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# THE ROLE OF THE PUBLIC AND THE HUMAN RIGHT TO WATER

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## ABSTRACT

*The emerging international human right to water (and sanitation) has not yet been widely invoked before, nor declared upon by, international human rights courts, though some of the variants which it has inspired under national legal frameworks have been recognised and applied by domestic courts. However, many of the key elements of this purported derivative right, both procedural and substantive, have long been recognised by international human rights tribunals as arising independently, either under general international human rights law, international environmental law, or international law relating to sustainable development. Therefore, even in advance of clear judicial endorsement of the formal legal status and justiciability of the international human right to water, many of the key components for its effective implementation are already firmly in place.*

## RÉSUMÉ

*L'affirmation du droit international de l'homme à l'eau (et à l'assainissement) est encore ni justiciable ni reconnue par les juridictions internationales des droits de l'homme, alors que les variantes qu'il a inspiré en droit interne ont été reconnues et appliquées par les juridictions nationales. Cependant, la plupart des composantes, tant substantielles que procédurales, de ce prétendu droit dérivé ont été reconnues par ces juridictions de manière autonome à travers l'interprétation du droit international des droits de l'homme, du droit international de l'environnement et du droit international relatif au développement durable. Aussi, malgré les hésitations jurisprudentielles sur le statut et la justiciabilité du droit à l'eau, les éléments clés pour sa mise en œuvre efficace sont déjà bien établis.*

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**Key words:** Human right to water, public participation, international human rights courts

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**Mots clés :** Droit à l'eau, participation du public, juridictions internationales des droits de l'homme

## I. Introduction

As a formal source of justiciable rights for individuals or communities, or of corresponding binding obligations upon State or other actors, the human right to water (and sanitation) remains beset by uncertainty, both as to its legal status and its normative content.<sup>1</sup> The human right to water is a derivative construct, inferred primarily from two rights expressly included in the 1966 International Covenant on Economic, Social and Cultural Rights (ECSR) —the right to an adequate standard of living, set out under Article 11(1), and the right to the highest attainable standard of health, set out under Article 12. However, the precise scope and legal significance even of these two express rights remain somewhat unclear, while the practical justiciability of any right articulated under the ECSR Covenant is open to question. Thus, an implied right derived from these somewhat aspirational provisions would not normally inspire confidence. Nevertheless, in 2002 the UN Committee on Economic Social and Cultural Rights adopted General Comment No. 15<sup>2</sup> which, though it might fail to make an altogether compelling case for the right's binding legal status, provides a non-binding interpretation of Articles 11 and 12 that sets out a comprehensive and persuasive account of the purported right's normative content.<sup>3</sup> This account has now been endorsed by the United Nations General Assembly<sup>4</sup> and the Human Rights Council.<sup>5</sup> Indeed, even before such high-level political and diplomatic endorsement was forthcoming, the human right to water concept had operated a profound impact, in terms of measures taken at multiple levels of State and non-State action, thus attracting support from a range of types of actors, many of whom would not traditionally have had a recognised role in formal law-making. This reality has led certain commentators to analyse the human right to water concept in terms of the phenomenon of 'global administrative law',<sup>6</sup> whereby globally convergent principles and standards of good governance become increasingly normativised, regardless of the formal sources of norm-creation, through the practice of a wide range of actors operating at different levels of jurisdictional administration and in different State and non-State capacities.<sup>7</sup>

It is important to note that such principles and standards of good governance, which are now ubiquitous in administrative practice, primarily include procedural controls on administrative decision-making through requirements or arrangements relating to transparency, public participation, reason-giving, reviewability and legal accountability.<sup>8</sup> Indeed, the broad arc of practice supporting the human right to water concept, ranging from the formal adoption of General Comment No. 15, through the voluntary principles offered for the guidance of corporate actors by the UN Global Compact<sup>9</sup> or the OECD Guidelines for Multinational Enterprises,<sup>10</sup> to the three

