have certain duties with regard to persons fallen into their power. As prisoners of war are according to Article 12 not prisoners of the individuals captured them but of the enemy, the enemy and therefore the state in war has to care for the prisoners of war. The Convention provides some provisions to ensure water for the prisoners of war.

Article 20 states that the: *"...The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water..."* Article 26 provides once again that: *"Sufficient drinking water shall be supplied to prisoners of war."* Furthermore, hygiene and medical attention shall be secured. According to Article 29: *"... Also, apart from the baths and showers with which the camps shall be furnished prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry..."*

#### **b. Geneva IV**

The Geneva Convention IV deals with the protection of civilian persons in times of war. Internees as well as prisoners of war have certain rights with regard to water. According to Article 85 they shall be: *"... provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose shall be granted to them. Showers or baths shall also be available."* Furthermore internees shall be supplied with sufficient drinking water according to Article 89. Additional: *"...The Detaining Power shall supply internees during transfer with drinking water and food sufficient in quantity, quality and variety to maintain them in good health..."*

### **3. The 1977 Protocols o the Geneva Conventions**

The two additional Protocols adopted in 1977 include statements more directly related to water. This was the result of the tremendous environmental destructiveness in Vietnam, as a result of the United States' use of chemicals and defoliants. In the same year the Convention on the Prohibition of Military or any

Other Hostile Use of Environmental Modification Techniques (ENMOD) followed. The ENMOD Convention is designed to prevent the deliberate manipulation of the environment for military purposes. It potentially could be applied more broadly to cover water facilities. Despite growing international concern about the effect of war on the environment, neither of these agreements has been universally adopted. The US, for example, has still failed to ratify the Protocol I.

**a. Protocol I**

Articles 35 and 55 of Protocol I specifically addresses the protection of the environment during periods of armed conflicts. Article 35 begins by stating the principle developed in The Hague: the right to choose means of warfare "*is not unlimited*" and it is prohibited to use "*methods of warfare of a nature to cause superfluous injury or unnecessary suffering.*"

Article 35 III further strengthens the protection of the environment by stating, that: "*it is prohibited to employ methods of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment.*" While Article 35 I mentions the protection of the environment as a basic rule, Article 55 is entirely devoted to the environment and thus represents the only truly "environmental" provision in Protocol I. It states:

- "*Care shall be taken in warfare to protect the natural environment against widespread, long-term, and severe damage. This protection includes a prohibition of the use of methods or means of warfare, which are intended or may be expected to cause such damage to the natural environment and thereby prejudice the health or survival of the population.*"
- "*Attacks against the natural environment by way of reprisals are prohibited*".

Article 54<sup>166</sup> deals with the protection of objects indispensable to the survival of the civilian population. Under Article 54 II it is prohibited to:

*"to attack, destroy...livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive".*

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<sup>166</sup> Geneva Convention, Protocol I available at: <http://www.unhcr.ch/html/menu3/b/93.htm>.

In response to many armed conflicts, where catastrophic damage or destruction of dams and dykes resulted in immense suffering by civilians Article 56 was adopted. Article 56 is especially designed for agricultural countries, because it provides that:

*“Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.”*

The protection guaranteed by Article 56 remains problematic if the facility is used in a manner inconsistent with its normal function and in regular, significant and direct support of military operations.

### **b. Protocol II**

Protocol II<sup>167</sup>, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

As the preamble reaffirms, the foundation of respect for the human person shall remain at the very centre. This Protocol shall, however, according to Article 1 II not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts. Article 14 and 15 reaffirm and are the dependant to Article 54 and 56 of the Protocol I. Therefore the protection of water and its associated storage enjoy the same protection during international conflicts as during non-international conflicts.

### **III. Enforcement mechanisms**

It remains to be seen, if the protection, which is provided by the above mentioned treaties is effective. In order to be effective, the provided provisions must be enforced effectively. In the context of the humanitarian jus in bello, it may readily be seen that the primary function of the law is not to punish war criminals, but to protect victims of armed conflicts by preventing war crimes from being committed.

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<sup>167</sup> Geneva Convention, Protocol II, available at: <http://www.unhchr.ch/html/menu3/b/94.htm>.

Before any question of enforcement action can arise, failure in that primary endeavor must be presupposed. In this sense, “enforcement” must be seen as a secondary office of the laws of armed conflict. Nevertheless, in order to deter and to maintain norms, which may otherwise be degenerated, it is important to have penal enforcement mechanisms.

