

The Human Right to Water as a Creature of Global Administrative Law

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Introduction

This paper explores whether we can better understand the significance of the current, urgent discourse in international law on human rights-based approaches to water and sanitation entitlements as an expression of universally accepted standards of global governance, rather than as an enforceable ‘human right’ to water in any strict sense of that term. Such an analysis might obviate many of the difficulties which arise in relation to the precise normative status of the human right to water under international law as well as doubts concerning its enforceability by means of the traditional enforcement mechanisms existing under human rights law. Further, an analysis of the human right to water (HRW) in terms of ‘global administrative law’ (GAL) assists in explaining its potential application in such disparate doctrinal areas of law as international water resources law, international environmental law, and international investment law, as well as in national public and constitutional law. Crucially, the GAL concept helps to address problems which arise with the extension of human rights requirements to the actions of private corporate actors and with the problem of extra-territoriality.

Conversely, a survey of the commonly accredited sources of rules of GAL helps to make sense of the wide variety and diversity of mechanisms, in addition to the formal conventional obligations and practice of States, for the generation of rules and standards which inform the procedural and substantive normative content of the HRW concept. Such mechanisms include, for example, the International Standards Organisation, various voluntary codes of corporate conduct, international investment arbitration tribunals provided for under bilateral investment treaties, national systems of administrative law, and of course the institutional machinery which elaborates upon human rights values.

Such an analysis in turn permits concrete conclusions to be drawn on, *inter alia*, the key procedural and due process elements of the HRW concept, the key rule of law values stemming from the movement towards free trade and economic liberalism, the key good governance values, relating particularly to transparency, participation and accountability, and the key human rights values impacting upon the concept. This mode of analysis goes some way towards detailing the rights and obligations created by the HRW concept for a variety of actors, including individuals, vulnerable communities, transnational corporations, investors in water and sanitation services, and of course State agencies.

Global Administrative Law

The emerging concept of Global Administrative Law (GAL) addresses the rapidly changing realities of transnational regulation, which increasingly involves, *inter alia*, various forms of industry self-regulation, hybrid forms of private-private and public-private regulation, network governance by State officials, and governance by inter-governmental organisations with direct or indirect regulatory powers, and ‘begins from the twin ideas that much global governance can be understood as administration, and that such administration is often organized and shaped by principles of an administrative law character’.¹ It is proposed that these disparate regulatory regimes, some voluntary and some mandatory, and operating at various levels (sector-specific, national, regional and global),

‘together form a variegated “global administrative space” that includes international institutions and transnational networks involving both governmental and non-governmental actors, as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects’.²

Kingsbury deliberates further on the idea of a ‘global administrative space’ and explains that it ‘marks a departure from those orthodox understandings of international law in which the international is largely inter-governmental, and there is a reasonably sharp separation of the domestic and the international’, and that it reflects the practice of global governance, whereby ‘transnational networks of rule-generators, interpreters and applicators cause such strict barriers to break down’.³ To the student of international water resources law, this observation is reminiscent of the International Law Association’s (ILA) 2004 Berlin Rules on Water Resources Law which, though primarily concerned with

the rules facilitating inter-State cooperation over shared transboundary water resources, contain a dedicated Article 17 asserting that ‘every individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual’s vital human needs’.⁴ Indeed, in remarking on the ‘highly decentralized and not very systematic’ nature of much of the administration of global governance, Kingsbury observes that ‘[S]ome entities are given roles in global regulatory governance which they may not wish for or be particularly designed or prepared for’,⁵ bringing to mind the recent decisions of International Centre for the Settlement of Investment Dispute (ICSID) tribunals which would appear to tacitly support the centrality of human rights concerns to contracts in respect of the provision of water and sanitation services.⁶

Crucially, in respect of the normative content of GAL, and reflective of the key procedural aspects of the HRW concept as articulated by the U.N. Committee on Economic, Social and Cultural Rights in General Comment No. 15,⁷ the leading proponents of GAL observe that

‘These evolving regulatory structures are each confronted with demands for transparency, consultation, participation, reasoned decisions, and review mechanisms to promote accountability. These demands, and responses to them, are increasingly framed in terms that have an administrative law character. The growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of governance.’⁸

Of course, the function of administrative law generally is to protect individuals by checking the unauthorised, excessive, arbitrary or unfair exercise of public power and, by so doing, to give direction to the practices of administrative bodies, particularly in terms of their responsiveness to broader public interests. Proponents of GAL argue that it can perform a similar function for global administrative structures and point out that many of the types of regulatory measures cited above have resulted from the efforts of global administrative bodies, often stimulated by external criticism, to improve internal accountability and bolster external legitimacy.⁹ One needs only to consider the establishment of accountability mechanisms by all major multilateral development banks or the widespread inclusion of mechanisms for NGO participation and representation in the decision-making structures of regulatory bodies. In an attempt to provide a definition of the concept of GAL, the same leading proponents explain that it

‘encompasses the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the *accountability* of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make’.¹⁰

In addition, they accompany this definition with a broad understanding of the ‘global administrative bodies’ which generate GAL norms and to which such norms might apply, to include

‘intergovernmental institutions, informal inter-governmental networks, national governmental agencies acting pursuant to global norms, hybrid public-private bodies engaged in transnational administration, and purely private bodies performing public roles in transnational administration’.¹¹

Thus, much of the normative content of the HRW concept and, in particular the procedural rights of individuals and communities contained therein, along with the policies, procedures and decisions of the disparate entities which seek to give effect to the values contained therein, can be viewed through the prism of GAL

As regards the sources of GAL, Benedict Kingsbury, one of the leading scholars in the field, while emphasising that ‘there is no single unifying rule of recognition covering all of GAL’, includes the conventional sources of public international law, *i.e.* treaties, fundamental customary international law rules, and general principles of law, but also certain principles associated with ‘publicness’ in law.¹² He suggests that ‘[p]rinciples relevant to publicness include the [public] entity’s adherence to legality, rationality, proportionality, rule of law, and some human rights’, which are manifested in ‘practices of judicial-type review of the acts of global governance entities, in requirements of reason-giving, and in practices concerning publicity and transparency.’¹³ In an account of GAL, which is slightly more sceptical about the difficulty of identifying a universal set of administrative law principles, Harlow systematically identifies and describes four potential sources as a foundation for a global administrative law system:

‘first, the largely procedural principles that have emerged in national administrative law systems, notably the principle of legality and due process principles; second, the set of rule of law values, promoted by proponents of free trade and economic liberalism; third, the good governance values, and more particularly transparency, participation and

accountability, promoted by the World Bank and International Monetary Fund; and finally, human rights values.¹⁴

Harlow concludes from her examination of all these sources that ‘there is considerable overlap between principles found in these different sources’.¹⁵ In addition, Kingsbury includes among the sources of GAL the rules, standards and safeguards developed as a result of processes of so-called ‘private ordering’, such as the three sets of guidelines adopted in 2007 by Technical Committee 224 of the International Standards Organisation (ISO),¹⁶ though he cautions that such “[P]rivate ordering” comes within this concept of law only through engagement with public institutions’.¹⁷

As regards the specific normative content of GAL, Kingsbury identifies certain ‘[g]eneral principles of public law [which] combine formal qualities with normative commitments in the enterprise of channelling, managing, shaping and constraining political power’.¹⁸ In addition to certain ‘more detailed elements, or requirements ... particularly review, reason-giving, and publicity/transparency’, his indicative list of such general principles of public law includes:

- (i) *The Principle of Legality* – requiring that actors within a power system are constrained to act in accordance with the rules of the system;
- (ii) *The principle of Rationality* – requiring the justification of decisions, including that decision-makers give reasons and produce a factual record for decisions;
- (iii) *The Principle of Proportionality* – requiring a relationship of proportionality between means and ends;
- (iv) *Rule of Law* – requiring particular deliberative and decisional procedures; and
- (v) *Human Rights* – requiring protection of human rights values which are intrinsic (or natural) to a modern public law system.¹⁹

