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UNMUDDYING THE WATERS: EVALUATING THE LEGAL BASIS OF THE HUMAN RIGHT TO WATER UNDER TREATY LAW, CUSTOMARY INTERNATIONAL LAW, AND THE GENERAL PRINCIPLES OF LAW

*Ndjodi Ndeunyema**

I. INTRODUCTION

Water scarcity, insecurity, and inequality are increasingly recognized as universal concerns.¹ The annual World Economic Forum's Global Risk Report² has identified water crises as among the top five risks facing the planet for eight consecutive years. Water crises remain entrenched among a cluster of other risks that are rated as having both a very high *likelihood* and a very high *impact*. Access to water is therefore more than just a concern for the Global South and developing countries; it is a universal challenge for all states, including the Global North and developed countries. Accordingly, Goal 6 of the United Nations Sustainable Development Goals challenges states to “ensure availability and sustainable management of water . . . for all” by 2020,³ while appreciating that water challenges manifest differently in different geographies and situations.

In this context, it is unsurprising that legal arguments that assert a binding right to water in both the domestic and international spheres have garnered significant attention. This article continues in that vein, assessing

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1. Illustratively, in 2017, water scarcity already affected four out of every ten people, while 2.1 billion people lacked access to safely managed drinking water services. See *Water*, UNITED NATIONS, <https://www.un.org/en/sections/issues-depth/water> (last visited May 9, 2019).

2. World Economic Forum, *The Global Risks Report*, at 5 (14th ed. 2009), http://www3.weforum.org/docs/WEF_Global_Risks_Report_2019.pdf (last visited Nov. 8, 2019).

3. *Transforming Our World: the 2030 Agenda for Sustainable Development*, UNITED NATIONS, <https://sustainabledevelopment.un.org/sdg6> (last visited Apr. 20, 2019).

the existence of a legally binding right to water (that is, a human right to access to clean and potable⁴ water for personal and domestic use) by drawing on each of the three principal sources of international law: treaties, customary international law (“CIL”), and the general principles of law.

In Part II, I argue that the right has largely already been recognized in international human rights treaty law, even if only implicitly. First, through adoption of its 2002 General Comment 15, the UN Committee on Economic, Social and Cultural Rights implied the right to water into article 11 of the International Covenant on Economic, Social and Cultural Rights,⁵ although there is some scholarly disagreement as to the normative suitability of creating an implied right. Second, other treaties contain express right to water provisions, although these treaties are of limited applicability, as they have fewer contracting parties and are designed to only extend to specific categories of protected people.

Part III considers an alternative approach: The right to water as a matter of customary international law. This approach is appealing as norms of customary international law bind *all* states, including states that are not parties to those limited-purpose treaties that explicitly incorporate a right to water. Further, as CIL, the right to water could be asserted by states in investor-state dispute settlement (“ISDS”) contexts where water-related investments have harmed local access to water. Unfortunately, even though political bodies of the UN, particularly the UN General Assembly (“UNGA”) in its 2010 Resolution 64/292, have “recognised” the right to water, establishing the crystallization of the right as a CIL norm is challenging. While there is strong evidence of *opinio juris*, evidence of state practice is sparser. Consequently, this article assesses the presence of CIL in support of a right to water under two different methodologies—the “sliding scale approach” and the “reflective equilibrium approach”—and finds the evidence of state practice inadequate to support a new CIL norm.

Part IV then evaluates whether the right to water has become part of the corpus of binding international law through “the general principles of law recognized by civilized nations” and finds that there is no independent legal basis for the right to water as a matter of general principle. Part V concludes the article.

4. See *Potable*, OXFORD ENGLISH DICTIONARY (2017) (defining potable as “fit or suitable for drinking”).

5. UN Econ. & Soc. Council, Comm. on Economic, Social and Cultural Rights, General Comment 15: The Right to Water (arts. 11 and 12 of the Covenant), ¶¶ 3–4, U.N. Doc. E/C.12/2002/11 (2002); see also Human Rights Council, Rep. of the U.N. High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation Under International Human Rights Instruments, ¶ (e), U.N. Doc. A/HRC/6/3 (Aug. 16, 2007); Human Rights Council, Rep. of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque, ¶ 16, U.N. Doc. A/HRC/15/31 (June 29, 2010).

II. EVALUATING A TREATY-BASED RIGHT TO WATER

International civil society and intergovernmental organizations have advocated for a universal convention specifically dedicated to the right to clean water for over a decade.⁶ However, at this time, there exists no independent, issue-specific treaty that proclaims an express, circumstance-independent right to water from a strictly anthropocentric perspective, and that outlines the right's normative content; and determines the obligations of States Parties in respect to the right. For our purposes, an *express* right to water is to be understood as one that is textually specified in a treaty instrument. The existence of an express treaty-based right to water in limited circumstances is discussed below in sections A and B. This is in contrast with an *implied* or derivative right to water under treaty law, which will be addressed in sections C and D of this part.

A. *An Express Right to Water for Children, Women, Persons with Disabilities, and Certain Persons in Armed Conflicts*

Various international treaties have expressly recognized a right to water as part of their range of human rights guarantees. Regional treaties also offer a potentially solid basis for water as a human right. The most prominent international treaties that expressly recognize a right to water are the UN Convention on the Rights of the Child (“CRC”),⁷ the UN Convention on the Rights of Persons with Disabilities (“CRPD”),⁸ the UN Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”),⁹ and the Geneva Conventions.¹⁰ Regional treaties that expressly recognize the right include the African Charter on the Rights and Welfare of the Child¹¹ (“African Children’s Rights Charter”) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the “Maputo Protocol”).¹² All of these

6. See *Statement by Green Cross International*, U.S. SUSTAINABLE DEVELOPMENT PLATFORM (Apr. 21, 2005), <https://sustainabledevelopment.un.org/index.php?page=view&type=255&nr=2158&menu=35>.

7. Convention on the Rights of a Child art. 24, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

8. Convention of the Rights of Persons with Disabilities art. 28, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

9. Convention of the Elimination of All Forms of Discrimination Against Women art. 14, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

10. See *infra* notes 36–37.

11. African Charter on the Rights and Welfare of the Child art. 14, July 11, 1990, CAB/LEG/24.9/49 [hereinafter African Children’s Rights Charter].

12. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art. 15, July 11, 2003, African Union Assembly, Decision on the Draft Protocol to the African Charter on Human and Peoples’ Rights Relating to Women, Assembly/AU/Dec.19 (III), <https://au.int/en/treaties/protocol-african-charter-human-and->

instruments are limited in scope, as they apply only to specific categories of individuals or groups. People who do not fall within one of the categories protected by a given treaty are not able to claim the rights it guarantees. These group-based treaties are nevertheless salient to the examination of whether a universal right to water exists and are thus assessed herein.

Beginning with the UN Convention on the Rights of the Child, CRC article 24(1) recognizes the child's right to enjoy "the highest attainable standard of health" and medical facilities, requiring States Parties to "strive to ensure that no child is deprived of his or her right of access to such health care services." Article 24(2) proceeds to list categories of measures that States Parties "shall take"—as "appropriate"—to fully implement article 24(1), including measures "[t]o combat disease and malnutrition, including within the framework of primary health care[,] through, inter alia, . . . the provision of adequate nutritious foods and *clean drinking-water*["]¹³

But while the CRC creates an obligation for states to provide clean drinking water, that obligation is limited to the context of the child's right to the enjoyment of health.¹⁴ That is, the right that accompanies states' obligations may only be claimed by children—human beings below the age of eighteen.¹⁵ Additionally, it is arguable that the provision of water is only obligatory under the CRC insofar as water is the nexus to realize the health of the child. Indeed, scholars who have analyzed the CRC's *travaux préparatoires* affirm this interpretation of article 24 by pointing out that India proposed the introduction of the expression "clean drinking water" in recognition of its importance for avoiding serious disease and even death in children.¹⁶

However, while it is clearly understood that water is indispensable to the basic health of a child (or any person), there is reason to believe the CRC's right to water might extend even farther. Water is, after all, critical to health in many senses and what constitutes health can be broadly defined. This is a proposition that finds interpretive support in the Committee on the Rights of the Child's General Comment 15 which points to water's essentiality both in the prevention of water-related diseases and, more broadly, to life and other human rights.¹⁷

peoples-rights-rights-women-africa [hereinafter Maputo Protocol on the Rights of Women in Africa].

13. CRC, *supra* note 7, art. 24 (emphasis added).

14. *See id.* art. 24(1). The child's right to water can also be implied from the child's right to an adequate standard of living in CRC article 27.

15. *See id.* art. 1.

16. JIMENA CHÁVARRO, THE HUMAN RIGHT TO WATER: A LEGAL COMPARATIVE PERSPECTIVE AT THE INTERNATIONAL, REGIONAL AND DOMESTIC LEVEL 59 (2014); SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 405, 409 (1999).

17. UN Comm. on the Rights of the Child, General Comment 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24), ¶ 48, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013), providing that:

A similar regional expression of an explicit right to water as a derivative of the right to health can be found in article 14(2)(c) of the African Children's Rights Charter.¹⁸ The African Children's Rights Charter adopts language and structure similar to the CRC's, although the African Children's Rights Charter refers to *safe* drinking water as opposed to the CRC's *clean* drinking water.¹⁹

Treaties addressing women's rights also expressly affirm the existence of the right to water, albeit in a limited context. The UN Convention on the Elimination of All Forms of Discrimination against Women provides *rural* women with a right to water as part of their right to participate in and benefit from rural development.²⁰ Articles 14(1) and (2) of CEDAW detail the unique challenges that rural women—who represent a quarter of the world's population²¹—face both in ensuring the economic survival of their families and in contributing non-monetized work to their communities and households.²² In response to this problem, CEDAW requires States Parties

Safe and clean drinking water and sanitation are essential for the full enjoyment of life and all other human rights. Government departments and local authorities responsible for water and sanitation should recognize their obligation to help realize children's right to health, and actively consider child indicators on malnutrition, diarrhoea and other water related diseases and household size when planning and carrying out infrastructure expansion and the maintenance of water services, and when making decisions on amounts for free minimum allocation and service disconnections. States are not exempted from their obligations, even when they have privatized water and sanitation.

18. See African Children's Rights Charter, *supra* note 11, art. 14 (“(1) Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. (2) State Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures: . . . (c) to ensure the provision of adequate nutrition and *safe drinking water* . . .” (emphasis added); see also HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S FOREIGN POLICY 51 (1980); SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 69 (2008).