The 1949 Geneva Conventions and the 1977 Additional Protocol are multilateral treaties, and therefore, like all other treaties, subject to the principle of reciprocity which derives ultimately from the norm that *pacta sunt servanda* (“agreements are to be observed”) recited in the Article 26 of the 1969 Vienna Convention on the Law of Treaties. As the overwhelming proportion of the 1949 Geneva Conventions’ provision has achieved customary status, and at least some of the provisions of the 1977 Additional Protocol I also have that status, the provisions are *ex hypothesi* binding upon all states. The bodies, which, in a given situation, might be involved in investigatory (fact finding) activities in relation to breaches of the laws of armed conflict include the parties themselves, NGOs, UN forces and *ad hoc* commissions of one sort or another.<sup>168</sup>

### 1. Tribunals

Principal among international tribunals is the International Court of Justice (ICJ). The ICJ has jurisdiction only with respect to disputes between states. The criminal acts of individuals are not covered by its jurisdiction. A second kind of international tribunal of great significance is the *ad hoc* variety established by the Security Council of the United Nations. Under Chapter VII of the United Nations Charter, the Security Council has the power to take measures to protect international peace and security.<sup>169</sup> The specific examples of importance are the proceedings before the International Military Tribunals at Nuremberg and Tokyo in 1945 and those in the 1990s before the International Criminal Tribunals for Former Yugoslavia and Rwanda.

In Germany, the International Military Tribunal (IMT) at Nuremberg was established by the USA, UK, USSR and France under the 1945 London Agreement, acting as occupying powers in transition to a new and legitimate German regime.<sup>170</sup> The proceedings before the IMT were of profound significance in the development of the criminal jurisprudence of armed conflict in several regards. Not only was the

<sup>168</sup> McCoubrey, H. 1998; “*International Humanitarian Law*”; pp. 285.

<sup>169</sup> UN Charter, Article 39; text available at: <http://www.un.org/aboutun/charter>.

<sup>170</sup> McCoubrey, H. 1998; “*International Humanitarian Law*”; pp. 290.

foundation for the modern categorization of war crimes made, but it also clearly established the jurisprudential basis of the criminal liability of individuals for violations of the international laws of armed conflict.

The Tribunal for Yugoslavia was established by UN Security Council Resolutions 808 and 827 of 1993 for the prosecution of those responsible for serious violations of international humanitarian law in former Yugoslavia after 1991. Security Council Resolution 808, in particular refers to obligations under the Geneva Conventions. Therefore the tribunal's jurisdiction could be extended to cover environmental war crimes as well. The Tribunal's major decision was the Tadic case, in which the Tribunal decided to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia.

In S.C. Resolution 1373, adopted on September 28, 2001, the Security Council stated that the acts committed on September 11 2001, "*like any act of international terrorism, constitute a threat to the peace and security*" of the international community.<sup>171</sup> This Resolution raises the possibility that the Security Council could establish an ad hoc tribunal to prosecute acts of terrorism. The tribunal would have the peremptory powers of the Security Council and would not necessarily have to rely on complicated extradition and cooperation treaties to obtain evidence and suspects.<sup>172</sup> International Tribunals may be therefore established to prosecute acts of terrorism.

## **2. International Criminal Court (ICC)**

### **a. Development**

The United Nations first recognized the need to establish an international criminal court to prosecute crimes against humanity so far back no 50 years ago. As a result of the crimes committed during the World War II, the General Assembly, stated in resolution 260 of 9 December 1948, in Article VI, that persons charged with genocide "*shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction . . .*"<sup>173</sup>

<sup>171</sup> U.N. SCOR, 56<sup>th</sup> Sess. 4385<sup>th</sup> mtg., U.N. Doc. S/RES/1373 (2001).

<sup>172</sup> Goldstone, R.J. & Simpson, J. 2003. "*Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*"; 16 Harv. Hum Rts. J. pp.20.

<sup>173</sup> See: Modern History Sourcebook: UN Resolution 260, 1948 - On Genocide available at: <http://www.fordham.edu/halsall/mod/UN-GENO.html>



But only in 1993, because of the conflict in former Yugoslavia, where war crimes, crimes against humanity and genocide -- in the guise of "ethnic cleansing" occurred, the demand for a criminal court was strong enough to take more concrete steps. Shortly thereafter, the International Law Commission successfully completed its work on the draft statute for an international criminal court and in 1994 submitted the draft statute to the General Assembly. After the General Assembly had considered the Committee's report, it created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference. The Preparatory Committee, which met from 1996 to 1998, held its final session in March and April of 1998 and completed the drafting of the text. The 60th ratification necessary to bring the Rome Statute of the International Criminal Court into force was exceeded on 11 April 2002. With the necessary ratifications, the Rome Statute entered into force on 1 July 2002 at which time the Court's jurisdiction took effect. Up to September 2003, 92 countries have ratified, accepted, approved or accessed the Rome Statute.<sup>174</sup>

The creation of the International Criminal Court (ICC) is a historic victory for human rights and international justice. It is the first permanent international judicial institution with jurisdiction over individuals who commit the most egregious violations of human rights and humanitarian law. The most important principle of the Statute of Rome is that the Court complements national jurisdictions and that it may only exercise its jurisdiction if the States concerned are unable or unwilling to prosecute the perpetrators of crimes which fall within the competence of the Court.