Kingsbury further identifies three broad categories of public global administrative activity to which the rules and principles of GAL might apply, and which in turn generate practices which can give rise to such rules and principles. These include:

- (i) The institutional design, and legal constitution, of the global administrative body

- (ii) The norms and decisions produced by that entity, including norms and decisions that have as their addressees, or otherwise materially affect:
 - a. other such public entities
 - b. states and agencies of a particular state
 - c. individuals and other private actors
- (iii) Procedural norms for the conduct of those public entities in relation to their rules and decisions, including arrangements for review, transparency, reason-giving, participation requirements, legal accountability and liability.²⁰

While it is perfectly clear that rules and principles of GAL are relevant to the institutional design, and thus to the legitimate functioning, of the myriad of entities involved in elaborating upon the HRW concept, it is the second and third categories of administrative activity listed above which play a significant role in the development of its normative status and content. Such entities might, for example, include the U.N. Committee on Economic, Social or Cultural Rights, or other global or regional bodies concerned with the interpretation or monitoring of human rights instruments, international standard-setting bodies, such as the International Standards Organisation, and judicial and quasi-judicial organs, such as international investment arbitration tribunals established under the International Centre for the Settlement of Investment Disputes (ICSID) or the accountability mechanisms of multi-lateral development banks (MDBs). As will be illustrated below, the interpretative statements, such as General Comment No. 15,²¹ the best practice guidelines, such as the 2007 ISO Guidelines,²² and the arbitral and quasi-judicial decisions, such as those of recent ICSID tribunals,²³ adopted by such entities lend much-needed support to and substantially inform the HRW concept, while also illustrating the practical utility of the GAL concept as a means of understanding common normative approaches which converge from complex, chaotic and pluralistic origins.

While Harlow includes human rights values as a source of GAL norms, she does so 'only to the extent that these are procedural in character'.²⁴ In other words, she highlights the fact that 'many international human rights texts contain due process rights of a type traditionally developed in and protected by classical administrative law systems'.²⁵ However, Kingsbury appears to suggest that the substantive normative content of human rights regimes might in some instances be relevant by suggesting that 'some human rights (perhaps of *bodily integrity*, privacy, personality) are likely to be protected by public law as

an intrinsic matter (without textual authority), yet without being subsumed into “rule of law”.”²⁶ Like the human right to water, the human right to bodily integrity is often closely linked to, and under many human rights texts derived from, the right to health and, indeed, further connected to mutually related standards of protection of the human environment.²⁷ Therefore, Kingsbury’s express reference to bodily integrity implies that substantive human rights values must be relevant to the identification of GAL norms, and *vice versa*. Indeed, though General Comment No. 15 is very largely concerned with informational, participative and other procedural elements of the human right to water, it seems difficult to imagine that substantive human rights values would not be relevant to, and captured by, the general public law principles of proportionality and rationality.²⁸

Of course, there are those who have serious misgivings about the GAL phenomenon and highlight its hazards for democracy and traditional political processes, for developing economies, and for the coherence and predictability of applicable legal standards.²⁹ The key concern is that GAL tends to subvert the traditional democratic processes vital to the legitimacy of law, such as by circumventing the requirement of State consent under international law, by means of which States have traditionally exercised sovereignty. The role of judicial, arbitral and quasi-judicial bodies in particular raise concerns over the juridification of the political process and of ‘government by judges’ by virtue of a general empowerment of a transnational ‘juristocracy’.³⁰ The undermining of sovereign democratic processes and the emergence of common and universal administrative standards presents a particular risk for developing economies, which may not have had a significant role in generating the practice upon which these standards are based. Harlow suggests that administrative law is largely a ‘Western construct’,³¹ which is protective of Western values and interests and may impact unfavourably on development economies, leading to a ‘double colonization’ involving ‘a complex process of “cross-fertilization” or legal transplant, whereby principles from one administrative law system pass into another’.³² She suggests that often ‘[g]ood governance in this all-embracing sense is, however, simply not obtainable ... and, at least for the foreseeable future, it may be necessary and even preferable for them to settle for less costly, “good enough governance”’.³³ Further, due to the non-systematic nature of the processes shaping GAL, the rules and standards invoked as inherent to the GAL concept may often lack clarity and certainty. As Kingsbury points out, the difficulty in identifying universal rules and principles stems from the fact that

“[g]lobal administrative law” is not an established field of normativity and obligation in the same way as “international law”. It has no great charters, no celebrated courts, no textual provisions in national constitutions giving it status in national law, no significant long-appreciated history.³⁴

Similarly, Harlow notes that there is ‘no shortage of candidates for a set of universal values’ and alludes to the ideological battle raging in this regard between ‘[h]ard-line economic liberals’, ‘[s]oft economic theorists’ and ‘the movement for cosmopolitan law and social democracy’.³⁵ Indeed, she highlights the considerable disparity of principle that exists ‘[e]ven within the systems in which modern administrative law [has] developed’ and points out that ‘[a]t least four administrative law families have been identified within the EU alone’.³⁶ However, as argued below, the inclusive nature of the various institutional structures and processes which have given rise to the HRW concept, as well as the detailed normative guidance adopted thereunder, do much to address such concerns about sovereign legitimacy, normative clarity or Western bias, thus marking out the HRW concept as an exemplar of the GAL phenomenon.

Therefore, rather than attempting to provide a comprehensive and coherent unifying theory of global governance arrangements, the GAL concept is merely an observed phenomenon which seeks to explain the growing commonality apparent among the administrative principles and practices which apply across otherwise disparate areas of governance. As Kingsbury explains

‘[E]ndeavouring to take account of these phenomena, one approach understands global administrative law as the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make.’³⁷

This phenomenon has been apparent to observers for some time and one commentator has noted of Lorenz von Stein, an early pioneer, that

‘the concept of international administrative law (*internationales Verwaltungsrecht*) as originally conceived by Lorenz von Stein in 1866 described an ensemble of legal rules based partially on international sources and partially on domestic sources dealing with administrative activity in the international field as a whole. Von Stein’s interest, here as elsewhere, was to capture and describe the reality of public administration rather than its underlying legal basis.’³⁸

Good Water Governance

The recent discourse on good water governance reflects many of the key principles of GAL, including accountability, participation, predictability and transparency.³⁹ For example, an influential 2003 Global Water Partnership (GWP) background paper identified the key characteristics of effective water governance which relate both to the approach that governance should take and to performance and operational requirements of governance.⁴⁰ It suggested that effective water governance must take an approach which is *open and transparent* (information should be made available and understandable to stakeholders), *inclusive and communicative* (the widest range of stakeholders should be involved in policy formulation), *coherent and integrative* (water governance arrangements should cut across traditional sectoral boundaries so as to ensure coherence), and *equitable and ethical* (interests of all stakeholders should be considered and safeguards adopted), while such governance should prove to be *accountable* (institutions taking responsibility for their decisions), *efficient* (not excessively burdensome in terms of time and resources), and *responsive and sustainable* (policies should respond to identified needs without jeopardising future needs).⁴¹ The role of law is recognised by all involved in this discourse as being absolutely central in achieving good water governance in accordance with the principles outlined above. GWP explains that effective water governance requires ‘an enabling environment which facilitates efficient private and public sector initiatives’ which is dependent upon ‘a coherent legal framework with a strong and autonomous regulatory regime’.⁴² Similarly, Tropp, whose model of water governance consists of four dimensions, including *social, economic, political* and *environmental*, stresses that administrative systems play a part in all four and highlights the need for strong regulatory authority at national level which ‘embraces new forms of governance’.⁴³ Clearly, the human right to water concept provides just such a new form of governance, which is largely administrative in nature and ‘can assist in defining the ultimate goal of water governance’.⁴⁴ At the Third World Water Forum in 2003, GWP emphasised the intrinsic link between the HRW concept and good water governance, stating:

‘Effective water governance is necessary to solve the water crisis ... If we are to secure access to water for all (thus complying with a recent UN human rights declaration), maintain vital ecosystems and produce

economic development out of water management, effective water governance is essential.⁴⁵

Indeed, the importance of legally coherent rights-based approaches to achieving good governance has long been recognised by the World Bank, which has tended to stress predictability, stating that ‘people’s knowledge of their rights helps both to limit the arbitrary behaviour of government officials and to create the climate of predictability which is associated with the rule of law’.⁴⁶ The close connection between the principles of good governance and GAL is self-evident.