- 1 See, for example, S. McCaffrey, 'The Human Right to Water', in E. Brown Weiss, L. Boisson de Chazournes, N. Bernasconi-Osterwalder, *Fresh Water and International Economic Law*, Oxford University Press, Oxford, 2005, pp. 93-115.
- 2 Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. DOC. E/C.12/2002/11, 26 November 2002.
- 3 See M. Williams, 'Privatization and the Human Right to Water: Challenges for the New Century', *Michigan Journal of International Law*, vol. 28, 2007, at 475. See also E. B. Bluemel, 'The Implications of Formulating a Human Right to Water', *Ecology Law Quarterly*, vol. 31, 2004, at 972.
- 4 UN General Assembly Resolution on the Human Right to Water and Sanitation, UNGA Res. A/RES/64/292, 28 July 2010.
- 5 UN Human Rights Council Resolution on the Human Right to Safe Drinking Water and Sanitation, A/HRC/RES/15/9.
- 6 See, for example, B. Morgan, 'Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law', *European Journal of International Law*, vol. 17, 2006, pp. 215-246; O. McIntyre, 'The Human Right to Water as a Creature of Global Administrative Law', *Water International*, vol. 37, 2012, pp. 654-669.
- 7 On the phenomenon of 'global administrative law' generally, see B. Kingsbury et al., 'Global Governance as Administration—National and Transnational Approaches to Global Administrative Law', *Law and Contemporary Problems*, vol. 68, 2005, pp. 1-13; B. Kingsbury, 'The Concept of "Law" in Global Administrative Law', *European Journal of International Law*, vol. 20, 2009, pp. 23-57; C. Harlow, 'Global Administrative Law: the Quest for Principles and Values', *European Journal of International Law*, vol. 17, 2006, pp. 187-214; D. C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', *Yale Law Journal*, vol. 115, 2006, pp. 1490-1562; K.-H. Ladeur, 'The Emergence of Global Administrative Law and Transnational Regulation', *Transnational Legal Theory*, vol. 3, 2012, pp. 243-267.
- 8 Kingsbury (2009), *supra*, n. 7, p. 34.
- 9 See, for example, the CEO Water Mandate launched in 2007 by the UN Secretary-General and a group of committed business leaders, online: [http://www.unglobalcompact.org/Issues/Environment/CEO\\_Water\\_Mandate/index.html](http://www.unglobalcompact.org/Issues/Environment/CEO_Water_Mandate/index.html)
- 10 See Organisation for Economic Co-operation & Development, *OECD Guidelines for Multinational Enterprises*, June 21, 1976, online: <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (revised 2000).

sets of technical guidelines adopted in 2007 by the International Standards Organisation (ISO),<sup>11</sup> also places great emphasis on procedural safeguards which aim to ensure the meaningful participation of the public in decisions on water services provision and policy. Therefore, we should expect that the public would have a significant role to play in the effective enforcement and continuing judicial elaboration of the human right to water concept through complaints taken before international human rights bodies and tribunals.

## II. THE HUMAN RIGHT TO WATER UNDER REGIONAL HUMAN RIGHTS INSTRUMENTS

Though the emergence of a right to water has received support in the national courts in a number of jurisdictions, this has been based on their domestic constitutional and legislative arrangements, of which Tully is dismissive, pointing out that ‘national constitutional provisions may be distinguished between those proclaiming collective governmental responsibilities with respect to water and those contemplating an individual entitlement’, and, further, that ‘[o]f the latter, weakly formulated provisions commonly provide that governments need only facilitate equality of access to water’.<sup>12</sup> India provides a notable example, given that its Supreme Court has held that the right to life includes the ‘right to pollution-free air and water’ and expressed the expectation that the State should ‘take effective steps to protect this right’.<sup>13</sup> This is also true of South Africa, where the courts have examined the legal nature of the right to water supply<sup>14</sup> and sanitation,<sup>15</sup> and where section 27.1(b) of the 1996 Constitution grants to everyone a right of access to sufficient food and water and compels the government to adopt reasonable measures within its available resources to progressively realise this right,<sup>16</sup> while section 3(1) of the 1997 Water Services Act guarantees to everyone in South Africa the right to access a basic water supply ‘to support life and personal hygiene’ at no cost<sup>17</sup> and the 1998 National Water Act states that its aims are to meet the basic human need of present and future generations, promote equitable access to water, facilitate social and economic development, and reduce and prevent pollution of water resources.<sup>18</sup>

However, despite the fact that a number of regional human rights instruments would appear to support the existence of a right to water, there is little evidence of the public relying on the relevant provisions. For example, there does not appear to be any example of individuals invoking Article 14 of the 1990 African Charter on the Rights and Welfare of the Child, which expressly requires States to ensure the availability of safe drinking water for the ‘best’ attainable state of health,<sup>19</sup> or on Article 11 of the 1988 Additional Protocol to the American Convention of Human Rights in the area of economic, social and cultural rights, which provides that ‘everyone shall have the right to live in a healthy environment and to have access to basic public services’.<sup>20</sup> Similarly, while