19. Compare African Children's Rights Charter, *supra* note 11, art. 14, with CRC, *supra* note 7, art. 24(2).

20. CEDAW Comm, Gen. Recommendation No. 34 on Rural Women, ¶ 36, U.N. Doc. CEDAW/C/GC/34 (Mar. 7, 2016).

21. See *id.* ¶ 3.

22. CEDAW art. 14(1) and (2):

- (1) States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
- (2) States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

....

to “take all appropriate measures to eliminate discrimination” against rural women by “ensur[ing] such women the right” to “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”²³ Article 14 of CEDAW thus engenders the right to water as an intersectionality concern,²⁴ by coupling gender with socio-economic class, given the article’s specific application to women who are rurally located.²⁵

The specific protection of rural women under article 14 is based on data showing that rural women fare worse than (1) rural men and (2) both urban women and men on every socio-economic indicator.²⁶ Article 14 thus seeks to ensure that rural women benefit directly from social security programs and have adequate living conditions, including adequate access to water.²⁷

As with the right to water under the CDC, scholars also advance a “holistic” understanding of article 14²⁸ that is supported by the CEDAW Committee’s General Recommendation 34 asserting that “[r]ural women’s and girls’ rights to water and sanitation are not only essential rights in themselves, but also are key to the realization of a wide range of other rights, including rights to health, food, education and participation.”²⁹

-
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

23. See *id.* art. 14(2)(h) (emphasis added).

24. On intersectionality, see Kimberlé Crenshaw, *Demarginalizing The Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L.F. 139, 139–67 (1989); Sandra Fredman, *Engendering Socio-Economic Rights*, in *WOMEN’S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW* 218 (Anne Hellum & Henriette Sinding Aasen eds., 2013).

25. For an intersectional perspective, anchored in Southern and Eastern African case studies, on women’s right to water considering “intersecting and overlapping marginalizations on the basis of gender, race, ethnicity, political exclusion, and social economic class,” see *WATER IS LIFE: WOMEN’S HUMAN RIGHTS IN NATIONAL AND LOCAL WATER GOVERNMENT IN SOUTHERN AND EASTERN AFRICA* (Anne Hellum et al. eds., 2015).

26. See CEDAW Comm., Gen. Recommendation No. 34 on Rural Women, *supra* note 20, ¶ 5. This is a particularly pertinent concern in the Sub-Saharan African context where 40 billion hours are spent collecting water every year, with women bearing two-thirds of the burden. *Water, Sanitation and Hygiene (WASH)*, UNICEF, http://www.unicef.org/media/media_45481.html (last visited Apr. 6, 2020); see also U.N. Econ. & Soc. Council, Sub-Comm’n on the Promotion and Protection of Human Rights, Final Report of the El Hadji Guisse (Special Rapporteur), Relationship Between the Enjoyment of Economic, Social, and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation, ¶¶ 18–19, U.N. Doc. E/CN.4/Sub.2/2004/20 (July 14, 2004), <https://www.cetim.ch/legacy/en/documents/rap-2004-20-ang.pdf>.

27. See generally MEGHAN CAMPBELL, *WOMEN, POVERTY, EQUALITY: THE ROLE OF CEDAW* (2018).

28. Anne Hellum, *Engendering the Right to Water and Sanitation*, in *THE HUMAN RIGHT TO WATER THEORY, PRACTICE AND PROSPECTS* 300, 316–17 (Malcolm Langford & Anna Russell eds., 2017).

29. See CEDAW Comm., *supra* note 20, ¶ 81.

Similarly, the Maputo Protocol recognizes the rights of African women to food security, with a duty upon States Parties to “ensure that women have the right to nutritious and adequate food.” States are consequently required to take “appropriate” measures to “provide women with access to clean drinking water,” per article 15(a).³⁰ Like CEDAW, the Maputo Protocol’s scope of application is limited to women and girls, and its scope is further limited to African women and girls.³¹

The Convention on the Rights of Persons with Disabilities also expressly provides for the right to water. Through article 28(2)(a), CRPD States Parties “recognize the rights of persons with disabilities to social protection,” and agree to take “appropriate steps” to “ensure [their] equal access . . . to clean water services.”³² This same requirement has been affirmed by the UN Committee on the Rights of Persons with Disabilities.³³ As with the other treaties discussed in this section, the scope of application for the CRPD is limited; this time to the protected group of persons with disabilities.³⁴

The right to water under treaties pertaining to international humanitarian law, which is the body of international law that specifically finds application during international or non-international armed conflicts,³⁵

30. The Maputo Protocol’s article 15 reads:

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

- (a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food.

Maputo Protocol on the Rights of Women in Africa, *supra* note 12, art. 15.

31. *See id.*, art. 1.

32. Article 28 of the CPRD reads, in relevant part:

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

CRPD, *supra* note 8, art. 28.

33. UN Comm. on the Rights of Persons with Disabilities, Guidelines on Treaty-Specific Document to be Submitted by States Parties Under Article 35, Paragraph 1, of the Convention on the Rights of Persons with Disabilities, at 16, U.N. Doc. CRPD/C/2/3 (Nov. 18, 2009) (averring that, with regard to article 28, States Parties should report on “[m]easures taken to ensure availability and access by persons with disabilities to clean water, adequate food, clothing and housing and provide examples”). The Committee was established under article 34 of the CRPD with the purpose of monitoring the implementation of the CRPD.

34. CRPD, *supra* note 8, art. 1.

35. *See generally* Dapo Akande, *Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS (Elizabeth Wilmshurst ed., 2012); Dieter Fleck, *The Law of*

also merits some analysis. While water can be implicated at the level of both *jus ad bellum* (as a source of armed conflict in water-related conflict situations) and *jus in bello* (with regard to the provision of water during armed conflicts), it is through the latter that international humanitarian law offers potential as a source of water-related rights and obligations upon states. The Third and Fourth Geneva Conventions,³⁶ treaty instruments that largely also reflect customary international humanitarian law, contain provisions that protect access to water in armed conflict-related situations for persons such as prisoners of war, internees, and civilians, thereby creating water-related rights and obligations that bind parties participating in hostilities.³⁷

B. *Limitations of Existing Express Treaty-Based Rights to Water*

Many of the treaties assessed above are limited scope, *ratione personae* treaties that apply only to specific categories of groups or individuals. These treaties thus do not offer a general, free-standing right to water. In fact, they often formulate the right to water as a derivative of another “principal” or “core” right, whether it is the right to health (in the CRC), to social protection (in the CRPD), or to adequate living conditions (in the CEDAW).

The “ill-defined status” of the right, as scholar Amanda Cahill frames it, “causes confusion as to the scope and core content of the right to water.”³⁸ That confusion raises problems concerning the right’s justiciability and implementation, presenting the challenge of establishing “whether violations are of the right to water itself or, first and foremost, violations of

Non-International Armed Conflicts, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 581 (Dieter Fleck ed., 2013); Christine Byron, *Armed Conflicts: International or Non-International?*, 6 J. CONFLICT & SEC. L. 63 (2001).

36. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV Geneva Convention) arts. 85, 89, 127, Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War (III Geneva Convention) arts. 20, 26, 29, 46, Aug. 12, 1949, 75 U.N.T.S. 135.

37. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 36, at 99, 102–03, 109 (guaranteeing sufficient water for drinking purposes and other human needs); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 36, at 197–98, 213 (mentioning water and the protection of civilian persons in times of war); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 54, June 8, 1977, 1125 U.N.T.S. 3 (prohibiting the attacking, destroying, removing or rendering “useless objects indispensable to the survival of the civilian population” including “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”); see also LAURENCE BOISSON DE CHAZOURNES, FRESH WATER IN INTERNATIONAL LAW 169–73 (2013); cf. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) arts. 5, 14, June 8, 1977, 1125 U.N.T.S. 609.

38. Amanda Cahill, *The Human Right to Water—A Right of Unique Status: The Legal Status and Normative Content of the Right to Water*, 9 INT’L J. HUM. RTS. 389, 391 (2005).

other related rights.”³⁹ Cahill thus illuminates the challenge of cogently asserting that a right to water, as formulated in one of the treaties above, has, as a matter of law, been violated.⁴⁰

In the context of international humanitarian law, scholar Inga Winkler has argued that if water-related guarantees exist even in the strenuous context of armed conflicts, where significant derogations from various human rights protections are often permitted, then they must continue in times of peace when there would ordinarily be no “military necessity” justification for restricting human rights.⁴¹ While Winkler’s deductive reasoning may be attractive, it is in apparent contradiction with the Geneva Conventions’ facial *ratione materiae* (armed conflict) and *ratione personae* (prisoners of war, internees, and civilians) limitations.

Ultimately, all of the treaties assessed to this point referencing an express right to water are insufficient to establish a universal *human* right to water as well as to determine the right’s content and correlated duties upon states.⁴² They apply only to rural women, children, persons with disabilities, or certain persons in armed conflicts, as the case may be, although the application of water-related rights and obligations may sometimes also extend to the dependents and families of persons within those categories. While the “vulnerability-based” approach to the right to water taken by these treaties is laudable,⁴³ this article focuses on evaluating the existence of a *general* human right to water. By delimiting the instances in which a treaty-based right to water is expressly present, these treaties actually suggest that an express, treaty-based human right to water does not yet exist. Nevertheless, these treaties may serve as modest evaluative and deliberative resources in determining the normative scope and substantive content of a future, express human right to water—or even an implied human right to water.

What follows, therefore, is a consideration of treaty law sources that may assert the existence of a right to water, if only implied, that is not subject to *ratione materiae* or *ratione personae* limitations.

39. *Id.*

40. *See id.*

41. INGA WINKLER, THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION 62 (2012).

42. A *human* right is a right that is of general application to *all human beings* by virtue of the biological status of their humanity alone.

43. The vulnerability-based approach has even been adopted into broader international agendas. *See, e.g.*, G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, Goal 6.2 (Sept. 25, 2015) (setting out in Target 6.2 of the United Nations Sustainable Development Goals to “achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations”).

C. A Universal Implied Right to Water

Two international treaties potentially support an implied right to water: the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), and the International Covenant on Civil and Political Rights (“ICCPR”).⁴⁴ This article argues that these treaties support an implied right to water that is of general application, relying on judicial, quasi-judicial, and soft law sources as interpretive aids.

1. Implying the Right to Water Under the ICESCR

Support for a right to water under the ICESCR finds textual anchorage in two provisions: articles 11(1) and 12.⁴⁵ Article 11(1) of the ICESCR reads:

The States Parties to the present Covenant recognize 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. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.⁴⁶

While article 11(1) does not refer to water explicitly, the UN Economic and Social Council’s Committee on Economic, Social and Cultural Rights (the “CESCR” or the “Committee”)⁴⁷ has repeatedly interpreted this provision as including a right to water as part of the individual’s right to an

44. Cf. Convention on the Law of the Non-Navigational Uses of International Watercourses, art. 10(2), May 21, 1997, 2999 U.N.T.S. (requiring special regard be given to “the requirements of vital human needs” in the event of a conflict between uses of an international watercourse).

45. See Cahill, *supra* note 38, at 390. Cahill also points out that article 1(2) of ICESCR provides that “in no case may a people be deprived of its own means of subsistence” and argues that means of subsistence must include water. *Id.* at 391.

46. International Covenant on Economic, Social and Cultural Rights [ICESCR] art. 11(1), Dec. 16, 1966, 993 U.N.T.S. 3 (emphasis added); see also U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, General Comment 12: The Right to Adequate Food, ¶ 1, U.N. Doc. E/C.12/1999/5 (1999) (interpreting the right to adequate food as applying to “everyone” without any limitation upon the applicability of this right to individuals or to female headed households despite the ICESCR’s gendered reference to “himself and his family”).