Human Right to Water

Uncertainty regarding legal bases and status

Despite recent high profile support for the legal status of the human right to water concept from key U.N. bodies, including a U.N. General Assembly Resolution in June 2010⁴⁷ and a Resolution adopted by the Human Rights Council in September 2010,⁴⁸ considerable uncertainty persists with regard to the true normative status of the human right to water under international law. In the legal systems of many States, this uncertainty may also impact upon its status in national law. Although General Comment No. 15 identifies Articles 11 and 12 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴⁹ on the right to an adequate standard of living and the right to the highest attainable standard of health respectively, as the primary legal bases for the HRW concept,⁵⁰ it should be remembered that CESCR general comments do not formally impose legal obligations on ICESCR States Parties, let alone other States, and that General Comment No. 15 merely constitutes a non-binding but ‘highly authoritative interpretation of the Covenant’ and of the legal implications which flow from key relevant Covenant provisions.⁵¹ McCaffrey characterises General Comment No. 15 as being ‘more in the nature of a statement *de lege ferenda* rather than *lex lata*’ and cautions that the interpretation of Articles 11 and 12 contained therein ‘must be accepted by the States parties to the Covenant in order to be binding upon them’.⁵² Also, the fact the HRW derives from a number of expressly articulated primary rights may lead to confusion. As Williams puts it, ‘various connected rights may implicate different state obligations’ and she illustrates this point by explaining that a right to water derived from the right to life, which requires the provision of drinking water,

would impose lesser State obligations than a right to water derived from the right to health, which requires the provision of water for both drinking and sanitation.⁵³ Of course, uncertainty remains as to the true normative status and content of a number of the economic, social and cultural rights listed under the ICESCR, from which the rights to water may be derived, inevitably leading to further confusion as to the implications of the right to water.⁵⁴ For example, though some commentators describe the right to food as well established,⁵⁵ it might be argued that it raises many questions with regard to the force and extent of such welfare rights under the ICESCR. At any rate, though proponents of an independent right to water argue that it would result in greater interpretive consistency, State compliance, enforcement and remedies for violations,⁵⁶ such an independent right could only arise in international law by means of a dedicated treaty instrument or customary international law.⁵⁷ It is clear that there does not currently exist a general treaty instrument, nor any proposal for such an instrument, by which States might bind themselves in this regard. Also, it would appear that, despite the sustained declaratory support of international conferences and U.N. agencies, as well as some limited legal and constitutional State recognition,⁵⁸ there is as yet insufficient generalised State practice to establish a right to water under customary international law that would bind those States that have not actively and formally recognised the right.⁵⁹ Therefore, Williams concludes that '[A]t best, this seems to give the independent right the current status of a normative ideal'.⁶⁰ Indeed, overshadowing any discussion of whether the human right to water might exist as an ancillary or independent right is the fact that the ICESCR, and any rights derived therefrom, suffer from a clear lack of immediate enforceability, with Article 2(1) merely requiring each State party 'to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant'. As one commentator has noted in relation to such "second generation" rights, '[t]he principal challenge is therefore linking the expectations of individuals as rights-holders with the duties owed by others.'⁶¹ At the level of the practical enforceability of the obligations set out under the ICESCR, McCaffrey points out the language of Article 2(1) would provide a lawyer acting for a State accused of breaching its obligations with 'ample bases for a defense'.⁶²

Provisions of other international human rights instruments are also cited, even less convincingly, as providing support for the normative status of the HRW concept in international law. Article 25 of the 1948 Universal Declaration of Human Rights (UDHR), which proclaims 'the right to a

standard of living adequate for the health and well-being of himself and his family, including food ...', is often cited,⁶³ even though, as a U.N. General Assembly Resolution,⁶⁴ the UDHR is not binding *per se*. While it is generally accepted that many of the basic human rights contained therein have become part of customary international law, or at least constitute authoritative interpretations of the U.N. Charter's provisions on human rights,⁶⁵ and thus bind States generally, such customary status is normally only accorded to the so-called 'liberty rights' contained in the Declaration,⁶⁶ rather than the 'welfare rights', of which the right to an adequate standard of living is one.⁶⁷ Similarly, though Article 22 of the UDHR refers generally to the individual's entitlement 'to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality', the IESCR ought, as the specific implementing instrument, to be considered the primary source of justiciable rights in this category.⁶⁸ Paragraph 3 of general Comment No. 15 also links the HRW to the right to life set out under Article 6 of the 1966 International Covenant on Civil and Political Rights (ICCPR),⁶⁹ even though it remains unclear whether Article 6 'merely protects against arbitrary deprivation of life by the State, or also guarantees against death from such causes as lack of water or food, exposure to the elements, or lack of medical attention'.⁷⁰ Though the Human Right Committee (HRC) has since 1982 interpreted the reference to the 'inherent right to life' in Article 6 to mean that the right to life 'includes a socioeconomic component and demands positive action by states',⁷¹ it has traditionally been understood only to extend to arbitrary deprivations of life by the State.⁷² McCaffrey points out that the view that 'rights such as one to an appropriate means of subsistence belong within the category of economic, social and cultural rights' enjoys the support of respected commentators⁷³ and is more in accordance with the reality of water services provision and with the true intentions of States parties to the Covenants.⁷⁴ He questions why States would

'insist on so heavily qualifying their obligations in one case (the ESC Covenant, which expressly recognises the right to an adequate standard of living) but not in the other (the CP Covenant, from which such a right would have to be inferred)?'⁷⁵

Particular provisions of a number of binding international conventions which apply in varying specific contexts are also commonly cited in support of the HRW. These include Article 14(2) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁷⁶ Article 24(2)(c) of the 1989 Convention on the Rights of the

Child (CRC),⁷⁷ the 1949 Geneva Convention (III) on the Treatment of Prisoners of War,⁷⁸ the 1949 Geneva Convention (IV) on the Treatment of Civilian Persons in Time of War.⁷⁹ Though Gleick heralds Article 24 of the CRC as the first ever example in a binding international treaty instrument having general application of ‘explicit recognition of the connection between resources, the health of the environment, and human health’,⁸⁰ McCaffrey is rather more circumspect and points out that

‘none of these agreements casts the corresponding entitlement in human rights terms. Instead, they place a duty on governments to ensure that water, among other things necessary to life and good health, is provided to members of groups that have been identified as requiring special protection.’⁸¹

He cautions that, while the clear need of vulnerable groups for access to sufficient and safe water supplies has been recognised in such instruments, ‘this does not necessarily mean that States have recognized a human right to water, with all its implications, either generally or in those specific instruments’.⁸² Similarly, in relation to number of regional human rights instruments, such as Article 14 of the 1990 African Charter on the Rights and Welfare of the Child⁸³ or Article 11 of the 1988 Additional Protocol to the American Convention of Human Rights in the area of economic, social and cultural rights⁸⁴, McCaffrey once again cautions that, even where ‘safe drinking water’ or ‘basic public services’ are expressly mentioned, ‘[A] right to water was not recognized per se ... however. Rather, the failure to meet basic water needs was found to constitute, or at least contribute to, violations of other rights’.⁸⁵ Therefore, though a human rights-based approach may be conceptualised ‘in terms of society’s obligations to respond to the inalienable rights of individuals’,⁸⁶ fundamental questions persist about the normative origins and precise legal status of the rapidly emerging rights-based approach to water entitlements, adding to the appeal of a GAL analysis of the concept. As the HRW concept has had to be derived from selected provisions of key human rights instruments by bodies charged with their authoritative, if at times progressive, interpretation, it can be regarded to some extent as a creature of GAL. Indeed, it is in keeping with a GAL analysis of HRW that regional bodies with responsibility for monitoring State compliance with human rights obligations have also inferred the existence of a right to water from the core obligations of States under more general regional human rights instruments. For example, in 1995, the African Commission on Human and Peoples’ Rights found that Zaire (now the Democratic Republic of Congo) had violated the right to health under Article 16 of the African