11 ISO 24510:2007 Activities relating to drinking water and wastewater services—Guidelines for the assessment and for the improvement of the service to users; ISO 24511:2007 Activities relating to drinking water and wastewater services—Guidelines for the management of wastewater utilities and for the assessment of wastewater services; ISO 24512:2007 Activities relating to drinking water and wastewater services—Guidelines for the management of drinking water utilities and for the assessment of drinking water services. Online:

[http://www.iso.org/iso/catalogue/catalogue\\_tc/catalogue\\_tc\\_browse.htm?commid=299764&published=on&includesc=true](http://www.iso.org/iso/catalogue/catalogue_tc/catalogue_tc_browse.htm?commid=299764&published=on&includesc=true)

12 S. R. Tully, ‘The Contribution of Human Rights to Freshwater Resource Management’, *Yearbook of International Environmental Law*, 2004, at 120.

13 *Charan Lal Sabu v. Union of India*, AIR (1990) SC, at 1495. Subsequently, in *F. K. Hussain v. Union of India*, AIR (1990) Kerala 321, at 340, the Kerala High Court has held that the right to water is an integral part of the right to life guaranteed under Article 21 of the Indian Constitution, while the Bihar High Court has recognised that the right to life includes the right to a healthy environment in *Subash Kumar v. State of Bihar* (1991) 1 SCC 598, at 608, a point reaffirmed by the Supreme Court of India in *M.C. Mehta v. Union of India* (1998) 9 SCC 589, at 607. See J. Razzaque, ‘Trading Water: The Human Factor’, *Review of European Community and International Environmental Law*, vol. 13, 2004, at 21.

14 See, for example, *Mazibuko v. City of Johannesburg*, Supreme Court of South Africa, 8 October 2009.

15 See, for example, *Beja v. City of Cape Town and Others*, Case No. 21332/10, Ruling of Judge Nathan Erasmus, 29 April 2011.

16 Constitution of the Republic of South Africa, adopted by the Constitutional assembly on 4 December 1996 and entered into force 4 February 1997.

17 Act 108 of 1997.

18 Act 36 of 1998.

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

20 (San Salvador, 17 November 1988). Available at <http://www.oas.org/juridico/english/Treaties/a-52.html>. See J. Razzaque, *supra*, n. 13, p. 19.

Article 2 of the European Convention on Human Rights on the right to life is commonly regarded as requiring that States have an obligation 'not only to refrain from taking life 'intentionally' but further, to take appropriate steps to safeguard life';<sup>21</sup> one leading proponent of the current binding legal status of the human right to water can only suggest that the right might one day apply directly under the European Convention,

if the European Court of Human Rights were to recognize that it is a necessary element of some protected general human rights (e.g., the right to dignity or the right to life). This could potentially occur, as the European Court is already moving towards recognition of the right to a clean environment (which did not exist when the Convention was adopted).<sup>22</sup>

In one much cited judgment from 1993, the European Court of Human Rights found that potential pollution of a complainant's well by a nearby waste facility was a violation of a civil right (to property) for the purposes of Article 6(1) of the European Convention on Human Rights,<sup>23</sup> though this finding ought not to be considered of direct relevance to the emergence of a distinct right of access to water.

It has been more usual, however, for regional bodies with responsibility for monitoring State compliance with human rights obligations to infer the existence of a right to water from the core obligations of States under more general regional human rights instruments. For example, in 1995, the African Commission on Human and Peoples' Rights found that Zaire (now the Democratic Republic of Congo) had violated the right to health under Article 16 of the African Charter<sup>24</sup> by failing 'to provide basic services such as safe drinking water',<sup>25</sup> while the 1997 report on Ecuador of the Inter-American Commission on Human Rights found that the 'considerable risk posed to human life and health by oil exploration activities ... through, *inter alia*, contamination of water supplies'<sup>26</sup> could impact upon the right to life and the duty to protect the physical integrity of the individual under the 1969 American Convention on Human Rights.<sup>27</sup> However, in respect of the regional human rights instruments and cases cited above, McCaffrey once again cautions that, even where 'safe drinking water' or 'basic public services' are expressly mentioned, '[a] right to water was not recognized *per se*...Rather, the failure to meet basic water needs was found to constitute, or at least contribute to, violations of other rights'.<sup>28</sup>