#### ***b. ICC and water***

It is thus questionable, if and under which provisions the ICC could have jurisdiction over an attack on water facilities. First of all, the competence of the Court is restricted to the gravest crimes affecting the entire international community, in other words, genocide, crimes against humanity and war crimes. Therefore an attack on water facilities must be able to be qualified as a crime against humanity or war crime.

For the purpose of The Rome Statute, "crime against humanity" means any of the listed crimes in Article 7 when committed as part of a widespread or systematic

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<sup>174</sup> see the status of the Rome Statute at:  
<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>

attack directed against any civilian population, with knowledge of the attack. Relevant to water is Article 7 I (k), which states that a crime against humanity is committed, when: "*Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*"<sup>175</sup> The phrase, other inhuman acts indicates that the lists of expressly named activities is not exhaustive.

According to Article 8, the Court has jurisdiction over war crimes. For the purpose of this Statute, "war crimes" means: "*Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention*".<sup>176</sup> Grave breaches of the Geneva Conventions include also extensive destruction and appropriation of property as already discussed. A destruction and appropriation of property is only allowed if it is justified by military necessity. What is justified by military necessity must be determined bearing in mind the information available to the perpetrator at the time and without regard to hindsight.<sup>177</sup> Therefore attacks on waterfacilities could be qualified either as acts against humanity or war crimes if they are not justified by military necessity.

### **c. ICC and terrorism**

There was significant interest in Rome, in including terrorism in the Court's mandate, but it was decided not to do so. Resolution E of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court did, however note, that the Assembly of States Parties could add the crime of terrorism to the ICC's jurisdiction at a later stage.<sup>178</sup>

Today, in addition to various treaties prohibiting many specific acts of terrorism, and in the aftermath of 11 September 2001, the Member States of the UN have undertaken the drafting of a comprehensive convention against terrorism.

Although terrorism does not fall within the jurisdiction of the ICC, such acts could however fall within the definition of one of the crimes already under the Court's

<sup>175</sup> Article 7 I (k); text is available at:

[http://www.icc-cpi.int/library/basicdocuments/rome\\_statute\(e\).html#part2](http://www.icc-cpi.int/library/basicdocuments/rome_statute(e).html#part2).

<sup>176</sup> Article 8 II (a).

<sup>177</sup> Fenrick, W.J. 1999. In: Otto Triffterer's "*Commentary on the Rome Statute of the International Criminal Court*"; pp. 183.

<sup>178</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex 1, Res. E., U.N. Doc. A/CONF. 183/10 (1998).

jurisdiction, namely crimes against humanity.<sup>179</sup> It is just necessary that the act itself can be qualified as an inhuman act committed as part of a widespread or systematic attack directed against a civilian population. Furthermore, while it is most likely that most cases that could fall within the jurisdiction of the ICC will be excluded by individual nations exercising their own jurisdiction, the ICC will nevertheless act as a safety net, ensuring that important cases do not escape prosecution.<sup>180</sup>

#### **IV. Conclusion**

Tribunals have been very important in order to recreate justice as far as it is possible to create justice after incidents, which caused irrevocable damage. The problem with tribunals, however, remain that they have a defined and limited temporal and geographic competence and once they have completed their tasks they are dissolved. Furthermore, a problem poses the possibility of using veto by one or more members of the permanent members of the Security Council as the tribunals rely on the support of the Security Council for the establishment and enforcement of its jurisdiction. Tribunals are therefore a possibility to enforce law but they are not the best solution.

The ICC could, however, become a powerful mechanism, if there is sufficient support by the international community. Furthermore it could be an especially credible institute by virtue of its transparency and commitment to the legal ideals respected by most domestic legal systems. As demonstrated, the ICC could even become an efficient tool in fighting terrorism.

#### **D. Role of international law during terrorist attacks**

Water facilities offer a particularly vulnerable target. A terrorist attack on water supply facilities could cause immense suffering amongst civilians. Water facilities have already been targets of recent criminal or terrorist attacks including the dumping of chemicals into the Meuse River in France, the placing of a bomb in a water reservoir in South Africa and the destruction of water pipes in the Israeli

<sup>179</sup> Goldstone, R.J. & Simpson, J. 2003. "Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism"; 16 Harv. Hum Rts. J. pp.15.