Charter⁸⁷ by failing 'to provide basic services such as safe drinking water',⁸⁸ while the 1997 report on Ecuador of the Inter-American Commission on Human Rights found that the 'considerable risk posed to human life and health by oil exploration activities ... through, *inter alia*, contamination of water supplies'⁸⁹ could impact upon the right to life and the duty to protect the physical integrity of the individual under the 1969 American Convention on Human Rights.⁹⁰

Of course, implicit support for the HRW concept can be found in a very wide and diverse range of legal instruments operating at both the international and national levels and covering a variety of areas of activity. In relation to international water resources law, for example, though the U.N. Watercourses Convention addresses the obligations of international watercourse States rather than the rights of individuals, it would appear to support the existence of a State obligation to cater for the basic needs of citizens for water by expressly providing for watercourse States to have 'special regard ... to the requirements of vital human needs' over and above all other classes of uses of shared water resources.⁹¹ The 'requirements of vital human needs' would appear to correspond closely with the obligations of States and the entitlements of individuals under the human right to water.⁹² Similarly, though the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes⁹³ is a regional instrument concerned primarily with the rights and obligations of States, its 1999 Protocol on Water and Health⁹⁴ expressly requires the parties to take 'all appropriate measures for the purpose of ensuring ... adequate supplies of wholesome drinking water'⁹⁵ and further provides that the parties 'shall pursue the aims of ... access to drinking water for everyone ...'.⁹⁶ At the level of a river basin agreement, the 2002 Water Charter of the Senegal River⁹⁷ provides 'a rare example of a treaty referring expressly to a human right to water'.⁹⁸ The ILA's 2004 Berlin Rules, which have revised and updated the ILA's seminal 1966 Helsinki Rules,⁹⁹ give clear and formal priority to vital human needs¹⁰⁰ and also include a dedicated article on 'The Right of Access to Water'.¹⁰¹ Thus, a learned body as influential as the ILA expressly links the human right to water to the position, widely acknowledged in international codifications and accepted in State and arbitral practice, that uses required for the satisfaction of vital human needs take priority over other, less urgent uses. Indeed, General Comment No. 15 suggests on numerous occasions the significance of the emergence of the HRW concept for inter-State practice in respect of shared water resources.¹⁰²

Though the recognition given to the HRW concept in national constitutional texts¹⁰³, national legislation¹⁰⁴ and the pronouncements of

national courts,¹⁰⁵ has often tended to be anything but unequivocal,¹⁰⁶ it has received solid support in numerous seminal declaratory instruments, including the preamble of the 1977 Mar del Plata Action Plan of the United Nations Water Conference,¹⁰⁷ paras. 6.12 and 18.47 of Agenda 21,¹⁰⁸ and Principle No. 4 of the Dublin Statement on Water and Sustainable Development.¹⁰⁹ In recent decades, numerous declaratory instruments have committed governments to improving levels of access to water supply and sanitation.¹¹⁰ In addition, the UN Commission on Sustainable Development (CSD),¹¹¹ has concluded that priority must be accorded to ‘the social dimension of freshwater management’ and has invited governments to allocate sufficient public financial resources to ensure universal access to water supply and sanitation.¹¹² Indeed, it would appear that many international financial institutions (IFIs), including most multilateral development banks (MDBs), have for some time included *de facto* recognition of key elements of the right to water in their relevant institutional safeguard policies and procedures, adopted to protect individuals who might otherwise be adversely affected by MDB-funded projects.¹¹³ Thus, the HRW concept certainly conforms to the GAL characteristic of a norm arising from a plurality of sources of practice, but not necessarily satisfying the traditional sources of norms of international law.

Procedural elements of HRW

Significantly as regards a GAL analysis of HRW, it is clear that any elaboration of the concept involves the inclusion of detailed procedural elements regarded as inherent to the concept. In addition to those provisions of global and regional human rights instruments which might be argued explicitly or implicitly to include the human right to water, it is quite clear that all such instruments would now be interpreted and applied so as to require that States generally facilitate a participative approach in respect of projects or policies that might impact on human rights, by ensuring the adoption of procedures by which interested groups or individuals or communities likely to be affected by such projects or policies can receive and access relevant information, meaningfully participate in decision-making and, if necessary, have access to some appropriate means of legal recourse.¹¹⁴ Such a participatory approach to guaranteeing human rights would equally apply to projects or policies which might impact on the availability of water resources, particularly where this might arise by virtue of environmental risk, and procedural and participative rights are a very significant element of the normative content

of the human right to water as put forward in General Comment No. 15.¹¹⁵ Indeed, the requirement for States parties to the ICESCR to ensure a participatory and transparent process for the adoption and implementation of a national water strategy and plan of action is included among the non-derogable ‘core obligations’ of States under General Comment No. 15.¹¹⁶ For example, in the *Ogoni* case the African Commission on Human Rights gave a broad participative reading to Article 24 of the African Charter on Human and Peoples’ Rights, which acknowledges all peoples’ right to a generally satisfactory environment, to include specific procedural guarantees concerning the carrying out of environmental and social impact assessment.¹¹⁷ Clearly, such procedural requirements, which correlate closely with the procedural and informational requirements of the human right to water as set out under General Comment No. 15, would equally apply under existing regional human rights instruments to any major project or policy initiative, such as the privatisation of a water utility, which threatened the quality or availability of water supply or sanitation services. Similarly, the Inter-American Commission on Human Rights has, in the context of Article 11 of the 1988 Additional Protocol, repeatedly recommended the adoption of domestic legislation providing for meaningful and effective participatory mechanisms for indigenous peoples in the adoption of political, economic and social decisions that affect their interests.¹¹⁸

These procedural requirements appear all the more widely accepted and applied when one considers that broad informational and participatory rights are generally also included under regional and global environmental instruments. The concept of participation in international environmental law is exemplified by the 1998 UNECE Aarhus Convention¹¹⁹ and such participation requirements are also central to the carrying out of an adequate environmental impact assessment (EIA) consistent with the standards established under international law.¹²⁰ More generally, in the field of sustainable development, all seminal instruments purport to establish participatory standards which apply not only to States but also to international organisations, including multilateral development banks (MDBs). Participatory rights are absolutely central to Chapter 18 on freshwater resources of Agenda 21¹²¹ Therefore, the accumulated practice of regional human rights enforcement bodies strongly suggests that the CESCR’s General Comment No. 15 largely involves a codification of existing State obligations under general international human rights law and general international environmental and sustainable development law, rather than an attempt at the progressive development of participatory principles applying to matters of access to water. The same might be said

of the origins and normative basis of the principle of non-discrimination, which forms another essential substantive element of the human right to water as set out under General Comment No. 15 and is also included among the non-derogable ‘core obligations’ of States.¹²² Likewise, the inclusion of special protections for indigenous peoples under General Comment No. 15¹²³ might be traced to and justified under ILO Conventions 107 and 169.¹²⁴ This focus on procedural obligations arising from a wide diversity of legal sources certainly lends itself to a GAL analysis.