### III. PROCEDURAL RIGHTS UNDER HUMAN RIGHTS AGREEMENTS

Of greater significance than those provisions of regional human rights instruments which might be argued to explicitly or implicitly include the human right to water, it is quite clear that all such instruments must now be interpreted and applied so as to require that States generally facilitate a participative approach in respect of projects or policies that might impact on human rights, by ensuring the adoption of procedures by which interested groups or individuals or communities likely to be affected by such projects or policies can receive and access relevant information, meaningfully participate in decision-making and, if necessary, have access to some

21 See P. H. Gleick, 'The Human Right to Water', *Water Policy*, vol. 1, 1998, at 493, citing R. R. Churchill, 'Environmental Rights in Existing Human Rights Treaties', in A. E. Boyle and M. R. Anderson, *Human Rights Approaches to Environmental Protection*, Clarendon Press, Oxford, 1996, pp. 89-108 and *Association X v. United Kingdom*, Application 7154/75, (1979) 14 *Decisions and Reports of the European Commission on Human Rights*, at 31-32.

22 See, H. Smets, 'Economics of Water Services and the Right to Water', in E. Brown Weiss, L. Boisson de Charzounes, N. Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law*, Oxford University Press, Oxford, 2005, at 178.

23 ECHR, *Zander v. Sweden* (1993), Series A, No. 279B. See Razzaque, *supra*, n. 13, at 20.

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

25 African Commission on Human and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93, Decision taken at the 18th Ordinary Session, 1995. See McCaffrey, *supra*, n. 1, at 99.

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

27 1144 *UNTS* 123; (1969) 9 *ILM* 673; (1971) 65 *AJIL* 679 (22 November 1969)

28 *Supra*, n. 1, at 99.

appropriate means of legal recourse.<sup>29</sup> Such a participatory approach to guaranteeing human rights would equally apply to projects or policies which might impact on the availability of water resources, particularly where this might arise by virtue of environmental risk, and procedural and participative rights are a very significant element of the normative content of the human right to water as put forward in General Comment No. 15.<sup>30</sup> Indeed, the requirement for States parties to the ICESCR to ensure a participatory and transparent process for the adoption and implementation of a national water strategy and plan of action is included among the non-derogable 'core obligations' of States under General Comment No. 15.<sup>31</sup> In the *Ogoni* case, the African Commission on Human Rights gave a broad participative reading to Article 24 of the African Charter on Human and Peoples' Rights, which acknowledges all peoples' right to a generally satisfactory environment, to include specific procedural guarantees concerning the carrying out of environmental and social impact assessment. According to Cullet and Gowlland-Gualtieri, the Commission

indicated that compliance with the spirit of Article 24 must include a requirement to undertake and publicize environmental and social impact studies prior to major industrial development, as well as the appropriate monitoring of environmental conditions, the provision of information to communities exposed to hazardous materials and activities, and the provision of meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.<sup>32</sup>

Clearly, such procedural requirements, which correlate closely with the procedural and informational requirements of the human right to water as set out under General Comment 15, would equally apply under existing regional human rights instruments to any major project or policy initiative, such as the privatisation of a water utility, which threatened the quality or availability of water supply or sanitation services. Similarly, the Inter-American Commission on Human Rights has, in the context of Article 11 of the 1988 Additional Protocol, repeatedly recommended the adoption of domestic legislation providing for meaningful and effective participatory mechanisms for indigenous peoples in the adoption of political, economic and social decisions that affect their interests.<sup>33</sup> In the *Awas Tingni Mayagna (Sumo) Indigenous Community* case,<sup>34</sup> the Inter-American Court of Human Rights recognised, in the context of Article 21 of the American Convention on Human Rights guaranteeing the right to property, related participatory rights for indigenous peoples in the case of activities relating to the exploitation of natural resources.<sup>35</sup> In addition, the European Court of Human Rights has held in the *Guerra* case<sup>36</sup> that Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life, imposes a positive duty of States to impart information in respect of the risks and the measures to be taken in the case of a major environmental accident as 'the right protected is infringed unless the subject can obtain information about the health risks to which she or he is exposed'.<sup>37</sup> Also, in the *Zander* case,<sup>38</sup> the European Court of Human Rights found that the lack of a procedure by which the applicants could review the decision of a licensing authority to permit the dumping of waste without the taking of precautionary measures to prevent pollution of the applicants' drinking water amounted to a breach of the

29 See generally, P. Cullet, A. Gowlland-Gualtieri, 'Local Communities and Water Investments', in E. Brown Weiss, L. Boisson de Charzounes, N. Bernasconi-Osterwalder (eds.), *Fresh Water and International Economic Law*, Oxford University Press, Oxford, 2005 pp. 303-330.