47. The Committee is a body of eighteen independent experts that is tasked with monitoring the implementation of the ICESCR by its States Parties and with developing general interpretations of the ICESCR’s provisions (called “General Comments”). It was established by resolution of the UN Economic and Social Council [“ECOSOC”] to carry out the monitoring functions assigned to ECOSOC in Part IV of the ICESCR. See U.N. OFFICE OF THE HIGH COMM’R, *Committee on Economic, Social and Cultural Rights: Introduction*, <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (last visited Apr. 6, 2020).

adequate standard of living for herself and her family.⁴⁸ Essentially, the Committee utilized article 11(1) to carve out a free-standing right to water, as water is amongst the pre-requisites for an adequate standard of living.⁴⁹ The right to an adequate standard of living is thus the “source right” for the right to water.⁵⁰

In its most expansive analysis of the right to water, the CESCR’s General Comment 15 sets out its legal bases, its normative content, states’ obligations with regard to the right⁵¹ (and what would constitute corollary state violations thereof),⁵² state implementation requirements,⁵³ and the obligations of non-state actors.⁵⁴ Notably, the CESCR’s discussion of General Comment 15 extends only to water for personal and domestic use and thus excludes considerations borne out of commercialization or transboundary concerns, for example.⁵⁵

In General Comment 15, the CESCR principally relied on three implicit legal justifications for reading the right to water into the ICESCR.⁵⁶ The first is the *original intent* of the ICESCR drafters, who, the Committee argued, used the word “including” in ICESCR article 11(1) as an indication that the catalogue of rights mentioned there (food, clothing, and housing) was not

48. U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, General Comment 15: The Right to Water (2002), *supra* note 5, (offering a full exposition of the right to water under the ICESCR); U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, General Comment 4: The Right to Adequate Housing, ¶ 8, U.N. Doc. E/1992/23 (Dec. 13, 1991) (recognizing, in a more limited capacity than General Comment 15, that all beneficiaries of the right to adequate housing have a right to sustainable access to safe drinking water, without elaboration on the right’s legal source or normative content).

49. See Takele Bulto, *The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?*, 12 MELB. J. INT’L L. 299 (2011).

50. Pierre Thielbörger, *Re-Conceptualizing the Human Right to Water: A Pledge for a Hybrid Approach*, 15 HUM. RTS. L. REV. 225, 226 (2015).

51. See U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, General Comment 15: The Right to Water, *supra* note 5, ¶¶ 17–38.

52. See *id.* ¶¶ 2–38.

53. See *id.* ¶¶ 39–44.

54. See *id.* ¶ 60.

55. *Id.* ¶ 2. See generally Catarina de Albuquerque & Inga Winkler, *Neither Friend Nor Foe—Why the Commercialization of Water and Sanitation Services Is Not the Main Issue for the Realization of Human Rights*, 17 BROWN J. WORLD AFF. 167 (2010); Malcolm Langford, *Privatisation and the Right to Water*, in THE HUMAN RIGHT TO WATER THEORY, PRACTICE AND PROSPECTS, *supra* note 28, at 463; Andrew Lang, *Privatisation and Regulatory Autonomy: The Right to Water and International Economic Law*, in THE HUMAN RIGHT TO WATER THEORY, PRACTICE AND PROSPECTS, *supra* note 28, at 531 (for a discussion on the commercialization and privatization of water).

56. Though scholars have ascribed these three justifications to the CESCR from their readings of Comment 15, the CESCR itself did not frame its justifications in the exact language scholars have since used. The words “derivative” and “multiplier” for instance are nowhere to be found in Comment 15 and are the byproduct of scholarly analysis.

intended to be exhaustive but rather exemplary.⁵⁷ The Committee's understanding of the term "including" reflects a legal drafting tradition that is frequently adopted by domestic and international law-making organs.⁵⁸

The second justification is that water is a *multiplier right*.⁵⁹ Water is of overarching salience in the realization of other rights, as without water other rights cannot be fulfilled. As the Committee framed it, water "clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."⁶⁰ Indeed, the Committee recognized that water is necessary "to realise many of the [ICESCR] rights" such as adequate food, health and environmental hygiene, livelihood, and cultural practices.⁶¹

The third justification relates to water as a *derivative right*,⁶² derived from—as opposed to contributing to—the rights to life, dignity, or health.⁶³ The Committee points out that water "should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights,

57. See U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, General Comment 15: The Right to Water, *supra* note 5, ¶ 3.

58. The interpretive inclusion of the right to water in article 11(1) is anchored in teleological interpretation under the primary rule of treaty interpretation contained in article 31(1) of the Vienna Convention on the Law of Treaties (the "VCLT"). See Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (requiring that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"); see also Bulto *supra* note 49 at 302.

59. Sandra Fredman, *supra* note 18, at 216.

60. U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, General Comment 15: The Right to Water, *supra* note 5, ¶ 3; see also David Copp, *The Right to an Adequate Standard of Living: Justice, Autonomy, and the Basic Needs*, 9 SOC. PHIL. & POL'Y 231, 252 (1992) (concluding that "[a]ny credible analysis of the concept of a basic need would imply . . . basic needs [such as] clean water."); cf. WINKLER, *supra* note 41, 43 (highlighting the challenge of determining what forms the right to an adequate living under article 11(1) of the ICESCR while advancing Engbruch's assumption that an adequate standard of living is met "when individuals live in an environment and under conditions that allow them to participate in social life while maintaining their dignity and to realise their rights by their own means").

61. U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, Gen. Comment 15: The Right to Water, *supra* note 5, ¶ 6; see also U.N. Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health (art. 12), ¶ 15, U.N. Doc. E/C.12/2000/4 (2000).

62. See, e.g., Cahill, *supra* note 38, at 391 (arguing that because water is a crucial element of the ICESCR's article 11 rights to food, clothing, and housing, "the right to water still exists in international human rights law with a 'unique status'—somewhere between that of a derivative right and an independent right"); Comm. on Elimination of Discrimination Against Women, General Recommendation 34 (2016) on the Rights of Rural Women, ¶¶ 81–85, U.N. Doc. CEDAW/C/GC/34 (2016) (recognizing the right to water as a component of both the right to health and the right to housing).

63. See Chávarro, *supra* note 16 at 48 (finding a derivative right to water under the ICESCR rights to food, health, and an adequate standard of living); Erik Bluemel, *The Implications of Formulating a Human Right to Water*, 31 ECOLOGY L.Q. 957, 969–70 (2005).

foremost amongst them the right to life and human dignity.”⁶⁴ The value of the right to water can thus be seen as being of intrinsic value; its worth derives from its “inherent qualities, powers, and potentialities” and not by being ascribed through social conventions or subjective preferences.⁶⁵

The CESCR also found a right to water in the context of the right to health in ICESCR article 12.⁶⁶ This argument was advanced in detail in the Committee’s General Comment 14.⁶⁷ In that Comment, the Committee stated first that the article 12(1) right to health is “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 . . .”⁶⁸ The Committee also interpreted ICESCR article 12(2)(b), requiring “the improvement of all aspects of environmental and industrial hygiene” to include, *inter alia*, a requirement “to ensure an adequate supply of safe and potable water and basic sanitation.”⁶⁹

The CESCR’s various justifications for the legal foundations of the right to water have not been without scholarly demur and criticism. The principal objector is Stephen Tully, who has taken issue with General Comment 15.⁷⁰ Tully criticizes General Comment 15 as “revisionist” and admonishes what he sees as the Committee’s invention of a novel right to water.⁷¹ His reasoning is described below, though this article is restricted to addressing his legal and normative concerns and refrains from engaging with his policy-based considerations.⁷²

First, Tully disputes the Committee’s expansive reading of the word “including” in article 11(1) ICESCR, arguing that it is a “self-evidently imprecise term” that leads one to “speculate on the number and nature of

64. U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, General Comment 15: The Right to Water, *supra* note 5, ¶ 3 (referring presumably to the rights to life and dignity in the UDHR, ICESCR, ICCPR, and the Optional Protocols).

65. Michael Penn & Aditi Malik, *The Protection and Development of the Human Spirit: An Expanded Focus for Human Rights Discourse*, 32 HUM. RTS. Q. 665, 667 (2010).

66. Thielbörger, *supra* note 50, 228–29.

67. See also U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, General Comment 15: The Right to Water, *supra* note 5, ¶¶ 3, 8, 11–13, 44 (approaching the right to water from the perspective of the right to health).

68. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health, *supra* note 61, ¶ 11.

69. *Id.* ¶ 15.

70. See generally Stephen Tully, *A Human Right to Access Water? A Critique of General Comment No. 15*, 23 NETH. Q. HUM. RTS. 35, 63 (2005).

71. Bulto *supra* note 49, at 292.

72. There is a series of relevant debates between Stephen Tully and Malcolm Langford on General Comment 15. See generally Malcolm Langford, *Ambition That Overleaps Itself? A Response to Stephen Tully’s Critique of the General Comment on the Right to Water*, 24 NETH. Q. HUM. RTS. 433 (2006); Stephen Tully, *Flighty Purposes and Deeds: A Rejoinder to Malcolm Langford*, 24 NETH. Q. HUM. RTS. 461 (2006); Malcolm Langford, *Expectation of Plenty: Response to Stephen Tully*, 24 NETH. Q. HUM. RTS. 473 (2006). For Tully’s policy-based considerations, see generally Tully, *supra* note 70, at 45–51.

other characteristics essential to an adequate standard of living but not explicitly guaranteed by the [ICESCR].”⁷³ Effectively, Tully faults the Committee for engaging in a form of proliferation of rights.⁷⁴ To him, an expansive reading of the word “including” could encompass rights to electricity, the internet, or other civic services, “open[ing] up the floodgates of other less important rights.”⁷⁵ Tully does nevertheless accept an implied right to access water but only insofar as it is necessary to grow food or satisfy housing needs.⁷⁶

Tully’s second critique is that the CESCR’s inclusion of water as an article 11 right was outside its competence as an interpretive, non-legislative body. Tully argues that the ICESCR’s *travaux préparatoires* reveal states’ deliberate omission of a right to water at the drafting stage.⁷⁷ Thus, Tully suggests that the Committee’s recognition of water as a human right was, in effect, an amendment of the ICESCR. Since amending the ICESCR to add new rights is only possible through the amendment procedure outlined in ICESCR article 29,⁷⁸ Tully’s argument implies that the Committee *invented* rather than *discovered* the right to water.⁷⁹

Tully’s views were rendered in the mid-2000s, and much of the wind has been taken out of his revisionism objection by the passage of time. The global consensus—or at least the absence of express objection—to water’s recognition as a human right is today epitomized by the non-binding 2010 UN General Assembly Resolution 64/292, which recognized 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.”⁸⁰

While Tully is correct that the meaning of the phrase “adequate standard of living” in article 11(1) ICESCR is imprecise, other scholars have compellingly argued that, at a minimum, an “adequate standard of

73. *Id.* at 36–37. Cf. Langford, *Ambition That Overleaps Itself? A Response to Stephen Tully’s Critique of the General Comment on the Right to Water*, *supra* note 72.

74. See Phillip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L L. 607 (1984).

75. Tully, *A Human Right to Access Water?*, *supra* note 70, at 37; Stephen Tully, *A Human Right to Access the Internet? Problems and Prospects*, 14 HUM. RTS. L. REV. 175 (1984).

76. Tully, *A Human Right to Access Water?*, *supra* note 70, at 36–37.

77. Tully, *A Human Right to Access Water?*, *supra* note 70, at 37 (citing generally, for analysis of the *travaux*, P.H. Gleick, *The Human Right to Water*, 1 WATER POL’Y 487, 491 (1999) (suggesting, without providing an explicit source, that “the framers of the UDHR considered water to be implicitly included as one of the ‘component elements’—as fundamental as air”).