<sup>180</sup> Goldstone, R.J. & Simpson, J. 2003. "Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism"; 16 Harv. Hum Rts. J. pp.26.

settlement of Yitzhar.<sup>181</sup> Colombian rebels have also damaged a gate valve in the dam that supplies most of Bogota's drinking water in January 2002.<sup>182</sup>

Additional there have been a number of threats with regard to water supply, which luckily did not lead to an attack, like for example the in 2002, when the Earth Liberation Front threatened the water supply for the town of Winter Park.<sup>183</sup> In 2003, the terror network Al-Qaida threatened US water systems via a call to a Saudi Arabian magazine. Al-Qaida does not "rule out...the poisoning of drinking water in American and Western cities."<sup>184</sup>

It is thus questionable if international law and especially IHL give sufficient protection for water facilities during a terrorists' attack. The international legal foundation of the concept of terrorism began with the phenomenon of violent offences by individuals, directed against civilians in order to make political protests, or to secure certain political behavior by states.<sup>185</sup> Terrorism has existed in society for as long as societies exist. The difference between its various manifestations, has been as to its methods, means and weapons. The manifestations of terrorism and the means to prevent and control them have long been studied, but governments have tended to ignore the dangers.<sup>186</sup>

Treaty based international legal efforts to combat terrorism are characterized in particular by the absence of a comprehensive convention governing the international dimensions of the fight against terrorism. Instead, the legislative international legal framework consists of many different conventions that apply to different types of terrorism such as: airplane hijacking or piracy on the high seas. Recent developments, such as 11 September 2001, have demonstrated, that there are many forms of terrorism and therefore a general definition of terrorism is needed because the variety of attacks make it impossible to have a special definition of terrorism for every kind of attack.

<sup>181</sup> Chalecki, E. 2001.; "A New Vigilance: Identifying and Reducing the Risks of Environmental Terrorism." Pacific Institute for Studies in Development, Environment and Security. See: [www.pacinst.org](http://www.pacinst.org).

<sup>182</sup> See the water conflict chronology created by Gleick, P.H. from the Pacific Institute; available at: <http://www.worldwater.org/conflict.htm>.

<sup>183</sup> See: <http://www.worldwater.org/conflict.htm>.

<sup>184</sup> See: <http://www.worldwater.org/conflict.htm>.

<sup>185</sup> Higgins, R. & Flory, M.; 2000; "Terrorism and International Law"; pp 26.

<sup>186</sup> Bassiouni, M. 2002; "Legal Control of International Terrorism: A Policy Oriented Approach"; 43 Harvard International Law Journal; pp. 83.

The attacks from 11 September, where thousands of innocents became victims of rather unsophisticated methods, showed the world community that there is an urgent need for protection against terrorism and for subsequent legislative measures. The events of 11 September were qualified as terrorists' attacks but until now, the international community failed to define terrorism at the global scale. Among the legal writers, terrorism is defined as: "...a strategy of violence designed to instill terror in a segment of society in order to achieve a power-outcome, propagandize a cause, or inflict harm for vengeful political purposes. That strategy is resorted to by state actors either against their own population or against the population of another country. It is also used by non-state actors, such as insurgent or revolutionary groups acting within their own country or in another country. Lastly, it is used by ideologically motivated groups or individuals, acting either inside or outside their country of nationality, whose methods may vary according to their beliefs, goals and means."<sup>187</sup>

As we read, water facilities are protected under certain provisions of IHL, however, the main problem remains that terrorist attacks are considered to be a criminal act essentially outside the coverage of the laws of war. It is argued that customary law of armed conflict and the Geneva Conventions apply only in times of armed conflicts.<sup>188</sup> An international armed conflict exists if one party uses force of arms against another party.<sup>189</sup> Only states can be parties at war<sup>190</sup> and therefore one can argue that terrorists' groups cannot be party to an armed conflict and therefore IHL is not applicable.

On the other hand, typical "armed conflicts" are decreasing while inner-state conflicts and terrorist attacks are increasing. The nature of conflicts changes. Therefore all law, if it is to avoid practical devaluation, must meet the developing demands of the sector of human activity, which it seeks to regulate. This is the reason why IHL must necessarily develop to take account of the new activities.

If the Appeal Chamber's application of the definition of armed conflict states: "*it is by now a settled rule of customary international law that crimes against humanity*

<sup>187</sup> Bassiouni, M. 2002; "*Legal Control of International Terrorism: A Policy Oriented Approach*"; 43 Harvard International Law Journal; pp. 84.

<sup>188</sup> Bassiouni, M. 2002; "*Legal Control of International Terrorism: A Policy Oriented Approach*"; 43 Harvard International Law Journal; pp. 89.