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

31 See General Comment 15, para. 37(f). General Comment 15, para. 40, describes the core obligations set out in para. 37 as 'non-derogable'.

32 *Ibid.*, at 313-314, citing Communication No. 155/96, *The Social and Economic Rights Action Center and the Center for Social and Economic Rights v. Nigeria*, African Commission on Human and Peoples' Rights, 30th Ordinary Session, (13-27 October 2001), at para. 53.

33 See, Chapter X to the Second Report on the Situation of Human Rights in Peru, Inter-American Commission on Human Rights; Chapter IX to the Report on the Situation of Human Rights in Ecuador, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Recommendations) (24 April 1997); Case 7615 (Brazil), Inter-American Commission on Human Rights, 1984-1985 Annual Report 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985), the *Yanomami* case. See Cullet and Gowlland-Gualtieri, *supra*, n. 29, at 314-315.

34 *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights, (Ser. C), No. 79 (2001).

35 See Cullet and Gowlland-Gualtieri, *supra*, n. 29, at 315-316.

36 *Guerra and Others v. Italy* (1998) 26 *European Human Rights Reports* 357.

37 Cullet and Gowlland-Gualtieri, *supra*, n. 29, at 316.

38 *Zander v. Sweden* (1993) 18 *European Human Rights Reports* 175, at para. 29.

right to a fair and public hearing under Article 6 of the Convention, thus supporting the participatory right of access to justice, at least in relation to environmental matters.<sup>39</sup>

These procedural requirements appear all the more widely accepted and applied when one considers that broad informational and participatory rights are generally also included under regional and global environmental instruments. The concept of participation in international environmental law is exemplified by the 1998 Aarhus Convention,<sup>40</sup> which involves three components, namely freedom of access to environmental information, participation in environmental decision-making, and access to justice (administrative or judicial recourse) in environmental matters. Such participation requirements are also central to the carrying out of an adequate environmental impact assessment (EIA) consistent with the standards established under international law.<sup>41</sup> More generally, in the field of sustainable development, all seminal instruments purport to establish participatory standards which apply not only to States but also to international organisations, including multilateral development banks (MDBs). Participatory rights are also absolutely central to Chapter 18 on freshwater resources of Agenda 21,<sup>42</sup> in relation to which Cullet and Gowlland-Gualtieri point out that

Chapter 18 sets forth standards regarding the participation of local communities in water resources management. For instance, it mandates States to design, implement, and evaluate projects and programmes based on the full participation of local communities ... in water management policy-making and decision-making.<sup>43</sup>

Therefore, the accumulated practice of regional human rights enforcement bodies outlined above strongly suggests that the CESCR's General Comment 15 largely involves a codification, for the purposes of environmental protection of water resources and social protection relating to access to water and sanitation services, of existing State obligations arising under general international human rights law and general international environmental and sustainable development law,<sup>44</sup> rather than an attempt at the progressive development of participatory principles applying to matters of access to water. The same might be said of the origins and normative basis of the principle of non-discrimination, which forms another essential substantive element of the human right to water as set out under General Comment 15 and is also included among the non-derogable 'core obligations' of States.<sup>45</sup> Likewise, the inclusion of special protections for indigenous peoples under General Comment 15<sup>46</sup> might be traced to and justified under ILO Convention 107 and its successor, ILO Convention 169,<sup>47</sup> which includes clear obligations for member States to facilitate the participation of peoples concerned. For example, Article 6 of ILO Convention 169 obliges member States to 'consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly', while Article 7 provides a right of

39 See Cullet and Gowlland-Gualtieri, *supra*, n. 29, at 317.

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

41 See, for example, arts. 2.2, 2.6, 3.8 and 4.2 of the Convention on Environmental Impact Assessment in a Transboundary Context, 1991, 30 *ILM* 800 (1991). See also, the Protocol on Strategic Environmental Assessment, 2003.

42 Agenda 21, 1992, U.N. Doc. A/CONF.151/26 (Vols. I, II & III) (1992).

43 *Supra*, n. 29, at 305.