78. *Id.*

79. Cf. Bulto, *supra* note 49, at 298 (arguing that the water was a more of a “discovery” than an “invention”).

80. G.A. Res. 64/292, ¶ 1 (July 28, 2010); see also *id.* pmb. (recalling the General Assembly’s various previous resolutions on the right to development, the decade of water action, and the habitat agenda, amongst others, that have affirmed a human right to water).

living” requires an environment that allows individuals to “participate in social life while maintaining their dignity.”⁸¹ Without access to water, then, realizing an adequate standard of living would be impossible. As for Tully’s concern that admitting a right to water is a slippery slope, this is more hypothetical than a real risk. Jenny Granwall observed that the Committee’s treatment of water as a *pre-requisite* for other rights restricts the potential for “any flood of new rights only because the special status of water is recognised.”⁸²

The thrust of Tully’s second critique can be neutralized through an examination of the ICESCR’s *travaux préparatoires*. Pierre Thielbörger compellingly argues that the ICESCR’s textual silence on water ought not to be interpreted as a consensus that there is not a right to water.⁸³ A plausible alternative is that the drafters’ textual omission constitutes a merely “negligent silence,” as water was simply forgotten, or taken for granted, at the time of drafting the ICESCR.⁸⁴ This theory is particularly convincing when considering that a global food crisis was contemporaneous to the ICESCR’s drafting, while drinking water was considered to be a plentiful and renewable natural resource.⁸⁵ The absence of a specifically elaborated right to water in article 11 should thus be understood as neither an exclusionary nor an inclusionary absence, as Takele Bulto argues, but as resulting simply from a lack of “cognition” or “recognition.”⁸⁶

Moreover, even assuming that the *travaux préparatoires* did establish the exclusion of water as a human right, the *travaux* are of only secondary interpretive significance under article 32 of the VCLT.⁸⁷ Since regional bodies, including the Inter-American Court on Human Rights in *Xákmok Kásek Indigenous Community v. Paraguay*, have accepted General Comment 15’s interpretation of an implied article 11 right to water, it appears that Tully’s understanding of the meaning and significance of the *travaux* is not universally held.⁸⁸

81. WINKLER, *supra* note 41, at 43.

82. JENNY GRANWALL, ACCESS TO WATER: RIGHTS, OBLIGATIONS, AND THE BANGALORE SITUATION 215 (2008).

83. Thielbörger, *supra* note 50, 227.

84. *Id.*

85. *Id.*

86. Bulto, *supra* note 49, at 303 (citing Matthew Craven, *Some Thoughts on the Emergent Right to Water*, in THE HUMAN RIGHT TO WATER 37, 38 (Eibe Riedel & Peter Rothen eds., 2006). Indeed, this is largely what Gleick was saying, too. See P.H. Gleick, *The Human Right to Water*, 1 WATER POL’Y 487, 491 (1999).

87. Recourse to the *travaux préparatoires* is secondary in light of article 32 of VCLT, providing that interpretative recourse to the preparatory works would only follow where the *primary* methods in article 31 VCLT are ambiguous, obscure, or lead to a result that is manifestly absurd or unreasonable. See VCLT, *supra* note 58, art. 32.

88. *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 195 (Aug. 24, 2010). Here, it was held that the supply of 2.17 litres of water per person per day by the government to the indigenous

2. Implying the Right to Water Under the ICCPR

Like the ICESCR, the ICCPR may also be read to include an implied right to water. In the ICCPR, that right would be found in its article 6(1) guarantee of the right to life, expressed thus: “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.”⁸⁹

The argument that the right to life implies a right to water is relatively banal, yet it is potent in its forcefulness: Water is a non-substitutable resource that is essential at the most basic level to ensure the survival and sustenance of human life. Lack of water is a “deprivation that threatens life, destroys opportunity and undermines human dignity.”⁹⁰

Whether the article 6(1) right to life includes access to water, however, is not cut and dry. The right to “life” in article 6(1) can arguably be understood in two senses. The first is in the strict and narrow sense that it would impose negative obligations of restraint or non-interference upon the state, which cannot to deprive a person of their life. The second is broader, requiring the state to, in addition to its negative obligations, also take positive steps to safeguard life.

Those who believe that article 6(1) adopts the narrow approach point to both the text and context of the ICCPR. Yoram Dinstein, for example, has argued that “[t]he human right to life per se . . . is a civil right and does not guarantee any person against death from famine or cold or lack of medical attention.”⁹¹ The ambit of ICCPR article 6, his argument goes, is confined to protection against the deprivation of life through means of homicide, not the freedom to live as one wishes or the right to have an appropriate standard of living.⁹² Dinstein’s restrictive interpretation may be further buttressed when considering that the right to life is contained in the ICCPR, which enumerates civil and political rights, and not the ICESCR, with socio-economic rights. This placement implies that article 6(1) ICCPR is to be understood *only* in the civil rights sense and at the exclusion of its socio-

community of Xákmok Kásek was not sufficient in quantity and of adequate quality, and had exposed them to risks and disease. The court described water as essential to meet “basic needs, including food and hygiene” while citing articles 11 and 12 of the General Comment 15; *see also* CHAZOURNES, *supra* note 36, at 158.

89. International Covenant on Civil and Political Rights [ICCPR] art. 6.1, Dec. 16, 1966, 999 U.N.T.S. 171.

90. UN Dev. Programme, Human Development Report—Beyond Scarcity: Power, Poverty and the Global Water Crisis, at 5 (2006).

91. Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 115 (Louis Henkin ed., 1981).

92. *Id.* Notably, the *travaux préparatoires* of the ICCPR contain comments on the right to life as it relates to state deprivation of an individual’s life. *See* MARC BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 115, 115–36 (1987).

economic connotations, such as an individual's underlying need to access clean drinking water.

However, this interpretation is disputed by an authoritative source. In 1982 the UN Human Rights Committee ("UNHRC"), the ICCPR's treaty body, adopted General Comment 6 on the Right to Life.⁹³ In General Comment 6, the UNHRC eschewed the narrow and restrictive interpretation of article 6 as vacuous.⁹⁴ Instead, according to scholar Antonio Trindade, it opined that a "modern and proper" construction of life should not only protect against any arbitrary deprivation of life but should also place states under a duty to "pursue policies which are designed to ensure access to the means of survival' for all individuals and all peoples."⁹⁵ While the UNHRC's General Comment 6 did not specify that a broader reading of the right to life included a right to water, it did state that the protection of the right to life "requires that States adopt positive measures."⁹⁶ Updating its analysis in 2018's General Comment 36, the UNHRC expressly included access to water as a component of the right to life.⁹⁷

III. A RIGHT TO WATER UNDER CIL?

A. *The Significance of Settling the Existence of a Right to Water Under CIL*

Like treaty law, CIL is one of the three principal sources of international law recognized by article 38(1)(b) of the International Court of

93. UN Human Rights Committee [U.N. HRC], General Comment 6 art. 6 (Right to Life), ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 30, 1982) [hereinafter U.N. HRC General Comment 6].

94. *See id.*; Cahill, *supra* note 38, at 397.

95. Antonio A. Cancado Trindade, *The Parallel Evolutions of International Human Rights Protections and of Environmental Protection and the Absence of Restrictions on the Exercise of Recognized Human Rights*, 13 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 35, 51 (1991) (quoting B.G. Ramcharan, *The Right to Life*, 30 NETH. INT'L L. REV. 301, 302 (1983). Further, the UN HRC stated that the ICCPR "should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions." U.N. HRC, Comm. No. 829/1988, U.N. Doc. CCPR/C/78/D/829/1998 (Aug. 13, 2003) (stating the ICCPR "should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions").

96. U.N. HRC General Comment 6, *supra* note 93, ¶ 5.

97. U.N. HRC, General Comment 36 on Article 6 (Right to Life), ¶ 26, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) ("The measures called for to address adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health care, electricity and sanitation, and other measures designed to promote and facilitate adequate general conditions, such as the bolstering of effective emergency health services, emergency response operations (including firefighters, ambulance services and police forces) and social housing programmes.") (emphasis added).

Justice (“ICJ”) Statute.⁹⁸ Whether or not a treaty-based right to CIL exists, it is valuable to independently evaluate the existence of a right to water in customary international law. A treaty-based right to water, whether express or implied, is only enforceable against states that are party to the treaty in question. A right to water that is predicated in customary international law, in contrast, would be binding on all states, save for persistent objectors.⁹⁹ This is particularly pertinent if we consider that the ICESCR, arguably the most compelling treaty from which water can be asserted as a right, has not attained universal signature and ratification by states.¹⁰⁰ Further, even where a treaty norm and a CIL norm have exactly the same content, both create independent obligations for states.¹⁰¹

Like a treaty-based right, a CIL right would have potential application both *between* states and *within* states. *Between* states, a CIL norm could potentially trigger state liability for breaches of conduct.¹⁰² *Within* states, a CIL norm may also have an immediate impact, as a number of national constitutions follow a monist approach and automatically domesticate international customs, even as new customs are formed, into binding national law—without the need for additional legislation.¹⁰³

Consider river damming, a common infrastructure project that has potentially adverse effects upon water access for downstream riparian states and their populations.¹⁰⁴ Asserting the existence of a CIL right to water would, theoretically at least, place obligations upon upstream riparian states, even where such states may have entered into bilateral or multilateral treaties concerning water resources to the contrary.

A CIL right to water would also have particular significance in the context of investor-state arbitration, where foreign investors sue states, often

98. Charter of the United Nations and Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, T.S. No. 993 [hereinafter ICJ Statute].

99. The persistent objector rule provides that a state that persistently objects to a rule of customary international law during the formative stages of that rule will not be bound by that rule when it comes into existence for as long as it consistently maintains its objection. See Olufemi Elias, *Persistent Objector*, in THE MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2012); Int’l Law Comm’n, Rep. on the Work of Its Sixty-Seventh Session, U.N. Doc. A/70/10, at ¶ 59 n.75 (2015) (defining “persistent objector”).

100. *Treaties: Status of Ratification*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2014), <http://indicators.ohchr.org> (last visited Apr. 6, 2020).

101. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. 14, ¶ 175 (June 26).

102. G.A. Res. 62/61, Responsibility of States for Internationally Wrongful Acts (Jan. 8, 2008).

103. See, e.g., CONSTITUTION, 1994, § 211 (Malawi); CONSTITUTION, 1996, § 322, (S. Afr.); CONSTITUTION, 2010, art. 2(5) (Kenya); CONSTITUTION 1990, art. 144 (Namibia); GRUNDGESETZ [BASIC LAW], art. 25 (Ger.), translation at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

104. See *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, Judgment, 1997 I.C.J. 88 (Sept. 25).

under bilateral investment treaties. Investor-state arbitrations have proven to be fertile ground for human rights arguments in the context of water-related investments of significant public interest that have direct impacts upon water access for local populations, including concessional contracts for privatized water provision.