<sup>189</sup> Fleck, D. 1995; "*The Handbook of Humanitarian Law in Armed Conflicts*"; pp. 41.

do not require a connection to international armed conflict" one could conclude that terrorists' attacks, if they lead to crimes against humanity, are to be seen as inside the coverage of IHL. Unfortunately, the international community still resists in codifying a definition for terrorism. If there is a definition of terrorism or not, terrorist activities are in any event implicitly placed outside the scope of legitimate combatancy in the course of armed conflict, in particular by the parameters set by article 4A of 1949 Geneva Convention III and articles 43 I and 44 III of 1977 Additional Protocol I.

#### **E. Weaknesses of existing law**

Some IHL provisions may be applicable to water but water is not expressly mentioned in any of the laws. Water as such is not given a protection.<sup>191</sup> Water is expressively mentioned only as an important condition for prisoners of war and for internees, in order to guarantee the minimum of humanity. Water is rather considered part of environmental issues, thus giving it a very vague status in terms of protection.

Furthermore, the 1977 Protocols have not been ratified by all States. Protocol I was ratified by 159 states, but unanimity was not reached and politically strong countries, such as USA, were opposed to its ratification. New forms of conflicts – such as terrorism, do not come under the scope of the international humanitarian law. There is no effective international authority to apply these laws. The establishment of a permanent International Criminal Court (ICC) offers hope.

As this body does not have the support of the USA, it may greatly weaken the effectiveness of the Court.

#### **F. Conclusion**

In armed conflict, water sometimes becomes a target or is even used as a means of warfare. In either case, as long as water is a civilian object and indispensable to the survival of the population, warfare against or by means of water is utterly incompatible with the principles and rules of humanitarian law<sup>192</sup>, as specified above. The main conventions and treaties of international humanitarian law apply

<sup>190</sup> Bassiouni, M. 2002; "Legal Control of International Terrorism: A Policy Oriented Approach"; 43 Harvard International Law Journal; pp. 99.

<sup>191</sup> Boutruche, T. 2000. "Le statut de l'eau en droit international humanitaire"; Revue internationale de la Croix-Rouge No. 840, p. 887-916.

<sup>192</sup> Zemmali, A. 1995. "La protection de l'eau en période de conflit armé"; Revue internationale de la Croix-Rouge no 815, p.601-615.

to water facilities only indirectly. There is a lack of clarity in the text and principles of proportionality and military necessity could be used to justify an attack on a water facility.

Furthermore, terrorist attacks, remain a big problem, as the international community failed to find consensus on the definition of terrorism. Given the development of international terrorism, the international community must establish effective means of punishing such criminal acts. The first step would be in developing a definition of terrorism and an international convention, which covers the main fields and not only specific forms of terrorism.

One should not forget that terror is the weapon of the weak and desperate. The success of combating terrorism will remain in preventive measures. With regard to the globalization of terrorism, international cooperation will remain the key for success in combating terrorism. Even, the administration of George W. Bush, isolationist as it had been with regard to most international matters, recognized that multilateral cooperation was essential to curb further attacks by a terrorist organization that spanned the globe.<sup>193</sup>

As result, the United Nations Security Council (Res. 1368) and General Assembly (Res. 56/1) stressed the need for all states to work together in a showing of international cooperation in order to eradicate acts of terrorism.

The most important remains in combating terrorism, is to address its causes in order to develop effective prevention. This however, is a challenge for national strategies and requires especially investments in education and poverty strategies.

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<sup>193</sup> Goldstone, R.J. & Simpson, J. 2003. "Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism"; 16 Harv. Hum Rts. J. pp.14.

## **4. Conclusion**

Water is a vulnerable and highly controversial commodity during peacetime, armed conflicts and terrorist attacks. It can be argued that access to water is a human right as it is a precondition of life and therefore, it is a human right because of humanity. As water is essential for life and linked to 2.3 billion diseases each year, it is surprising and disappointing that its status is still not sufficiently clarified by the international community.

A major step towards the clarification and the explicit codification of a human's right to water was made by the United Nations Committee on Economic, Social and Cultural Rights in its General Comment 15 which guarantees the right of access to water. The aim of the General Comments is to make the experience gained through the examination of states' reports available for the benefit of all and to reflect how states deal with certain rights issues. The General Comments are therefore a mirror image of the average achievements by states on specific human rights. Although the Comment is a guiding, rather than a binding instrument for states, it is important as it may lay down solid foundations for the future development of its jurisprudence. It remains to be seen if and how states are going to observe the right to water. Nevertheless, it is an important step towards declaring an explicit right to water.