Extension of HRW to private corporate actors

The GAL concept helps to address the difficult issue of extension of human rights norms and values to private corporate actors. The involvement of the private sector in the provision of water and sanitation services, makes global administrative law a useful prism through which to view and analyse the altered regulatory obligations imposed on State authorities and private actors by the emergence of the human right to water. According to Bronwyn Morgan,

‘Private-sector participation from outside national borders in the provision of basic goods makes urban water services a fascinating case study for exploring the potential ambit of what scholars have provocatively called “global administrative law”’.¹²⁵

She justifies this mode of analysis by explaining that such arrangements comprise ‘hybrid blends of public and private actors linked in routines of both formal and informal participation at multiple levels of governance’.¹²⁶ In her analysis, Morgan focuses specifically on the issue of participation in decision-making processes that affect vital individual interests to explore ‘[w]hat are the forms and processes (both formal and informal) that facilitate participation in, or the capacity to participate in, transnational urban water services governance?’¹²⁷

Despite recent interest in the idea of extending the application of key international human rights norms so as to apply directly to corporations,¹²⁸ which could make the requirements of the human right to water central to arrangements for the privatisation of water and sanitation services, it is clear that such norms could only as yet dictate corporate behaviour where individual corporations have voluntarily agreed to abide by codes of conduct which explicitly or implicitly require compliance with international human rights norms.¹²⁹ High-profile examples of such voluntary initiatives include the U.N. Global Compact, providing a set of

10 core principles which, while not referring explicitly to water rights or entitlements, does provide that companies should comply with international human rights norms, which might be argued to include a right to water and sanitation.¹³⁰ Indeed, Williams points out that the corporate code of conduct of at least one large transnational water services company expressly alludes to the UN Global Compact,¹³¹ thereby indirectly accepting international human rights obligations at the corporate level. Similarly, the OECD Guidelines for Multinational Enterprises represent another legally non-binding initiative which can operate to support application of key elements of the human right to water to private companies.¹³² They consist of recommendations providing voluntary principles and standards for responsible conduct for multinational corporations operating in or from States which adhere to the OECD Declaration. The Guidelines cover business conduct in such areas of relevance to the implementation of the human right to water as human rights, environment, information disclosure, combating bribery, and consumer interests. Though voluntary, it is significant that the Guidelines benefit from a formal monitoring apparatus as each of the 40 adhering States are required to set up a National Contact Point (NCP). In addition, there is a clear trend in the declarative practice of States towards extending responsibility for respecting human rights to private companies involved in the provision of private services. For example, the Draft Declaration on the Right to Access to Essential Services,¹³³ proposed by France in the context of the 2002 World Summit on Sustainable Development held in Johannesburg, relates to essential services indispensable for a dignified life, expressly including drinking water and sanitation,¹³⁴ and would apply equally to both public and private sector providers. In respect of the development of an appropriate regulatory framework for private sector water service providers, which is informed by international human rights values and widely accepted by States and leading private operators, the adoption in 2007 of three sets of guidelines by Technical Committee 224 of the International Standards Organisation (ISO) represents a significant step.¹³⁵ The guidelines set standards for service activities relating to the provision of drinking water supply and sewerage services, which apply equally to both public and private actors, both as service provider and user, and even attempt to deal with the role of 'cost' or 'price' within the standard of service. With 35 Participating Countries and 17 Observer Countries involved in their development and adoption, in liaison with a range of interested international organisations, including the World Health Organisation, World Bank and International Water Association, and with leading industry interests, the ISO guidelines are likely to prove influential

in determining an acceptable level of service provision where a dispute arises with a private sector provider.

Of potentially far greater significance in this regard is the ongoing U.N. initiative on the issue of human rights and transnational corporations and other business entities which is developing practical recommendations for operationalising a framework for ensuring that private corporations respect human rights. In 2008, the Special Representative of the Secretary-General (SRSG) proposed a new approach for understanding the issue of human rights and transnational corporations, based on the “protect, respect and remedy” policy framework. The framework is described as resting on three complementary pillars:

‘the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.’

Though much of the detail of this policy framework continues to be elaborated through the ongoing work of the SRSG, this approach appears already to enjoy considerable support from the Human Rights Council¹³⁶ and among States, leading business entities and civil society.¹³⁷ In respect of the State’s duty to protect, the SRSG’s 2009 Report states that this requires each State to ensure the protection of rights ‘against other social actors, including business, who impede or negate those rights’ and that it ‘applies to all recognized rights that private parties are capable of impairing, and to all types of business enterprises’.¹³⁸ The SRSG makes it clear that this duty relates to a standard of conduct rather than a standard of result and explains that States ‘may be considered in breach of their obligations where they fail to take appropriate steps to prevent it [abuse] and to investigate, punish and redress it when it occurs’.¹³⁹

Further, recent developments in international investment law, the body of rules that function to provide protection to private sector investors operating in foreign jurisdictions against arbitrary interference with their property or business interests by the sovereign actions of host States, suggest that this area may offer some clarity in respect of the requirements imposed by the human right to water on host States and private actors in cases of water services privatisation. The concept would appear to have received solid, if implicit, support in a number of recent statements of ICSID international arbitration tribunals engaged in the settlement of investor-State disputes over water and sanitation service contracts.¹⁴⁰ In

relation to a series of primarily procedural issues, ICSZID tribunals have recognised that the provision of water and sanitation services inevitably involves questions of human rights.¹⁴¹ Though the precise mechanism by means of which such human rights values came to inform the reasoning of international investment arbitration tribunals was nowhere set out by the tribunals in question, it can be easily explained in terms of the application of GAL standards of good governance.

Conclusion

Therefore, the diverse variety of legal sources for the HRW concept and the uncertainties surrounding its legal status, along with the procedural character of many of its inherent requirements and the challenges presented by the extension of human rights values to non-State actors, make a GAL analysis a very useful approach to better understanding the HRW discourse. Further, the HRW concept might be presented as an exemplar of the GAL phenomenon. Indeed, the HRW concept would appear to answer most, if not all, of the concerns raised earlier about the GAL concept.¹⁴² First, in response to the allegation that GAL subverts traditional democratic political processes and the principle of State sovereignty, a study published in June 2010 by the French NGO *Coalition Eau* claims that 190 States have thus far declared support for the HRW concept at ministerial level.¹⁴³ Indeed, as regards the concern that GAL is a ‘Western construct’, the same study points out that such ministerial declaratory support can be attributed to 139 developing States and 51 developed States. Further, the level of developing State representation in CESCR and ISO Technical Committee 224¹⁴⁴ should help to address such concerns in respect of the HRW. The existence of detailed normative and technical guidance on the HRW concept, contained in such documents as General Comment No. 15 and the 2007 ISO Guidelines, should go some way towards addressing concerns about the lack of clarity and consistency in respect of GAL norms. Indeed, several of the key areas of legal practice supporting and informing the HRW concept, such as human rights law and international investment law, are themselves ‘established fields of normativity’¹⁴⁵ with established institutional structures and autonomous bodies of jurisprudential thought. In response to concerns about the ‘juridification’ of political processes, the areas of human rights law and international investment law are already substantially ‘juridified’, but the discretion of judicial and quasi-judicial decision-makers are largely constrained by highly-developed normative and technical guidance.

¹ B. Kingsbury, N. Krisch, R. B. Stewart and J. B. Wiener, 'Global Governance as Administration – National and Transnational Approaches to Global Administrative Law', (2005) 68/3&4 *Law and Contemporary Problems* 1, at 2.

² *Ibid.*, at 3. The authors include among examples of such regulatory regimes and networks, at 2-3, business-NGO partnerships in the Fair Labor Association, OECD environmental policies to be followed by national export credit agencies, regulation of ozone depleting substances under the Montreal Protocol, sustainable forest use criteria for certification of forest products developed by the Forest Stewardship Council, World Bank standards for the conduct of environmental assessments, the Basle Committee of central bankers, and the Clean Development mechanism under the Kyoto Protocol.

³ B. Kingsbury, 'The Concept of "Law" in Global Administrative Law', (2009) 20/1 *European Journal of International Law* 23, at 25.

⁴ Available at www.asil.org/ilib/WaterReport2004.pdf

⁵ *Supra*, n. 3, at 25.

⁶ See, for example, ICSID Case No. ARB/03/19, *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005); ICSID Case No. ARB/03/17, *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, Order in Response to a Petition for Participation as *Amicus Curiae* (17 March 2006); ICSID Case No. ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission (12 February 2007); ICSID Case No. ARB/05/22, *Biwater Gauff (Tanzania) Ltd. V. United Republic of Tanzania*, Procedural Order No. 5 (2 February 2007).

⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. DOC. E/C.12/2002/11, 26 November 2002. Available at <http://www.unchr.ch/html/menu2/6/gc15.doc>

⁸ *Supra*, n. 1, at 2. The authors further explain that, whereas the impact of such global regulatory norms on domestic legal and administrative systems was initially limited, 'the separation between prevailing models of domestic and international regulation has been eroding faster in practice than it has in the theory of administration' and that 'Global rules and standards effectively determine the content of much domestic regulation, and thus significantly limit the freedom of domestic actors ... [T]hese impacts might be especially acute for developing countries and for prosperous small states'.

⁹ *Ibid.*, at 4.

¹⁰ *Ibid.*, at 5. (Original emphasis).

¹¹ *Ibid.*

¹² *Supra*, 3, at 23.

¹³ *Ibid.*

¹⁴ C. Harlow, 'Global Administrative Law: the Quest for Principles and Values', 17/1 (2006) *European Journal of International Law* 187-214, at 187.

¹⁵ *Ibid.*, at 188.

¹⁶ ISO 24510:2007 Activities relating to drinking water and wastewater services -- Guidelines for the assessment and for the improvement of the service to users; ISO 24511:2007 Activities relating to drinking water and wastewater services -- Guidelines for the management of wastewater utilities and for the assessment of wastewater services; ISO 24512:2007 Activities relating to drinking water and wastewater services -- Guidelines for the management of drinking water utilities and for the assessment of drinking water services. Available at http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_tc_browse.htm?com_mid=299764&published=on&includesc=true

¹⁷ *Supra*, 3, at 23.

¹⁸ *Supra*, n. 3, at 32.

¹⁹ *Ibid.*, at 32-33.

²⁰ *Ibid.*, at 34.

²¹ *Supra*, n. 7.

²² *Supra*, n. 16.

²³ *Supra*, n. 6.

²⁴ *Supra*, n. 14, at 188.

²⁵ *Ibid.*

²⁶ *Supra*, n. 3, at 33 (emphasis added).

²⁷ For example, it is interesting to note that the right of bodily integrity was first found to exist among the 'unspecified rights' recognised by the Irish courts as being additional to the specified 'personal rights' expressly set out in Article 40.3 of the Irish Constitution in the case of *Ryan v. Attorney General* [1965] I.R. 294, which involved an application for a declaration to the effect that fluoridation of the public water supply was unconstitutional. On the link between the human right to water and the human right to health, see General Comment No. 15, *supra*, n. 7. For example, para. 8 of General Comment No. 15 states that:

'Environmental hygiene, as an aspect of the right to health under article 12, paragraph 2(b), of the Covenant, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions.'

General Comment No. 15 is further concerned with environmental protection of water resources at paras. 10, 11, 12(b), 16(c) and (d), 21, 23, 28(b) and (e), 29, 44(a)(iii) and (b)(i).

²⁸ See Kingsbury, *supra*, n. 3, at 32-33.

²⁹ See, in particular, Harlow, *supra*, n. 14, at 207-214.

³⁰ Harlow, *ibid.*, at 213.

³¹ *Ibid.*, at 207.

³² *Ibid.*, at 209.

³³ *Ibid.*, at 211.

³⁴ *Supra*, n. 3, at 29.

³⁵ *Supra*, n. 14, at 208.

³⁶ *Ibid.*

³⁷ *Supra*, 3, at 25.

³⁸ Vogel, 'Administrative Law: International Aspects', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1922) 22, at 23, quoted in Kingsbury, *ibid.*, at 23-24. Kingsbury further explains, *ibid.*, at 25-26, that the GAL phenomenon is currently

'described as "global" rather than "international" to avoid implying that this is part of the recognized *lex lata* or indeed *lex ferenda*, and instead to include informal institutional arrangements (many involving prominent roles for non-state actors) and other normative practices and sources that are not encompassed within standard conceptions of "international law".'

³⁹ See further, H. Grimes, 'Responding to the "Water Crisis": The Complementary Roles of Water Governance and the Human Right to Water', (2009) 20:2/3 *Water Law* 119, at 121, citing a number of early definitions of "good governance", including United Nations Development Programme, *Governance for Sustainable Human Development* (UNDP, January 1997) and Asian Development Bank, *Governance: Sound Development Management* (ADB, August 1995), at viii.

⁴⁰ P. Rogers and A. Hall, *Effective Water Governance: GWP Technical Committee Background Paper No. 7* (GWP, Stockholm, 2003), at 27. See Grimes, *ibid.*

⁴¹ Grimes, *ibid.* (original emphasis).

⁴² *Supra*, n. 40, at 37. See Grimes, *ibid.*

⁴³ H. Tropp, 'Water Governance: Trends and Needs for New Capacity Development', (2007) 9 *Water Policy Supplement* 2, 19-30, quoted by Grimes, *ibid.*

⁴⁴ Grimes, *ibid.*, at 122.

⁴⁵ Global Water Partnership, 'Effective Water Governance: Learning from the Dialogues', Status Report from Third World Water Forum, Kyoto, Japan (16-23 March 2003), quoted in Grimes, *ibid.*, who points out that the 'recent UN human rights declaration' alluded to by GWP is General Comment No. 15, *supra*, n. 7.

⁴⁶ World Bank, *Governance and Development* (World Bank, Washington, 1992), at 32, quoted by Grimes, *ibid.*, at 121.

⁴⁷ UNGA Res. A/64/L.63/Rev.1 on The human right to water and sanitation (26 July 2010), which

'Declares the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights'.

⁴⁸ UN HRC Res. A/HRC/15/L.14 on Human rights and access to safe drinking water and sanitation (24 September 2010) which calls upon States, *inter alia*,

'To develop appropriate tools and mechanisms, which may encompass legislation, comprehensive plans and strategies for the sector, including financial ones, to achieve progressively the full realization of human rights obligations related to access to safe drinking water and sanitation, including in currently unserved and underserved areas'.

⁴⁹ UNGA Res. 2200, 21 UN GAOR, 22nd Sess., Supp. 49, UN Doc. A/6316 (1967), (1967) 6 ILM 360. Adopted and opened for signature, ratification and accession by

UN General Assembly Resolution 2200A (XXI) of 16 December 1966, the Covenant has now been ratified by 147 States. See further, J. Razzaque, 'Trading Water: The Human Factor', (2004) 13/1 *Review of European Community and International Environmental Law* 15, at 17.

⁵⁰ See further, P. H. Gleick, 'The human right to water', (1998) 1 *Water Policy* 487, at 492.

⁵¹ S. McCaffrey, 'The Human Right to Water', in E. Brown Weiss, L. Boisson de Chazournes and N. Bernasconi-Osterwalder, *Fresh Water and International Economic Law* (2005, Oxford University Press) 93, at 94. Though it should be pointed out that, as a non-binding interpretation, General Comment No. 15 may be used to determine whether States have met their treaty obligations, see M. Williams, 'Privatization and the Human Right to Water: Challenges for the New Century', (2007) 28 *Michigan Journal of International Law* 469, at 475. See also, E. B. Bluemel, 'The Implications of Formulating a Human Right to Water', (2004) 31 *Ecology Law Quarterly* 957, at 972.

⁵² *Ibid.*, at 103. He further points out that 'This is also true, *a fortiori*, of States that are not parties to the Covenant.' More positively, however, he also points out, at 94, that 'thus far States Parties to the Covenant have not objected to the interpretation contained in the General Comment'.

⁵³ *Supra*, n. 51, at 477. Williams also concludes that both CEDAW and CRC, *ibid.*, suggest that 'the right to water merits protection because of its connection to other rights'. See further, Bluemel, *ibid.*, at 963.

⁵⁴ Bluemel, *ibid.*, at 971.

⁵⁵ Williams, *supra*, n. 51, at 479.

⁵⁶ Bluemel, *supra*, n. 51, at 968-972; A. Hardberger, 'Life, Liberty and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates', (2005) 4/2 *Northwestern Journal of International Human Rights* 331, at 360-362. See, Williams, *ibid.*, at 478. See also, Gleick, *supra*, n. 50, as an example of a commentator who argues, at 490 and 501, that an independent right to water exists in customary international law.

⁵⁷ See, for example, Hardberger, *ibid.*, who, while conceding that an independent human right to water is not considered customary international law, argues, at 361-362, that 'there should be a binding document that encompasses the ideas of General Comment 15'.