A prominent illustration is the *Biwater v. Tanzania* arbitration before the ICSID Tribunal.¹⁰⁵ After Tanzania privatized public services and utilities, including water, it entered into a ten-year contract with a private entity that was partly owned by Biwater Group, a British water company.¹⁰⁶ After Biwater failed to deliver on its contractual obligations, Tanzania terminated the contract and took control of various Biwater assets. Biwater brought ICSID claims against Tanzania for unlawful expropriation of property and for failure to provide the company with fair and equitable treatment.¹⁰⁷ During the arbitration proceedings, Tanzania argued that, by failing to provide the contracted water provision, Biwater had created “a real threat to public health and welfare”—though it did not go so far as to describe water as a human right.¹⁰⁸ However, non-governmental organizations that were *amici curiae* before the Tribunal submitted arguments rooted in the characterization of water as a human right under General Comment 15.¹⁰⁹ Unfortunately, the Tribunal failed to address the existence of a treaty-based human right to water argument directly.¹¹⁰

While similar right to water arguments have been raised in other investor-state dispute proceedings concerning water,¹¹¹ a study by international water law scholar Tamar Meshel—reviewing investor-state arbitrations that have involved a right to water defense—revealed that arbitral tribunals have largely refrained from directly addressing the right to water’s potential effects on the investment protection obligations of states.¹¹²

105. *Biwater Gauff Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award (July 24, 2008).

106. See Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 J. INT’L DISP. SETTLEMENT 277, 290 (2015).

107. *Biwater Gauff*, Award, ¶ 95.

108. *Id.*, ¶ 436.

109. *Id.*

110. See *id.*; see also Meshel, *supra* note 106, at 291 (noting the structural barriers in the wording of arbitration agreements that hinder reliance upon human rights arguments in investor-state arbitrations).

111. See, e.g., *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007); *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010); *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010).

112. See Meshel, *supra* 106, at 294; see also Emma Truswell, *Thirst for Profit: Water Privatization, Investment Law and a Human Right to Water*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 570 (Chester Brown & Kate Miles eds., 2011).

In those arbitrations where right to water arguments were raised, they were not explicitly asserted as rooted in CIL obligations.¹¹³ Nevertheless, Kate Parlett developed a persuasive argument that circumstances exist where an investor might seek to rely on CIL as the basis of a claim for breach of an obligation under an investment treaty or contract,¹¹⁴ depending on the language of a given arbitration agreement.

This proposition invites one to interpret and apply a state's investment treaty obligations in light of obligations imposed by article 31(3)(c) of the VCLT, itself a CIL rule.¹¹⁵ Article 31(3)(c) is also known as the principle of systemic integration or harmonious interpretation.¹¹⁶ In this context, its application follows from the view that states "may rely on human rights obligations they owe to non-parties to the arbitration proceedings, such as individuals or groups under their jurisdiction, as a defence to investors' allegations of investment protection violations."¹¹⁷

Finally, there remains potential for a CIL right to water to attain the status of an obligation *erga omnes*, which are obligations of states towards the international community as a whole, that concern all states, and the protection of which is a legal interest of all states.¹¹⁸ Drawing from the ICJ's *obiter dictum* in *Barcelona Traction*,¹¹⁹ obligations *erga omnes* would derive from sources that include "principles and rules concerning the basic rights of the human person."¹²⁰ Indeed, access to water at the basic level of human sustenance and dignity is indispensable to maintaining such a basic right to life of the human person.

113. *Id.*

114. Kate Parlett, *Claims Under Customary International Law in ICSID Arbitration*, 31 ICSID REV. - FOREIGN INV. L.J. 434 (2016).

115. For authorities affirming the status of articles 31 and 32 of the VCLT as customary international law, see *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, 1994 I.C.J. Rep. 1, ¶ 41 (Aug. 31); *Oil Platforms (Islamic Republic of Iran v. United States of America)*, 1996 I.C.J. Rep. 23, ¶ 23 (Dec. 12); *Kasikili/Sedudu Island (Botswana v. Namibia)*, 1999 I.C.J. Rep. 1045, ¶ 18 (May 29); RICHARD GARDINER, *TREATY INTERPRETATION* 12 (2008); MARK VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES: A STUDY OF THEIR INTERACTIONS AND INTERRELATIONS WITH SPECIAL CONSIDERATION OF THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 484–506 (1985).

116. Adamantia Rachovitsa, *The Principle of Systemic Integration in Human Rights Law*, 66 INT'L & COMP. L.Q. 557 (2017); Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279 (2005).

117. Meshel, *supra* note 106, at 280.

118. See generally MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* (2000).

119. *Barcelona Traction Light and Power Company, Limited (Belgium v. Spain)*, 1970 I.C.J. Rep. 3, 33–34 (July 24).

120. For a discussion of the meaning of "basic rights of the human person," see RAGAZZI, *supra* note 118, at 136–45 (2000).

As such, in light of the *potential* relevance of a CIL right to water, the possible existence of such a right is assessed below.

B. *Evaluating the Right to Water in CIL Discourse*

The CESCR's adoption of General Comment 15, described above, resulted in significant debate over the existence of a right to water under CIL. The discourse and literature further increased after 2010 UNGA Resolution 64/292 explicitly recognized the right to water.¹²¹ Before offering an assessment on the existence of a CIL right to water, this section provides an indicative summation of some of the most prominent recent scholarly positions on the question.

The existence of a custom of international law requires both *opinio juris* and state practice.¹²² Scholars evaluating a customary right to water reach different conclusions about the existence of either: Daphina Misiedjan argues that the right to water “is still materialising in customary law[,] as it currently has a weak status, which is mostly fuelled by state practice in combination with states’ statements.”¹²³ Mary Arden, Justice of the Supreme Court of the United Kingdom, only tangentially mentions the possibility of a right based in CIL in her review of the potential for a right to water.¹²⁴ Stephen McCaffrey finds that despite the sufficiency of *opinio juris*, no right to water has emerged because the right has not been recognized “by an authoritative and generally recognized source, such as the International Court of Justice, or by states generally,” and given that “some states that play important roles in the international system have yet to accept the existence of the right.”¹²⁵

In contrast, Jimena Chávarro finds that there *is* sufficient evidence of both state practice and *opinio juris* to conclude that the right to water is an independent CIL right.¹²⁶ Likewise, Rebecca Bates has advanced the idea that “[t]he right to water is a principle capable of being recognized as a principle of customary international law.”¹²⁷ Rhett Larson states that

121. G.A. Res. 64/292, *supra* note 80.

122. ICJ Statute art. 38(1)(b).

123. DAPHINA MISIEDJAN, TOWARDS A SUSTAINABLE HUMAN RIGHT TO WATER: SUPPORTING VULNERABLE PEOPLE AND PROTECTING WATER RESOURCES 73 (2019).

124. Mary Arden, J., *Water for All? Developing a Human Right to Water in National and International Law*, 65 INT'L & COMP. L.Q. 771, 786 (2016).

125. Stephen C. McCaffrey, *The Human Right to Water: A False Promise?*, 47 U. PAC. L. REV. 231–32 (2016). McCaffrey's centralization of some states as more important in international law is problematic as it risks what Balakrishnan Rajagopal terms the hegemonic nature of human rights discourse in international law. See Balakrishnan Rajagopal, *Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27 THIRD WORLD Q. 767 (2006).

126. Chávarro, *supra* note 16, at 115–24.

127. Rebecca Bates, *The Road to the Well: An Evaluation of the Customary Right to Water*, 19 REV. EUR. COMMUNITY & INT'L ENVTL. L. 282, 293 (2011).

[c]onsidering the evolution of State practice, national and international jurisprudence, and the activities of several international bodies, it is possible to affirm that at least the core content of the human right to water—that is, the right of everyone to access to water necessary to respond to his/her basic needs—, has achieved the status of a customary international norm.¹²⁸

Finally, Pierre Thielbörger's 2015 study, which applies a reflective equilibrium approach to CIL and is discussed more below, has also found that the right to water has achieved the status of a norm or custom.¹²⁹

Because the existing literature reaches varying conclusions on water as a human right, what follows is a consideration of whether there is sufficient evidence to qualify the right as a CIL norm.

1. State Practice

The state practice element of CIL requires the existence of largely uniform, or consistent, general practice that subsists over a certain duration.¹³⁰ To assess state practice for the purpose of identifying a rule of CIL, it is appropriate to look to, non-exhaustively, states' internal laws, municipal court decisions, the practice of their executive branches, their diplomatic practice, and their treaty practice.¹³¹

Consistency requires near identical state behavior, though minor divergences do not undermine consistency but are rather regarded as violations of the general rule.¹³² Yet state practice concerning the right to

128. Rhett Larson, *The New Right in Water*, 70 WASH. & LEE L. REV. 2181, 2208 (2013) (citing Sara De Vido, *The Right to Water as an International Custom: The Implications in Climate Change Adaptation Measures*, 6 CARBON & CLIMATE L. REV. 221, 224–25 (2012)). The pre-2010 scholarship is largely of the view that no CIL right to water had yet evolved. Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations It Creates*, 4 NW. J. INT'L HUMAN RTS. 331, 340, 345 (2005) (“Although global recognition of this need is increasing, it has not reached the level of customary international law as a separate right.”); Melina Williams, *Privatization and the Human Right to Water: Challenges for the New Century*, 28 MICH. J. INT'L L. 469, 502 (2007) (citing DAVID BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 15 (2001)) (arguing that while there may be increasing state recognition of the right to water, one indication that the right was not yet customary international law was exactly what made the right so pressing: Many governments failed to ensure access to all citizens, and because generalized state practice is a necessary element of customary international law, the failure of state practice impedes the development of customary international law).

129. Thielbörger, *supra* note 50, at 239.

130. JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 24 (2012).

131. Int'l Law Comm'n, Formation and Evidence of Customary International Law: Elements in the Previous Work of the International Law Commission That Could be Particularly Relevant to the Topic, U.N. Doc. A/CN.4/659 (Mar. 14, 2013) [hereinafter ILC, Formation and Evidence of CIL in the Previous Work of the ILC].

132. WINKLER, *supra* note 41, at 67.

water evinces a mixed approach in the actual behavior of states: While some states provide water as a human right, other states behave as though there is no such right. The latter states may engage in widespread water disconnections and have prevailing disparities in water provision amongst members of the public.¹³³ They may also fail to regulate industrial water use effectively, resulting in the pollution of the water sources that others depend on, or discriminatorily deprive water to people living in certain regions.¹³⁴

On the other hand, an increasing number of states have inserted a right to water into their laws at both the constitutional¹³⁵ and statutory¹³⁶ levels. The inclusion of the right to water in state law has the potential to indicate state practice, “assuming that states . . . fulfil this self-proscribed legal commitment later on in their corresponding policies.”¹³⁷ Catarina de Albuquerque, “Special Rapporteur on the human right to safe drinking water and sanitation,” has identified “good practices” of different states, such as Kenya’s water reforms and Egypt’s water loan system, that may suggest that these states consider water to be a right.¹³⁸

Additionally, one can point to the now superseded Millennium Development Goals (“MDGs”), specifically MDG 7C, which aimed to halve the proportion of the global population without sustainable access to safe drinking water by 2015, as evidence of international recognition of the right. This target was met by the international community in 2010.¹³⁹ Today, the MDGs’ successor, the 2015 Sustainable Development Goals (“SDGs”),

133. *Id.*, at 68–72 (providing a fuller exposition on state practice as an element of CIL).