The United Nations General Assembly, in Resolution 55/196, proclaimed 2003 as the international Year of Freshwater. Governments and all other actors had and have the possibility to take advantage of the Year to increase awareness of the importance of sustainable freshwater use, management and protection. This provided a unique opportunity to raise the issue of legal protection at the highest level. The International Year of Freshwater was expected to follow up on agreements reached at the World Summit on Sustainable Development (Johannesburg, September 2002), and should have an impact far beyond 2003.

Participants of the 3rd World Water Forum made more than 100 new commitments on water. The Forum was qualified to be the most important international water meeting ever held. The World Water Council for example, committed itself to developing and implementing, with a consortium of International financial institutions, UN agencies, international non-governmental organizations and research institutions a program aiming to precisely identify and highlight the



benefits brought by sound water management. It would also provide governments with the appropriate tools and analysis so that they may be considered in priority setting, planning, development, management and budgeting for the water sector.

It is thus even more disappointing that water was not declared a human right in the final Ministerial Declaration<sup>194</sup> at the World Water Forum in Kyoto in March 2003. The international community therefore demonstrated that it was not ready to recognize an explicit human right to water and the legal status of water still remains unclear. All actors know the importance of water, but there is still a lack of a concise and clear commitment to categorize water as a human right.

Nevertheless, it is safe and important to argue that access to water is at least implicitly recognized as a human right from which certain duties for states derive. As water is a precondition and a necessary element of almost all social and economic rights, states, who are parties to the Covenant on Social, Economic and Cultural rights, are obliged to fulfill a range of duties. The main duty of States is to ensure the minimum core which is a right of access to water. The WHO has concretized this minimum in stating that every person should have a minimum water supply of 20 to 40 litres of safe drinking water per day and proper sanitation facilities. The water supply must also be located within a reasonable distance – approximately 200 metres – from the household.

Although states cannot provide water immediately to everyone, the duty is on the state to take immediate steps towards the full realization of the right to water. South Africa took major legislative measures, which the South African Constitution requires, in realizing the right to water<sup>195</sup> and which guarantees a minimum on water, which is free. Even if many argue that the amount is not sufficient<sup>196</sup>, it is, however, an important step on the way to fulfill the core obligation. As people in South Africa often cannot afford to pay for additional water, water cut-offs are common practise. Water cut-offs however lead to the exclusion of the enjoyment of even the free minimum on water, which is guaranteed by law. The state therefore violates its duty to respect the right to water, when its legislative or administrative conduct, deprives people from the enjoyment of the right to water.

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<sup>194</sup> Declaration is available at: [http://www.world.water-forum3.com/jp/mc/md\\_final.pdf](http://www.world.water-forum3.com/jp/mc/md_final.pdf).

<sup>195</sup> See the Water Services Act and the National Water Act.

On the international front there are many visionary documents. These “soft” treaties are important but what is needed are binding instruments which guarantees a human right to water. One of the most important benefits of an explicit recognition of a human right to water could thus represent one tool for civil society to hold governments accountable for ensuring access to sufficient and good-quality water.

The main challenge thus remains to codify it explicitly and to define its scope and states’ duties deriving from it. Access to water cannot entail an obligation to connect everyone, regardless of location, to a water distribution network; it only means that every individual should have access to drinking water in such a way that human dignity and survival are guaranteed. The most important is that a state takes legislative, administrative and other action progressively to achieve that every human being within its jurisdiction has access to adequate water within the maximum of its available resources. Furthermore states should primarily be obliged to prevent third parties from interfering in any way with the enjoyment of a human right to water. They should adopt the necessary and effective legislative and other measures to restrain third parties from denying access to adequate water and from polluting and inequitably extracting of water. As demonstrated, a state may even privatise water services and allow user fees as long as essential water is affordable for everyone.

One can even argue that states have a duty to delegate their obligation to the private sector in order to meet their minimum core obligation. The most important prerequisite is that states keep supervision over the private sector. Privatisation of water should never lead to the exclusion of the state itself in being the main responsible party to providing water. Although access to water is a human right, privatization of water is therefore not necessarily excluded.

As water is a precondition of life, all forms of intentionally deprivation of the access to water is a violation of a human’s right to water, even during armed conflicts access to water and water facilities are protected by the IHL. The International Humanitarian Law provides some degree of protection to civilians, the environment and water facilities. A States has a duty, even in abnormal circumstances, such as war. They have the duty to prevent all actions which could cause unnecessary

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<sup>196</sup> De Visser, J., Cottle, E. & Mettler, J. 2003. “Realising the right of access to water: Pipe dream or watershed?” in: *Law, Democracy & Development*, Vol. 7; pp. 43.

harm to the civilian population, which includes the prohibition to attack water facilities.