44 Para. 4 of General Comment No. 15 itself notes that '[t]he right to water has been recognised in a wide range of international documents, including treaties, declarations and other standards', before going on to cite such instruments as the Dublin Statement on Water and Sustainable Development (A/CONF.151/PC/112) and Agenda 21 (A/CONF.151/26/Rev.1) – soft-law instruments which are centrally concerned with achieving sustainable development. Regarding the overlap between General Comment No. 15 and the requirements of international environmental law, see O. McIntyre, 'Environmental Protection and the Human Right to Water: Complementarity and Tension', in L. Westra, C.L. Soskolne, D.W. Spady (eds.), *Human Health and Ecological Integrity: Ethics, Law and Human Rights*, Routledge, Oxford, 2012, p. 225.

45 See General Comment 15, paras. 13-16 and 37(b). On the emergence of the principle of non-discrimination in the context of international environmental law, see H. Smets, 'Le principe de non-discrimination en matière de protection de l'environnement', *Revue Européenne du Droit de l'Environnement*, 2000, n°1, pp. 3-33; See also, J. H. Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment', *American Journal of International Law*, vol. 96, 2002, at 296-301, who regards the proliferation of instruments requiring transboundary EIA as a logical extension of the development of a comprehensive set of national EIA regimes and the application of the non-discrimination principle.

46 See, for example, General Comment 15, paras. 16(d), and 37(b), (f) and (h).

47 Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957; Convention concerning Indigenous and Tribal peoples in Independent Countries, 1989. See further, Cullet and Gowlland-Gualtieri, *supra*, n. 29, at 323-324.



indigenous peoples to participate in the development of policies and programmes affecting them. More generally, Article 15.1 provides unequivocally that

[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be especially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

Clearly, the natural resources in question might include water resources<sup>48</sup> and, in the course of a number of complaints concerning the adequacy of arrangements for such consultation and participation, made under Article 24 of the ILO Constitution, the ILO Committee of Experts on the Application of Conventions and Recommendations has taken every opportunity to expound a general interpretation of the requirements under ILO Convention 169 and to emphasise 'the central importance of participation by stating that the spirit of consultation and participation constitutes the cornerstone of Convention 169'.<sup>49</sup>

## IV. CONCLUSION

Therefore, while international and regional human rights tribunals have yet to declare and elaborate upon the existence and normative content of a human right to water (and sanitation) *per se*, they have long given ready support to key aspects of any such right, particularly the procedural aspects which serve to facilitate the meaningful and effective participation of affected individuals and communities in the making of administrative decisions potentially affecting their access to water services. Such procedural aspects are now firmly established in practically all regional and international human rights regimes as well as in the vast majority of national administrative and constitutional law frameworks, and the resulting public participation would generally be expected to function so as to promote the substantive values inherent to the human right to water concept, primarily that of ensuring for everyone 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.<sup>50</sup> Similarly, certain substantive values, such as the principle of non-discrimination, have long been included in a wide range of international instruments and enthusiastically endorsed by international courts and tribunals. Thus, even in advance of clear judicial endorsement of the formal legal status and justiciability of the human right to water concept, the key components for its effective implementation are already firmly in place.

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### Further readings

Cullet, P., A. Gowlland-Gualtieri, 'Local Communities and Water Investments', in E. Brown Weiss, L. Boisson de Charzounes, N. Bernasconi-Osterwalder (eds.), *Fresh Water and International Economic Law*, Oxford University Press, Oxford, 2005, pp. 303-330.

McCaffrey, S., 'The Human Right to Water', in E. Brown Weiss, L. Boisson de Charzounes, N. Bernasconi-Osterwalder (eds.), *Fresh Water and International Economic Law*, Oxford University Press, Oxford, 2005, pp. 93-115.

McIntyre, O., 'The Human Right to Water as a Creature of Global Administrative Law', *Water International*, vol. 37, 2012, pp. 654-669.

Razzaque, J., 'Trading Water: The Human Factor', *Review of European Community and International Environmental Law*, vol. 13, 2004, pp. 15-26.

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48 For example, Fuentes suggests that the requirements to protect the interests of indigenous and tribal peoples set out above might in certain circumstances constitute a relevant factor to be considered in determining the equitable utilisation of shared international freshwater resources under the key normative principle of international water law. See X. Fuentes, 'The Criteria for the Equitable Utilization of International Rivers', *British Yearbook of International Law*, vol. 67, 1996, at 377.

49 Cullet and Gowlland-Gualtieri, *supra*, n. 29, at 324.

50 General Comment No. 15, para. 2.