134. *Id.* at 68.

135. National constitution provisions that have an explicit *enforceable* right to water (as opposed to water as an *unenforceable* principle of state policy for example) include: CONSTITUTION, 1996, § 27(a)(b) (S. Afr.); CONSTITUTION, 2010, art. 43(1)(d) (Kenya); CONSTITUTION, 2013, § 77a (Zimbabwe). In 2004, the Republic of Uruguay constitutionalized access to potable water as a human right by referendum. *See* CONSTITUTION, 1967, art. 47 (amended in 2004) (Uruguay). Most recently, the Republic of Slovenia has taken the step of amending its Constitution to include a right to drinking water in article 70a. *See* Constitutional Act Amending Chapter III of the Constitution of the Republic of Slovenia (Nov. 25, 2016) (Official Gazette of the Republic of Slovenia No. 75/16). For a discussion of the European position on the right to water, see PIERRE THIELBÖRGER, *THE RIGHT(S) TO WATER: THE MULTI-LEVEL GOVERNANCE OF A UNIQUE HUMAN RIGHT* 9 (2014).

136. For example, section 3(a) and (b) of Namibia’s Water Resource Management Act of 2013 (Act No. 11 of 2013).

137. Thielbörger, *supra* note 50, at 239.

138. Human Rights Council, Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque, U.N. Doc. A/HRC/15/31 (June 29, 2010); *see also* THIELBÖRGER, *supra* note 135, at 9.

139. UNITED NATIONS, *UN Millennium Development Goals, Goal 7: Ensure Environmental Sustainability*, <https://www.un.org/millenniumgoals/environ.shtml> (last visited Apr. 6, 2020).

are of greater relevance.¹⁴⁰ SDG 6, in particular, “seeks to ensure availability and sustainable management of water and sanitation for all,” with the specific target of achieving universal and equitable access to safe and affordable drinking water for all by 2030.¹⁴¹ Whether the 2030 objective will be achieved by states is patently a futuristic determination, but the commitment alone, while non-binding, would support the notion that states are actively pursuing water access for all.

One can arguably also invoke the existence of official multilateral instruments, such as declarations and resolutions, to substantiate the existence of state practice. However, to avoid what scholars Bruno Simma and Philip Alston cautioned against as “the tendency to ‘count’ the articulation of a rule twice, so to speak, not only as an expression of *opinio juris* but also as State practice itself,”¹⁴² official state documents such as UNGA resolutions will only be considered herein as evidence of *opinio juris*, below.

On balance, the evidence considered here, in agreement with the more rigorous scholarly assessments of the element,¹⁴³ suggests that existing state practice remains insufficient to uphold a CIL right to water given the limited *actual* behavior of states in support of that right.

2. *Opinio Juris*

The second element of CIL is *opinio iuris sive necessitates*, which only permits state practice to be regarded as evidence of an international norm where states perceive a legal obligation for following the norm that distinguishes it from mere usage.¹⁴⁴ Sources that can be invoked as evidence of *opinio juris* include public statements made on behalf of states, official publications, government legal opinions, diplomatic correspondences, decisions of state courts, treaty provisions, and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.¹⁴⁵ Thus, while UNGA resolutions, unlike UN Security Council resolutions, do not attract the binding force of law, they

140. UNITED NATIONS, *UN Sustainable Development Goals, Transforming Our World: the 2030 Agenda for Sustainable Development*, <https://sustainabledevelopment.un.org/post2015/transformingourworld> (last visited Apr. 6, 2020); Inga Winkler & Carmel Williams, *The Sustainable Development Goals and Human Rights: A Critical Early Review*, 21 INT’L J. HUM. RTS. 1023 (2017).

141. UNITED NATIONS, *UN Sustainable Development Goals, Goal 6: Ensure Access to Water and Sanitation for All*, <https://www.un.org/sustainabledevelopment/water-and-sanitation> (last visited Apr. 6, 2020).

142. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. OF INT’L L. 82, 96 (1988).

143. Thielbörger, *supra* note 50, at 239; WINKLER, *supra* note 41, at 69.

144. ILC, *Formation and Evidence of CIL in the Previous Work of the ILC*, *supra* note 131.

145. *Id.*

may retain normative value in establishing the existence of a rule or the emergence of *opinio juris*.¹⁴⁶ The following assessment, reviewing the plethora of multilateral declarations, resolutions, and other state-centric documents to that effect, reveals a strong basis for the existence of the *opinio juris* supporting a right to water, which is a view almost unanimously held by scholars who have considered the right to water to be a CIL norm.¹⁴⁷

Opinio juris supporting a CIL right to water has been developing since the 1977 UN Conference on Water in the Argentinian city of Mar del Plata, where the Conference reported that: “All peoples . . . have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”¹⁴⁸ More recently, the General Assembly asserted the right to water in the 2010 UNGA Resolution 64/292.¹⁴⁹

It is important to closely critique Resolution 64/292 given not only its probative value but also the significant weight that scholars attach to it in examining a CIL right to water. The material language in UNGA Resolution 64/292 “recognizes” that “the right to safe and clean drinking water and sanitation is a human right that is essential for the full enjoyment of life and all human rights.”¹⁵⁰ This language (“recognizes” as opposed to “declares”) clarifies that the UNGA does not lay claim to discovering the right to water but only affirms its existence.¹⁵¹

146. See Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 169, ¶ 155 (Feb. 25) [hereinafter ICJ Advisory Opinion on the Chagos Archipelago]; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8) [hereinafter ICJ Opinion on the Legality of the Use or Threat of Nuclear Weapons]. For a comprehensive discussion of UN General Assembly [“UNGA”] resolutions and their legal effects, see Marko Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT’L L. 879, 879–905 (2005); Cedric Ryngaert & Duco Siccama, *Ascertaining Customary International Law: An Inquiry Into the Methods Used by Domestic Courts*, 65 NETH. INT’L L. REV. 1, 10 (2018) (noting that the ICJ has the habit of regarding non-binding instruments such as UNGA resolutions as, under some circumstances, reflecting CIL, without much analysis of its own).

147. For a historical account of the evolution of the right to water since the 1970s, see SALMAN M.A. SALMAN & SIOBHAN MCLNERNEY-LANKFORD, *THE HUMAN RIGHT TO WATER: LEGAL AND POLICY DIMENSIONS* 7 (2004), and for a historical overview of the conferences, declarations, and resolutions on water since 1977, see WORLD WATER COUNCIL, *History*, <http://www.worldwatercouncil.org/en/history> (last visited Apr. 6, 2020); WINKLER, *supra* note 41, at 79–87; Thielbörger, *supra* note 50, at 240; Christy Clark, *Of What Use Is a Deradicalized Human Right to Water?*, 17 HUM. RTS. L. REV. 231, 242 (2017) (critiquing social movements for water rights in relation to water as an economic good).

148. UN Water Conference, Report of the United Nations Water Conference, Mar del Plata, U.N. Doc. E/CONF.70/29, at 66 (1977).

149. G.A. Res. 64/292, *supra* note 80.

150. *Id.* ¶ 1.

151. See THIELBÖRGER, *supra* note 137, at 79–81 (stating that the word “declares” was at the eleventh hour replaced with “recognizes,” which to him suggests that the drafters acknowledged that a UNGA resolution could not “declare” a new right due to its non-binding nature, but could at most “recognize” an already existing right).

One hundred and twenty-two states voted in favor of the Resolution with no states voting against; forty-one states abstained and twenty-nine states were absent.¹⁵² While no objections were recorded, this high number of abstentions and absenteeism casts doubt over the assertion that the Resolution reflects a shared *opinio juris*.¹⁵³ To reflect *opinio juris*, multilateral declarations ordinarily require proof of consensus through a higher number of positive votes.¹⁵⁴ In its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, for example, the ICJ determined that specific UNGA resolutions fell short of establishing the existence of an *opinio juris* on the illegality of the use of nuclear weapons, considering the “substantial numbers of negative votes and abstentions.”¹⁵⁵

Still, the ICJ noted that UNGA resolutions “may sometimes have normative value. . . . provid[ing] evidence important for establishing the existence of a rule or the emergence of an *opinio juris*,” and necessitating a “look at its content and the conditions of its adoption.”¹⁵⁶ The 2010 UNGA Resolution was promptly followed by further UNGA Resolutions in 2013¹⁵⁷ and 2015,¹⁵⁸ both of which recalled and effectively reaffirmed the 2010 UNGA Resolution. Additionally, the UNHRC adopted two further resolutions in 2010¹⁵⁹ and 2011¹⁶⁰ that also reaffirmed the 2010 UNGA Resolution. When considered in isolation, each of these UNHRC resolutions would be of limited weight as evidence of shared *opinio juris* on the right to water, as only 47 states are members of the UNHRC at any given time whereas the UN membership is at 193 states.¹⁶¹ Nonetheless, collectively,

152. See Press Release, General Assembly, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None Against, 41 Abstentions, U.N. Press Release GA/10967 (July 28, 2010). For an elaborate discussion of the context of the vote and its (in)significance, see WINKLER, *supra* note 41, at 76–79; Thielbörger, *supra* note 50, at 241; Tully, *supra* note 70.

153. Clark states that the reason for the considerably high number of abstentions is because of the politics underlying the introduction of the resolution, which was sponsored by Bolivia. Clark, *supra* note 147, at 244–45. Some states held the belief that it would have been more appropriate to wait for the UN HRC to complete its formal development of a substantive interpretation of the right. *Id.*

154. THIELBÖRGER, *supra* note 137, at 80.

155. ICJ Advisory Opinion on the Legality of the Use or Threat of Nuclear Weapons, at 71.

156. *Id.*, at 70.

157. G.A. Res. 68/157, The Human Right to Water and Sanitation, U.N. Doc. A/RES/68/157 (Dec. 18, 2013) (adopted without a vote).

158. G.A. Res. 70/169, The Human Right to Water and Sanitation (Dec. 17, 2015).

159. Human Rights Council Res. 15/9, U.N. Doc. A/HRC/RES/15/9, ¶ 3 (Sep. 30, 2013).

160. Human Rights Council Res. 16/2, U.N. Doc. A/HRC/RES/16/2, ¶ 1 (Mar. 24, 2011).

161. See generally Thielbörger, *supra* note 50, at 241 (explaining the U.N. HRC’s Resolution in greater detail).

there exists a sufficient amount of *opinio juris* to make a case for the CIL right to water.

C. *Evaluating the Presence of CIL in Light of Methodological Theories*

In light of the finding in section A that there is limited state practice supporting a CIL right to water, can one credibly assert the existence of water as a customary rule? Scholars claiming that CIL is nevertheless present rely on different methods for determining how the two CIL elements interact to crystallize into norms of custom than those who conclude it is not present. A consistent method, particularly at the ICJ level, to facilitate legal certainty has thus far proved elusive.¹⁶² For instance, Stephan Talmon's landmark study on the methodology for determining rules of CIL found that the ICJ has not used one single methodology but rather a mixture of methodologies: induction, deduction and, the main method, assertion.¹⁶³ While this paper is not specifically concerned with the abstract question of how CIL should be identified, the question of methodology is unavoidable in determining whether the right to water is a CIL norm.