The IHL however, still does not give adequate protection and states may avoid respecting it in many ways, as for example in using the principle of military necessity. Nevertheless, an attack on water facilities, which may lead to thousands of deaths, as in Iraq for example, could be categorized as a war crime. It should be impossible to justify such an action by the principle of military necessity, especially with regard to the growing humanization of the IHL. Such an attack could even be classified as an act against humanity.

A further problem is that the treaty rules mentioned above are primarily applicable to armed conflicts and not to terrorist attacks and on this, unanimity has not been reached. Of the 159 states that have ratified<sup>197</sup> Protocol I, the US as the most influential and powerful country with regard to new-armed conflicts, has not done so. Although the US has not ratified Protocol I, which can be seen as the most important tool with regard to the protection of water facilities, they are still bound by the rules of customary law.

Terrorist attacks have also still not been included in the international law which means that a lack of a definition may become an obstacle in the effective prosecution of those persons involved in terrorism.

All armed conflicts and terrorist attacks are and will always be a destructive action against the environment and society, which includes individuals and private property. To prevent all forms of conflicts would be a major task. As conflicts have existed for as long as humans have been on this earth and in some cases being unavoidable, it is the duty of the law to define clear rules; what is allowed and what not.

Water is the source and basis of life. The protection of water facilities in all circumstances remains a big challenge in order to provide water for all and to avoid unnecessary suffering by those who need it the most. International and national cooperation on all levels is necessary to ensure access to water as a human's right. Although the explicit right to water would not change the situation immediately

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<sup>197</sup> See: [http://www.icrc.org/eng/party\\_gc](http://www.icrc.org/eng/party_gc).

of all people in need, the explicit recognition of a human right to water would be the first step towards legal certainty. If the explicit recognition of a human right to water, through General Comment 15, will have an impact on meeting the basic needs of people in time of warfare and conflict, remains to be seen. The impact of the General Comments still needs to be researched as there is a lack of academic research about the General Comments, their position in the international law system and their influence for the international and national law.



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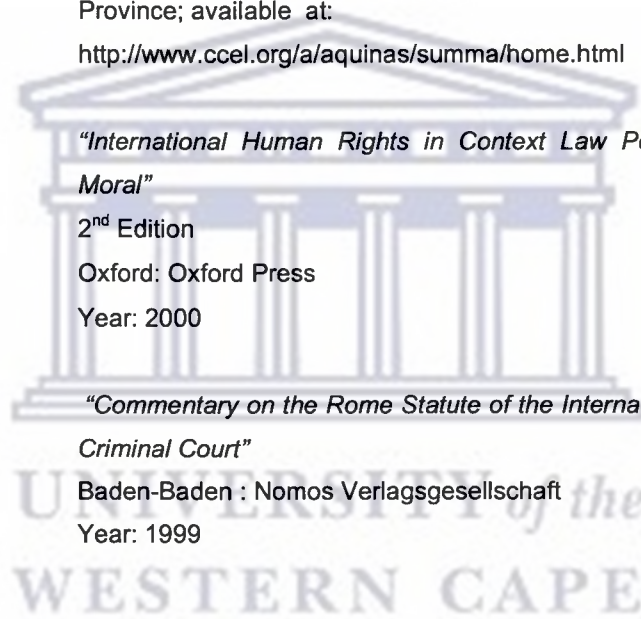
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## **6. Appendix I:**

### **Geneva Convention III (1949)**

#### **Article 20:**

The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and **potable water**, and with the necessary clothing and medical attention.

#### **Article 26:**

Sufficient **drinking water** shall be supplied to prisoners of war.

#### **Article 29:**

The Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics...Also, apart from the **baths and showers** with which the camps shall be furnished prisoners of war shall be provided with **sufficient water** and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.

#### **Article 46:**

The Detaining Power shall supply prisoners of war during transfer with sufficient food and **drinking water** to keep them in good health, likewise with the necessary clothing, shelter and medical attention.

### **Geneva Convention IV (1949)**

#### **Article 85:**

The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health...Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene, and are constantly maintained in a state of cleanliness. They shall be provided with **sufficient water** and soap for their daily personal toilet and for washing their personal laundry;



installations and facilities necessary for this purpose shall be granted to them. Showers or baths shall also be available.

Article 89:

Sufficient **drinking water** shall be supplied to internees.

Article 127:

The Detaining Power shall supply internees during transfer with **drinking water** and food sufficient in quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention.

**Additional Protocol I to the Geneva Convention (1977)**

Article 54(2):

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, **drinking water installations and supplies and irrigation works**, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party

(3) The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:

(b) - If not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

Article 55(1):

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare, which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

**Additional Protocol II to the Geneva Convention (1977)**

Article 5(b):

Persons whose liberty has been restricted...shall, to the same extent as the local civilian population, be provided with food and **drinking water** and be afforded safeguards as regards health and hygiene

Article 14:

It is therefore prohibited to attack, destroy, remove or render useless for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, **drinking water installations** and supplies and irrigation works.