⁵⁸ See further, *infra*.

⁵⁹ D. J. Bederman, *International Law Frameworks* (2001), at 15, cited by Williams, *supra*, n. 51, at 478.

⁶⁰ *Ibid.*

⁶¹ S. R. Tully, 'The Contribution of Human Rights to Freshwater Resource Management' (2004) *Yearbook of International Environmental Law* 101, at 103.

⁶² *Supra*, n. 51, at 97.

⁶³ See Gleick, *supra*, n. 50, at 491.

⁶⁴ UNGA Resolution 217A (III), (New York, 10 December 1948).

⁶⁵ Articles 55 and 56 of the 1945 U.N. Charter provide, rather generally, that the U.N. shall promote 'respect for, and observance of, human rights and fundamental freedoms' and state that it is the duty of all members to promote these goals.

⁶⁶ See, for example, O. Schachter, 'International Law in Theory and Practice', (1982) 178 *Recueil des Cours* 9, at 340, who lists among 'some of the rights recognized in the Declaration and other human rights texts [which] have a strong claim to the status of customary law', freedom from slavery, genocide, torture, mass murders, prolonged arbitrary imprisonment and systematic racial discrimination.

⁶⁷ McCaffrey, *supra*, n. 51, at 96. See further, S. McCaffrey, 'A Human Right to Water: Domestic and International Implications', (1992) 5 *Georgetown International Environmental Law Review* 1, at 8.

⁶⁸ See Hardberger, *supra*, n. 56, at 337, citing L. A. Malone, *International Human Rights* (Vol. 2, 3003), at 21-22; F. Gianviti, 'Economic, Social and Cultural Rights and the International Monetary Fund', IMF Conference, Washington D.C., 7-17 May 2002, at 2, available at www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf

⁶⁹ UNGA Res. 2200, 21 UN GAOR, 22nd Sess., Supp. 52, UN Doc. A/6316 (1967), (1967) 6 ILM 368.

⁷⁰ McCaffrey, *supra*, n. 51, at 97. See further, McCaffrey (1992), *supra*, n. 67, at 9-11.

⁷¹ See Office of the High Commissioner for Human Rights, *General Comment No. 6: The Right to Life (Article 6)*, (30 April 1982), UN Doc. A/37/40 (1982), para. 5.

⁷² See Williams, *supra*, n. 51, at 474.

⁷³ A. A. Cancado Trindade, 'The Parallel Evolutions of International Human Rights Protection and of Environmental Protection and the Absence of Restrictions on the Exercise of Recognized Human Rights', (1991) 13 *Revista IIDH* 35, at 52, cited in McCaffrey, *supra*, n. 51, at 97.

⁷⁴ *Ibid.*, at 98.

⁷⁵ *Ibid.*

⁷⁶ U.N. Doc. A/34/46 (1979). Entered into force 1981. See also, governmental declarations of intent to ensure universal access to safe drinking water and available sanitation through public distribution systems, contained in the 1995 Beijing Declaration and Platform for Action, UN Doc A/CONF.177/20 (1995) and UN Doc. A/CONF.177/20/Add.1 (1995), *Women and Health*, at paras. 92 and 106(x), cited in Tully, *supra*, n. 61, at 105.

⁷⁷ U.N. Doc. A/44/49 (1989). Entered into force 1990.

⁷⁸ Articles 20, 26, 29 and 46. (1949) 75 *UNTS* 135. Entered into force 1950.

⁷⁹ Articles 23, 55, 59, 85, 89 and 127. (1949) 75 *UNTS* 287. Entered into force 1950. See also, Additional Protocol to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (1977) 1125 *UNTS* 3, at Articles 54 and 68-71 (entered into force 1978), and Additional Protocol to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (1977) 1125 *UNTS* 609, at Articles 5 and 18 (entered into force 1978).

⁸⁰ *Supra*, n. 50, at 494.

⁸¹ *Supra*, n. 51, at 98.

⁸² *Ibid.*, at 107.

⁸³ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 1999.

⁸⁴ (San Salvador, 17 November 1988). Available at <http://www.oas.org/juridico/english/Treaties/a-52.html>

⁸⁵ *Supra*, n. 51, at 99.

⁸⁶ UNDP, *Integrating Human Rights with Sustainable Human Development* (UNDP, New York, 1998), at 173-174, cited in E. Filmer-Wilson, 'The Human-Rights-Based Approach to Development: the Right to Water', (2005) 23 *Netherlands Quarterly of Human Rights* 213, at 213.

⁸⁷ 1981 African Charter on Human and Peoples Rights, (1982) 21 *ILM* 58, entered into force 21 October 1986.

⁸⁸ African Commission on Human and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93, Decision taken at the 18th Ordinary Session, 1995. See McCaffrey, *supra*, n. 51, at 99.

⁸⁹ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 rev. 1 (24 April 1997). See McCaffrey, *ibid.*

⁹⁰ 1144 *UNTS* 123; (1969) 9 *ILM* 673; (1971) 65 *AJIL* 679 (22 November 1969)

⁹¹ Article 10(2) of the 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, (1997) 36 *ILM* 719 (New York, 21 May 1997, not yet in force).

⁹² See the oral report of the coordinator of the informal consultations on Article 10(2), U.N. Doc. A/C.6/51/SR.57 (1997), at 3. See further, A. Tanzi and M. Arcari, *The United Nations Convention on the Law of International Watercourses* (Kluwer Law International, The Hague / Boston, 2001), at 139.

⁹³ (1992) 31 *ILM* 1312.

⁹⁴ U.N. Doc. MP.WAT/AC.1/1991/1 (17 June 1999).

⁹⁵ Article 4(2)(a).

⁹⁶ Article 6(1)(a).

⁹⁷ 28 May 2002 (Mauritania, Mali, Senegal).

⁹⁸ Article 4(3) provides, according to the translation by McCaffrey, *supra*, n. 51, at 101, that the principles and mechanisms established therein for the distribution of water between competing sectors or uses

'will aim at guaranteeing to the populations of the riparian States the full enjoyment of the resource, respecting the safety of persons and works as well as "the fundamental human right to healthful water", in the perspective of sustainable development'.

⁹⁹ According to the Special Rapporteur's commentary, at 20, the Berlin Rules represent

'a comprehensive revision of the *Helsinki Rules* and related rules approved from time to time by the Association ... [and] ... set about to provide a clear, cogent, and coherent statement of the customary international law that applies to waters of international drainage basins

... [and] ... also undertake the progressive development of the law needed to cope with emerging problems of international or global water management for the twenty-first century.’

¹⁰⁰ Article 14(1) provides that

‘In determining an equitable and reasonable use, States shall first allocate waters to satisfy vital human needs’

Article 3(20) defines “vital human needs” to mean

‘waters used for immediate human survival, including drinking, cooking, and sanitary needs, as well as water needed for the immediate sustenance of a household’.

¹⁰¹ Article 17 provides, *inter alia*, that

‘[e]very individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual’s vital human needs’.

¹⁰² See, for example, General Comment No. 15, *supra*, n. 7, paras. 31, 34, 35 and 44(c)(vii).

¹⁰³ For example, section 27(1)(b) of the Constitution of the Republic of South Africa.

¹⁰⁴ For example, section 3(1) of the South African 1997 Water Services Act and Article 36 of the 1998 National Water Act.

¹⁰⁵ In respect of the Indian courts, see *Charan Lal Sahu v. Union of India*, AIR (1990) SC, at 1495; *F. K. Hussain v. Union of India*, AIR (1990) Kerala 321, at 340; *Subash Kumar v. State of Bihar* (1991) 1 SCC 598, at 608; *M. C. Mehta v. Union of India* (1998) 9 SCC 589, at 607.

¹⁰⁶ For example, Tully, *supra*, n. 61, is dismissive, at 120, of most of the examples commonly cited, pointing out that

‘national constitutional provisions may be distinguished between those proclaiming collective governmental responsibilities with respect to water and those contemplating an individual entitlement’, and, further, that ‘[o]f the latter, weakly formulated provisions commonly provide that governments need only facilitate equality of access to water’.