The importance of applying a cogent, clear, and rigorous legal methodology for identifying CIL is aptly summed up by Theodor Meron, who cautions against the "tendencies, apparent in various fields of international law, to impose treaty norms on non-parties in the guise of general international law or customary law, even in the absence of state practice de hors the treaty."¹⁶⁴ This, Meron laments, risks the "credibility of international human rights," thereby requiring that consistent and "irreproachable" legal methods be utilized when attempting to "extend the universality" of international human rights norms.¹⁶⁵

With this caution in mind, this article considers two approaches to determining whether a CIL right to water has crystallized: the sliding scale and reflective equilibrium approaches. While these two approaches are not the only approaches that have been developed in the identification of CIL,¹⁶⁶

162. Nadia Banteka, *A Theory of Constructive Interpretation for Customary International Law Identification*, 39 MICH. J. INT'L L. 301, 302 (2018).

163. Stephan Talmon, *Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion*, 26 EUR. J. INT'L L. 417 (2015). Concisely put, induction is a method of inferring the customary norm from an iterative process of state practice and *opinio juris*. Deduction infers a specific customary norm from a more general principle. Assertion means that the ICJ neither uses inductive nor deductive reasoning, but simply asserts a norm as customary international law. *Id.*; see also Stephen Choi & Mitu Gulati, *Customary International Law: How Do Courts Do It?*, in CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 117 (Curtis Bradley ed., 2016).

164. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 81 (1989).

165. *Id.*

166. Compare, for example, the constructive interpretation theory advanced by Nadia Banteka, which invokes the Dworkinian constructive interpretation approach; not viewing the

they are both especially applicable to the case at hand, as they were each developed to test the presence of CIL when one CIL element is lopsided in relation to another.

1. Kirgis's Sliding Scale Approach

In assessing the existence of CIL norms generally, significant discrepancies between the existence of state practice and *opinio juris* are often revealed. In a prominent example from 1986, the ICJ in *Nicaragua* was faced with significant evidence of a state practice of state intervention in the internal affairs of other states, while at the same time, there existed strong and, seemingly opposing, *opinio juris* supporting an obligation of non-intervention. To explain this paradox, Fredrick Kirgis engaged the metaphor of a "sliding scale":¹⁶⁷ One element of custom can compensate for the other, weaker element or, in the extreme case, an element can become entirely dispensable if the other element is of sufficient strength.¹⁶⁸

Under the sliding scale approach, state practice that is very frequent and consistent would establish a CIL rule even "without much (or any) affirmative showing of an *opinio juris* so long as it is not negated by evidence of non-normative intent."¹⁶⁹ Therefore, "[a]s the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required."¹⁷⁰

Kirgis asserted that at the other end of the scale, "a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule."¹⁷¹ The exact amount of state practice that would be a substitute for *opinio juris* and how clear a showing of *opinio juris* will substitute for consistent behavior depends on "the activity in question and on the reasonableness of the asserted customary rule."¹⁷²

Kirgis further found that the more destabilizing or morally distasteful the activity—for example, the offensive use of force or the deprivation of fundamental human rights—the more readily international decision makers will substitute one element for the other, provided that the asserted rule seems reasonable.

two elements of CIL as strictly divided into a binary, but instead viewing them as *interwoven*. The goal of constructive interpretation is to impose purpose on a practice in order to put it in the best possible light within the constraints of its factual history and shape. Banteka, *supra* note 162, at 301.

167. Frederic Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 146 (1987).

168. *Id.* at 149.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

The principal disquiet with the sliding scale approach is that it can justify totally dispensing with state practice as a CIL element where strong *opinio juris* exists. Recall that article 38(1)(b) ICJ Statute requires evidence of (1) general practice that is (2) accepted as law.¹⁷³ Scholars are uneasy imagining “customary law without custom,” as Neils Petersen succinctly puts it,¹⁷⁴ as this appears to disregard the intrinsic limitations presented by the text of article 38(1)(b) “in order to accommodate a desired (and highly admirable) policy outcome.”¹⁷⁵ In this context, Blutman cites Kirgis’s CIL methodology approach, amongst others, in cautioning against “dubious dichotomies in describing the operation of customary norms in order to get round the difficulties posed by sophisticated reconciliation theories.”¹⁷⁶ Consequently, many of the “most highly qualified publicists” to invoke the language of article 38(1)(d) ICJ Statute also continue to view both elements as indispensable for a CIL norm to exist.¹⁷⁷

Nevertheless, even though Kirgis’s approach may be deemed antiquated, the ICJ’s approach to CIL continues to place greater weight upon *opinio juris* in identifying CIL than on state practice, and the 2019 *Chagos Archipelago* advisory opinion by the ICJ evinces this approach.¹⁷⁸ In the context of the right to water, embracing the sliding scale approach would not result in the complete dispensability of the state practice element (as some state practice does exist) but would only require the strength of *opinio juris* to compensate for the shortfall in state practice.

2. Thielbörger’s Reflective Equilibrium Approach

The second approach to determining the presence of a CIL norm, despite an imbalance between the presence of state practice and of *opinio juris*, is that advanced by Pierre Thielbörger. Thielbörger specifically examined the right to water as a CIL norm and found the state practice element wanting, while *opinio juris* is sufficient.¹⁷⁹ To overcome the insufficiency in state practice, Thielbörger innovatively adopted a “modern” approach to establishing CIL. Thielbörger’s approach draws on Anthea Roberts’s original distinction between traditional and modern approaches to CIL,¹⁸⁰ which argues that, in the context of the ICJ’s jurisprudence,

173. Simma & Alston, *supra* note 142, at 83.

174. Niels Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT’L L. REV. 275, 284 (2008).

175. *Id.* at 96.

176. László Blutman, *Conceptual Confusion and Methodological Deficiencies: Some Ways That Theories on Customary International Law Fail*, 25 EUR. J. INT’L L. 529, 548 (2014).

177. Thielbörger, *supra* note 50, at 235.

178. ICJ Advisory Opinion on the Chagos Archipelago, *supra* note 146, at 155.

179. Thielbörger, *supra* note 50.

180. Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001).

traditional approaches to CIL emphasize general, consistent state practice, leaving *opinio juris* as an inferior second step.¹⁸¹ In contrast, modern approaches to CIL emphasize *opinio juris* as the decisive element for identifying custom, starting with examining general statements of rules, rather than specific state practices, which take a secondary role.¹⁸²

In many ways, Thielbörger's argument for a reflective equilibrium approach to CIL is an appeal to *lex ferenda* (law as it "ought" to be), which remains some distance from *lex lata* (law as it "is"). In order to overcome the lack of sufficient, uniform state practice to support a CIL right to water, Thielbörger has recourse to Roberts's theory of reflective equilibrium,¹⁸³ a theory that Roberts in turn developed through the work of John Rawls. Succinctly put, under reflective equilibrium "a strong *opinio juris* would become crucial under the condition that state practice is strong enough to allow for different interpretations."¹⁸⁴ However, Thielbörger emphasizes that this approach does not mean that state practice is irrelevant to the assessment, as would be the case in Kirgis's sliding scale approach to CIL assessed earlier.¹⁸⁵

Reflective equilibrium ultimately allows the existence of strong *opinio juris* to compensate for the inconclusive state practice that evinces water as a human right.¹⁸⁶ As such, Thielbörger concludes that the right to water has attained the status of a CIL norm. However, Thielbörger's recourse to Roberts's reflective equilibrium approach—notwithstanding its innovativeness—till leaves the right to water's legal basis under CIL tenuous at best.

First, it invites the same criticism that applies to the sliding scale approach above: It re-interprets and re-shapes the elements of CIL towards a particular result.¹⁸⁷ Therefore, an embrace of the reflective equilibrium approach would risk perpetuating the critique that CIL "cannot function as a legitimate source of substantive legal norms in a decentralized world of nations that lacks a broad sense of shared values."¹⁸⁸

181. Thielbörger, *supra* note 50, at 235; The North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), 1969 I.C.J. Rep. 101, ¶¶ 77–81 (Feb. 20); Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. Rep. 6, at 42–43 (Apr. 12).

182. Thielbörger, *supra* note 50, at 235. An example from the ICJ's jurisprudence is the Nicaragua decision, where the ICJ relied heavily on a General Assembly Resolution to establish a CIL rule against the use of force and the principle of non-intervention, with limited references to state practice. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 14, at 195 (June 26).

183. Roberts, *supra* note 180, at 779.

184. Thielbörger, *supra* note 50, at 238.

185. Kirgis, *supra* note 168, at 146.

186. Thielbörger, *supra* note 50, at 238.

187. Simma & Alston, *supra* note 142, at 83.

188. Banteka, *supra* note 162, at 302.

Second, valuing *opinio juris* above state practice, such that state practice need not be absolute in order for CIL to form, presents the normative challenge of allowing the practice of *some* states to determine what is or is not CIL. Framed differently, it manifests hegemony and biases based on geographic, economic, and political power. Such an understanding of CIL risks regressing to forms of international law-making that were seen during the colonial period—when recourse to the practices of only a handful of (western) states for the formation of CIL was replete.¹⁸⁹ The latent problems that would arise from reinforcing the role of *opinio juris* while downgrading that of state practice are laid bare by scholars George Galindo and Cesar Yip when they opine that:

Making customary international law exclusively an expression of a certain *opinio juris* is dangerous in many respects, especially because the practice of states can effectively play a role of protecting the interests of Third World states against the will of Great Powers. But the tendency of international courts to emphasize the role of *opinio juris* is even more dangerous when it represents the opinion of a single set of judges under the disguise of states' *opinio juris*.¹⁹⁰

Therefore, Thielbörger's theory of reflective equilibrium is also not an irreproachable legal method for identifying the existence of the right to water as a CIL norm.

D. *The Right to Water as a CIL Norm qua the UDHR?*

A road less travelled in the literature is to advance a right to water under CIL by drawing on the authority of the Universal Declaration of Human Rights ("UDHR"), without specifically evaluating state practice or *opinio juris*. In particular, the right to a standard of living adequate for well-being in article 25(1) UDHR¹⁹¹ has been invoked to imply the right to water.¹⁹² The normative justifications for implying a right to water under the UDHR mirror those advanced under article 11(1) ICESCR, discussed earlier:

189. George Galindo & Cesar Yip, *Customary International Law and the Third World: Do Not Step on the Grass*, 16 CHINESE J. INT'L L. 251, 254 (2017); Rajagopal, *supra* note 125, at 767; see also Tiyanjana Maluwa, *Reassessing Aspects of the Contribution of African States to the Development of International Law Through African Regional Multilateral Treaties*, 41 MICH. J. INT'L L. 327 (2020) (collecting sources considering similar issues in the context of both treaty law and custom before evaluating modern African contributions to international treaty law).

190. Galindo and Yip, *supra* note 189, at 261.

191. G.A. Res. 217(III)A, Universal Declaration of Human Rights art. 25 (Dec. 10, 1948) ("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 and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.").

192. Copp, *supra* note 60, at 252.

Access to water is fundamental for sustaining life and the minimum that is required to participate in social life with dignity.