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## **7. Appendix II :**

- Cambodia - Constitution, 1993      Article 59  
 The State shall protect the environment and balance of abundant natural resources and establish a precise plan of management of land, water, air, wind geology, ecological system, mines, energy, petrol, and gas, rocks and sand, gems, forests and forest products, wildlife, fish and aquatic resources
- Eritrea - Constitution, 1996      Article 10  
 The State shall work to bring about a balanced and sustainable development throughout the country, and shall use all available means to ensure all citizens to improve their livelihood in a sustainable manner, through their development.  
 The State shall have the responsibility to regulate all land, water and natural resources and to ensure their management in a balanced and sustainable manner and in the interest of the present and future generations; and to create the right conditions for securing the participation of the people to safeguard the environment.
- Ethiopia - Constitution, 1995      Article 90  
 To the extent the country's resources permit, policies shall aim to provide all Ethiopian access to public health and education, clean water, housing, food and social security.
- Gambia - Constitution, 1996      Article 216  
 (4) The State shall endeavour to facilitate equal access to clean and safe water.
- Guatemala - Constitution, 1985      Article 127  
 Régimen de aguas. Todas las aguas son bienes de dominio público, inalienables e imprescriptibles. Su aprovechamiento, uso y goce, se otorgan en la forma establecida por la ley, de acuerdo con el interés social. Una ley específica regulará esta materia.
- Article 128  
 Aprovechamiento de aguas, lagos y ríos. El aprovechamiento de las aguas de los lagos y de los ríos, para fines agrícolas, agropecuarios, turísticos o de cualquier otra naturaleza, que contribuya al desarrollo de la economía nación al, está a los servicios de la comunidad y no de persona particular

alguna, pero los usuarios están obligados a reforestar las riberas y los cauces correspondientes, así como a facilitar las vías de acceso.

Laos - Constitution, 1991

Article 17.

All organisations and citizens must protect the environment and natural resources: land, underground, forests, fauna, water sources and atmosphere.

Mexico - Constitution, amended in 1999

Article 27

Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property...

Centres of population which at present either have no lands or water or which do not possess them in sufficient quantities for the needs of their inhabitants, shall be entitled to grants thereof, which shall be taken from adjacent properties, the rights of small landed holdings in operation being respected at all times.

Panama - Constitution, amended in 1994

Article 114

Es deber fundamental del Estado garantizar que la población viva en un ambiente sano y libre de contaminación, en donde el aire, el agua y los alimentos satisfagan los requerimientos del desarrollo adecuado de la vida humana.

Article 256

Las concesiones para la explotación del suelo, del subsuelo, de los bosques y para la utilización de agua, de medios de comunicación o transporte y de otras empresas de servicio público, se inspirarán en el bienestar social y el interés público.

Switzerland - Constitution, 1991

Article 24bis

(1) To ensure the economical use and the protection of water and the prevention of damage by water, the Confederation, having regard to the total water economy, shall by legislation establish principles in the general interest concerning:

- a) the conservation and exploitation of water, especially for the supply of drinking water and the enrichment of underground water:
- b) the use of water for energy production and for cooling purposes;
- c) the regulation of water levels and of the flow of

surface and underground water, the diversion of water outside its natural course, irrigation and drainage and other intervention in the water cycle.

Uganda - Constitution,  
1995

Preamble

The State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda.

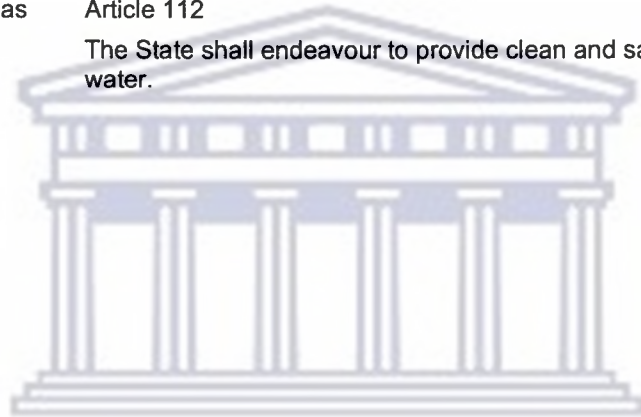
Article 14

The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that... all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, decent shelter, adequate clothing, food, security and pension and retirements benefits.

Zambia - Constitution, as  
amended in 1996

Article 112

The State shall endeavour to provide clean and safe water.



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