¹⁰⁷ Mar del Plata Declaration and Plan of Action, *Report of the UN Water Conference*, UN Publication No. E.77.II.A.12, Part One, Chapter 1 (1977). See General Comment No. 15, *supra*, n. 7, para. 4, note 5. The Mar del Plata Declaration stated 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’.

¹⁰⁸ *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 June 1992), UN Doc. A/ CONF.151.26 (vol. II) (1992). Available at www.un.org/esa/sustdev/agenda21.htm

¹⁰⁹ Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment: Development Issues for the Twenty-First Century, UN Doc. A/CONF.151/PC/112 (1992). Available at

<http://www.wmo.ch/homs/documents/english/icwedece.htm> Principle No. 4 states that

‘it is vital to recognise first the basic right of all human beings to have access to clean water and sanitation at an affordable price.’

¹¹⁰ For example, UN General Assembly Resolution 35/18 (1980) concerning a Proclamation of the International Drinking Water Supply and Sanitation Decade 1981-1990.

¹¹¹ The UN Commission on Sustainable Development was established by the UN General Assembly in December 1992 to ensure effective follow up of the UN Conference on Environment and Development, specifically by reviewing progress in the implementation of Agenda 21 and the Rio Declaration on Environment and Development, as well as providing policy guidance to follow up the Johannesburg Plan of Implementation. It is the high-level forum for deliberation on the overarching goal of sustainable development within the United Nations system.

¹¹² CSD Decision 6/1 (1998) on Strategic Approaches to Freshwater Management, Official Records of the Economic and Social Council, Supplement No. 9, UN Doc. E/1998/29, Chapter 1, Section B, paras. 3, 10 and 19.

¹¹³ For example, World Bank Operational Directive 4.30: Involuntary Resettlement, (June 1990), paras.9, 12 and 20 require that, where involuntary resettlement is unavoidable during the course of a project, access to water is to be considered under the detailed resettlement plan required to address and mitigate the impacts of the resettlement on the resettled and host populations.

¹¹⁴ See generally, P. Cullet and A. Gowlland-Gaultieri, ‘Local Communities and Water Investments’, in E. Brown Weiss, L. Boisson de Chazournes and N. Bernasconi-Osterwalder, *Fresh Water and International Economic Law* (2005, Oxford University Press) 303.

¹¹⁵ See, for example, General Comment No. 15, *supra*, n. 7, paras. 12(c)(iv), 16(a), 24, 37(f), 48, 55 and 56.

¹¹⁶ See General Comment No. 15, para. 37(f). General Comment No. 15, para. 40, describes the core obligations set out in para. 37 as ‘non-derogable’.

¹¹⁷ See Cullet and Gowlland-Gaultieri *supra*, n. 114, at 313-314, citing Communication No. 155/96, *The Social and Economic Rights Action Center and the Center for Social and Economic Rights v. Nigeria*, African Commission on Human and Peoples’ Rights, 30th Ordinary Session, (13-27 October 2001), at para. 53.

¹¹⁸ See, Chapter X to the Second Report on the Situation of Human Rights in Peru, Inter-American Commission on Human Rights; Chapter IX to the Report on the Situation of Human Rights in Ecuador, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Recommendations) (24 April 1997); Case 7615 (Brazil), Inter-American Commission on Human Rights, 1984-1985 Annual Report 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985), the *Yanomami* case. See Cullet and Gowlland-Gaultieri, *ibid.*, at 314-315. See further, *Awasi Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights, (Ser. C), No. 79 (2001); *Guerra and*

Others v. Italy (1998) 26 *European Human Rights Reports* 357; *Zander v. Sweden* (1993) 18 *European Human Rights Reports* 175.

¹¹⁹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (Aarhus, 25 June 1998), 38 *ILM* 517 (1999).

¹²⁰ See, for example, Arts. 2(2), 2(6), 3(8) and 4(2) of the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context, (Espoo, 25 February 1991), 30 *ILM* 800 (1991). See also, the Protocol on Strategic Environmental Assessment (Kiev, 21 May 2003).

¹²¹ Agenda 21, (Rio de Janeiro, 13 June 1992), U.N. Doc. A/CONF.151/26 (Vols. I, II & III) (1992). Cullet and Gowlland-Gaultieri, *supra*, n. 114, point out, at 305, that

‘Chapter 18 sets forth standards regarding the participation of local communities in water resources management. For instance, it mandates States to design, implement, and evaluate projects and programmes based on the full participation of local communities ... in water management policy-making and decision-making.’

¹²² See General Comment No. 15, paras. 13-16 and 37(b). On the emergence of the principle of non-discrimination in the context of international environmental law, see H. Smets, ‘Le principe de non-discrimination en matière de protection de l’environnement’, (2000) *Revue Européenne du Droit de l’Environnement*, 1. See also, J. H. Knox, ‘The Myth and Reality of Transboundary Environmental Impact Assessment’, (2002) 96 *American Journal of International Law* 291, at 296-301, who regards the proliferation of instruments requiring transboundary EIA as a logical extension of the development of a comprehensive set of national EIA regimes and the application of the non-discrimination principle.

¹²³ See, for example, General Comment No. 15, paras. 16(d), and 37(b), (f) and (h).

¹²⁴ Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (26 June 1957); Convention concerning Indigenous and Tribal peoples in Independent Countries (27 June 1989), 28 *ILM* 1382 (1989). For example, Article 15(1) of ILO Convention 169 provides:

‘The rights of the peoples concerned to the natural resources pertaining to their lands shall be especially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.’

¹²⁵ B. Morgan, ‘Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law’, (2006) 17/1 *European Journal of International Law* 215, at 216.

¹²⁶ *Ibid.* She further explains, at 217, that

‘disconnection from water services affects the rights and entitlements of citizens to a basic service in ways that raise classic administrative law questions of limits of public power, and this is so, moreover, whether public or private providers are involved.’

¹²⁷ *Ibid.*, at 217.

¹²⁸ See generally, S. R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’, (2001) 111 *Yale Law Journal* 443.

¹²⁹ See generally, S. D. Murphy, ‘Taking Multinational Corporate Codes to the Next Level’, (2005) 43 *Columbia Journal of Transnational Law* 389.

¹³⁰ See M. Williams, *supra*, n. 51, at 488-491.

¹³¹ RWE AG Corporate Code of Conduct, at 7-8. See, Williams, *ibid.*, at 488, who also points out that RWE is listed as a participant in the UN Global Compact.

¹³² The Guidelines were originally adopted in 1976 as an annex to the OECD Declaration on International Investment and Multinational Enterprises and have been revised in 1979, 1982, 1984, 1991 and 2000. See Organisation for Economic Co-operation & Development, OECD Guideline for Multinational Enterprises, June 21, 1976, available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (revised 2000).

¹³³ See further, B. Morgan, ‘The Regulatory Face of the Human Right to Water’ (2004) 15/5 *Water Law* 179-186, at 181-182.

¹³⁴ Draft Declaration, Article 1.

¹³⁵ *Supra*, n. 16. On the background to this ISO initiative, see generally, Morgan, *supra*, n. 133, at 182-183. See also Morgan, *supra*, n. 125, at 224-227.

¹³⁶ U.N. Doc. A/HRC/8/5. See U.N. Doc. A/HRC/11/13, *ibid.*, at 3, para. 1.

¹³⁷ U.N. Doc. A/HRC/11/13, *ibid.*, at 3-4, paras. 3-5.

¹³⁸ *Ibid.*, at 6-7, para. 13.

¹³⁹ *Ibid.*, at 7, para. 14.

¹⁴⁰ *Supra*, n. 6.

¹⁴¹ ICSID Case No. ARB/03/19, *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005).

¹⁴² See Harlow, *supra*, n. 14, at 207-214.

¹⁴³ See <http://www.coalition-eau.org/spip.php?rubrique1>

¹⁴⁴ See, Morgan, *supra*, n. 133, at 182-183.

¹⁴⁵ See Kingsbury, *supra*, n. 3, at 29.