However, this legal basis for the right to water in CIL depends on the assumption that the UDHR *en bloc* reflects CIL. That premise is untenable, despite receiving support internationally. For example, the view that the UDHR is CIL has been asserted judicially, by the ICJ¹⁹³ and the African Court of Human and Peoples' Rights,¹⁹⁴ and quasi-judicially.¹⁹⁵ Some scholars also consider the UDHR to be automatically binding because it represents the consensus of the international community.¹⁹⁶ Yet, while the argument for the UDHR's authority as CIL has support, it is difficult to countenance an approach where courts assert the existence of CIL norms by broad-brushingly categorizing a non-binding, UNGA declaratory instrument as CIL without any meaningful attempt at applying the established elements to identify CIL, let alone engaging CIL methodology. And, given the significant methodological disagreement the preceding discussion reveals, it does not seem likely that the UDHR would be considered CIL under that kind of painstaking legal analysis.

In the final analysis, this article has determined that there is no CIL right to water. The right remains an idea whose time has not yet come.¹⁹⁷ At best, in the CIL context, the rule can be regarded as *statu nascendi*, an emerging rule of custom that is yet to fully crystalize into a CIL norm.¹⁹⁸ Of course, the assertion of *statu nascendi* itself assumes that the effluxion of time will necessarily see the CIL norm's "crystallization" rather than "de-crystallization." This seems to be a fair assumption, as there is overwhelming state consensus of a right to water as a matter of *opinio juris*. This consensus is not insignificant; the non-binding documents conveying this consensus can serve as meaningful resources in interpreting and determining the normative content of a treaty-based right to water.

193. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. Rep. 3, 42 (May 24); Nottebohm Case (Liech. v. Guat.), Preliminary Objections, 1955 I.C.J. Rep. 4, at 63 (Guggenheim, *ad hoc* J., dissenting); South West Africa Cases (Eth. v. South Africa; Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J. Rep. 319, at 379 (Bustamente, J, separate opinion).

194. Anudo Ochieng Anudo v. United Republic of Tanzania, No. 012/2015, Decision, African Court on Human and Peoples' Rights, ¶ 76 (Mar. 22, 2018).

195. U.N. Commission on Human Rights, Rep. on the Human Rights, Situation in the Islamic Republic of Iran by the Special Representative of the Comm'n, Reynaldo Galindo Pohl, U.N. Doc. E/CN.4/1987/23, ¶ 22 (Jan. 28, 1987).

196. Louis Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 133 (1977); Simma & Alston, *supra* note 142, at 90.

197. Another potential method for establishing a right to water under CIL is to establish the CIL nature of the right to life from which the right to water can be derived. However, this argument is unlikely to hold as there is limited state practice or *opinio juris* to support the proposition of life as a CIL norm.

198. WINKLER, *supra* note 41, at 97.

IV. THE SIGNIFICANCE OF GENERAL PRINCIPLES OF LAW IN THE RIGHT TO WATER DEBATE

The third of the three principal sources of international law under article 38(1)(c) of the ICJ Statute¹⁹⁹ is “the general principles of law recognised by civilised nations.”²⁰⁰ This source, too, may arguably be of relevance to water’s status as a legally binding human right.²⁰¹ General principles of law, like CIL and treaties, can function as a direct source of rights and obligations.²⁰² It is widely accepted that general principles of law, like CIL, would bind all states. In fact, there is no indication of any *a priori* hierarchy among the three formal sources listed in article 38(1).²⁰³ Nevertheless, some scholars claim that general principles of law constitute a “secondary” source with the main function of “filling gaps”²⁰⁴ in the absence of a treaty or CIL norm.²⁰⁵

Partly given their unwritten character, the determination of general principles of law remains a controversy in international law. Whether general principles may be drawn from a comparison of domestic law, international law, or global legal systems,²⁰⁶ and what the methodology for defining a general principle should be, is contested.²⁰⁷ This article adopts the

199. ICJ Statute art. 38(1). For a comprehensive assessment and characterization of the key controversies around general principles of law as a source of international law, see Int’l Law Comm’n, Rep. of the Int’l Law Comm’n in its Sixty-Ninth Session, U.N. Doc. A/72/10, at 224 (2017) (Special Representative Marcelo Vásquez-Bermúdez).

200. The vocable “civilized nation” can today be argued to be obsolete, an argument that is concisely captured in Judge Ammoun’s separate opinion in *North Sea Continental Shelf*:

[T]he term ‘civilized nations’ is incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law. The discrimination between civilized nations and uncivilized nations, which was unknown to the founding fathers of international law, . . . is the legacy of the period, now passed away, of colonialism.

The *North Sea Continental Shelf Cases* (Ger./Den.; Ger./Neth.) 1969 I.C.J. Rep. 101, 133 (Feb. 20) (Fouad Ammoun, J., separate opinion).

201. Felix Ekardt & Anna Hyla, *Human Rights, the Right to Food, Legal Philosophy, and General Principles of International Law*, 103 ARCHIV FÜR RECHTS—UND SOZIALPHILOSOPHIE 221, 227 (2017).

202. Sienho Yee, *Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases*, 7 J. INT’L DISP. SETTLEMENT 472, 488 (2016).

203. CRAWFORD, *supra* note 130, AT 35 (2012); Sienho Yee, *supra* note 202, at 488.

204. JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 127–29 (2003).

205. Rumiana Yotova, *Challenges in the Identification of the ‘General Principles of Law Recognized by Civilized Nations’: The Approach of the International Court*, 3 CAN. J. COMP. & CONTEMP. L. 269, 279 (2017).

206. Catherine Redgwell, *General Principles of International Law*, in GENERAL PRINCIPLES OF LAW: EUROPEAN AND COMPARATIVE PERSPECTIVES 9 (Stephen Weatherill & Stefan Vogenauer eds., 2017).

207. *Id.* at 15–17.

widely accepted view advanced by Catherine Redgwell that general principles, in the sense of article 38(1)(c), may be derived from both domestic law and international law.²⁰⁸

Simma and Alston advocate for a greater grounding of the legality of human rights norms in general principles of law.²⁰⁹ This view has also been supported by the ICJ in the *South West Africa* cases, where Justice Tanaka, in his dissent, found equality and non-discrimination to be fundamental human rights norms, stating that “the concept of human rights and of their protection is included in the general principles in Article 38(1)(c).”²¹⁰ Yet, in the right to water discourse, the role of general principles of continues to receive sparse consideration.

Finding a right to water in general principles would ensure the right has a strong grounding in the “consensualist conception” of international law,²¹¹ with significant implications on at least two fronts. First, as a general principle of law, the right to water would be binding upon all states and not just treaty-contracting States Parties. Second, even if the right to water is not itself a general principle, existing general principles may be invoked to scope out the normative content of a right to water that is established under domestic law (such as a constitution), under treaty law, or under CIL.

In assessing the existence of the right to water as a general principle of law, it indeed is significant that some states have incorporated a right to water in their national constitutions.²¹² However, as argued in the earlier assessment of the state practice element of CIL, and as reflected in the preponderance of scholarship on the issue, the number of states is not sufficiently widespread and the practice not sufficiently common to the

208. Redgwell, *supra* note 206, at 10. Joost Pauwelyn also identified four non-watertight categories of general principles: First, “meta-principles,” which are the “rules of law that have an inherent and necessary validity, in whose absence no system of law at all can exist or be originated,” as prominently exemplified by the *pacta sunt servanda* principle. Pauwelyn, *supra* note 204, at 125–26. Second, legal principles of municipal legal systems which can be validly transposed to international law such as principles on jurisdiction, the burden of proof, and *res judicata*. *Id.* Third, legal principles of international law which “are produced mainly through the process of induction from other positive rules of international law,” such as the principle of equality of states. *Id.* The fourth are the principles of legal logic—“the instruments in legal reasoning providing for logical consequences,” such as the *lex specialis derogat legi generali* principle. *Id.*

209. Simma & Alston, *supra* note 142, at 105.

210. *South West Africa Cases* (Eth. v. S. Afr.; Liber. v. S. Afr.) Second Phase [1966] I.C.J. 250, 298. (Tanaka, J., dissenting).

211. *Id.*

212. *See supra* note 135.

representative legal systems of the world²¹³ to constitute a general principle of law that affirms the right to water.²¹⁴

Nevertheless, the lack of a general principle of law supporting the right to water does not necessarily mean that general principles are irrelevant to the debate over whether there is a right to water, which brings us to the second reason to assess general principles. General principles could be of relevance in defining the content, and determining the obligations that attach to, a right to water that is established as a matter of domestic law, treaty law, or—assuming such exists—CIL. The right to water's character as a general principle may well be acknowledged and reflected in treaties such as the ICESCR or ICCPR. This is particularly pertinent in light of the reality that a soft law instrument—General Comment 15—enunciates the substance of what the right to water would entail, including its normative content,²¹⁵ principles of non-discrimination and equality,²¹⁶ and the correlative general and core obligations of State Parties.²¹⁷ However, General Comment 15's soft law, non-binding nature limits reliance upon it, given its questionable legitimacy.

General principles of law may thus be utilised to offer universally binding law that would define those minimum social standards, particularly in terms of the positive and negative obligations of states *qua* access and provision of water as a right. In particular, the general principles of law already found in international environmental law would be of potential application given the heavily environmentally-laden concerns that water access, provision, and security would give rise to. For instance, the precautionary principle, would, in the water context, impose obligations of diligent prevention and control of foreseeable risks to the pollution of water sources.²¹⁸

V. CONCLUSIONS

Access to water will no doubt remain one of the most vexing global concerns in the decades to come. From the 2.1 billion people who lack access to safely managed drinking water services, to those whose water sources will be increasingly precarious due to the effects of climate change, pollution, and industrial over-abstraction, the consequences are potentially

213. Redgwell, *supra* note 206, at 15.

214. WINKLER, *supra* note 41, at 93; KNUT BOURQUAIN, FRESHWATER ACCESS FROM A HUMAN RIGHTS PERSPECTIVE, A CHALLENGE TO INTERNATIONAL WATER AND HUMAN RIGHTS LAW 191 (2008); THIELBÖRGER, *supra* note 135, at 86–87.

215. U.N. Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, General Comment 15: The Right to Water, *supra* note 5, ¶¶ 10–12.

216. *Id.* ¶¶ 13–16.

217. *Id.* ¶¶ 17–29.

218. PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 153 (2009).

life-threatening.²¹⁹ In addressing these challenges, multilateralism ought to inform global efforts. As such, international law offers potential for common norms for states.

This article has thus sought to un muddy the waters on the status of the right to water under international law by evaluating the right's existence under each of the three principal sources of international law. While water's status as an express human right has been affirmed under treaty law, it is limited to the context of specific, protected categories of persons such as women, children, and the disabled. With the aid of the implied rights doctrine, the ICESCR and ICCPR offer a freestanding human right to water of general application, but this right is not explicit and may therefore be debated. Non-treaty-based sources of a right to water—CIL and the general principles of law—could extend the right to water to non-treaty parties. However, limited state practice restricts the conception of water as a right under CIL, and the fate of the right to water as a CIL norm may remain unsettled until the broader controversy around the appropriate methodology for identifying CIL is settled. The right to water is also not supported as a general principle of law. Nonetheless, an ongoing conversation about how general principles of law support a right to water is valuable, as it can assist the determination of the nature and content of states' positive and negative obligations regarding the minimum social standards *qua* access and provision of water as a human right.

219. *Water*, UNITED NATIONS, <https://www.un.org/en/sections/issues-depth/water> (last visited May 9, 2019).