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The Human Right to Water



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## **Preface**

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## **A. Introduction**

### **I. Importance of Water and the Global Water Crisis**

It is undeniable that water is essential for survival and that “there is nothing more fundamental to human life than water”<sup>1</sup>. With each body comprising of 60-70% water<sup>2</sup>, nearly every bodily function is dependent on water<sup>3</sup>. Additionally, other human rights are dependent on water<sup>4</sup>, not just because without water one would die<sup>5</sup>, but also because, without water, there would be no food<sup>6</sup>, sanitation<sup>7</sup> and shelter<sup>8</sup>; even the right to freedom of expression is heavily reliant on water.<sup>9</sup>

Unfortunately, there is currently a global water crisis that is depriving billions around the world, access to clean and safe water. For example, in 2015, the World Health Organisation (WHO) found that every 3 out of 10 people were denied access to safely managed water.<sup>10</sup> Consequently, water-related diseases, which ultimately lead to death, are rampant<sup>11</sup>. The problem is so severe that statistics have confirmed that “the impacts of floods, droughts and conflicts are grossly outweighed by the number of those affected or killed by inadequate drinking water”.<sup>12</sup> Since water is a limited resource, with the growing population, water scarcity will continue to escalate<sup>13</sup>; the WHO has predicted that “by 2025, half of the world’s population will be living in water-stressed areas”.<sup>14</sup> Considering the statistics and dire effects of water deprivation plaguing the world, it is compelling to believe that the global water crisis has, in fact, reached critical status and requires immediate attention from world leaders.

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<sup>1</sup> *Arden*, I.C.L.Q, 65/2016, p. 771, 771.

<sup>2</sup> *Bulto*, Melb. J. Int’l L. 12/2011, p. 290, 291.

<sup>3</sup> *Curry*, Nw. U. J. Int’l Hum. Rts., 9/2010, p. 103, 103.

<sup>4</sup> *Qureshi*, U. Denv. Water L. Rev., 21/2018, p. 137, 141; UN Economic and Social Council 29<sup>th</sup> session, General Comment 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, UN Doc. E/C.12/2002/11; *McCaffrey*, The U. of Pac. L. Rev. 47/2016, p. 221, 226.

<sup>5</sup> *Qureshi*, U. Denv. Water L. Rev., 21/2018, p. 137, 141.

<sup>6</sup> *Hartley/ Van Meter*, Williamette J. Int’l L. & Dis. Res 19/2011, p. 66, 87.

<sup>7</sup> *Arden*, I.C.L.Q, 65/2016, p. 771, 771 ; *Hartley/ Van Meter*, Williamette J. Int’l L. & Dis. Res 19/2011, p. 66, 90.

<sup>8</sup> *Hartley/ Van Meter*, Williamette J. Int’l L. & Dis. Res 19/2011, p. 66, 90.

<sup>9</sup> *Howard*, Seattle J. Envtl. L., 1/2011, p. 123, 128.

<sup>10</sup> *World Health Organization*, Drinking-Water, <https://www.who.int/news-room/fact-sheets/detail/drinking-water>, (last accessed on 16/4/2019); *UN Water*, The United Nations World Water Development Report 2019: Leaving no one behind, facts and figures, <https://unesdoc.unesco.org/ark:/48223/pf0000367276/PDF/367276eng.pdf.multi>, (last accessed on 16/4/2019).

<sup>11</sup> UN Economic and Social Council 29<sup>th</sup> session, General Comment 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, UN Doc. E/C.12/2002/11; *Hartley/ Van Meter*, Williamette J. Int’l L. & Dis. Res 19/2011, p. 66, 68; *Curry*, Nw. U. J. Int’l Hum. Rts., 9/2010, p. 103, 103.

<sup>12</sup> *UN Water*, The United Nations World Water Development Report 2019: Leaving no one behind, facts and figures, <https://unesdoc.unesco.org/ark:/48223/pf0000367276/PDF/367276eng.pdf.multi>, (last accessed on 16/4/2019).

<sup>13</sup> *UN Water*, The United Nations World Water Development Report 2019: Leaving no one behind, facts and figures, <https://unesdoc.unesco.org/ark:/48223/pf0000367276/PDF/367276eng.pdf.multi>, (last accessed on 16/4/2019); *McCaffrey*, Geo. Int’l Envtl. L. Rev. 5/1992, p. 1, 3; *Hartley/ Van Meter*, Williamette J. Int’l L. & Dis. Res 19/2011, p. 66, 70.

<sup>14</sup> *World Health Organization*, Drinking-Water, <https://www.who.int/news-room/fact-sheets/detail/drinking-water>, (last accessed on 16/4/2019).

## II. The need to recognise the Human Right to Water (HRtW)

Despite its essential nature and the prevalent water crisis, no human right treaty expressly protects the HRtW, thereby casting doubt on and sparking a plethora of debate about its existence. As Bulto rightfully notes, this lack of express recognition is “odd, at best” and “startling”.<sup>15</sup>

Considering the severe consequences of the deprivation of water, it is paramount that the international community responds,<sup>16</sup> first, by recognising the HRtW. Although recognition would admittedly not immediately resolve existing problems, it would “place the issue of scarcity and human need at the forefront of discussion in international fora”<sup>17</sup>, and be a strong catalyst for pressing and necessary international and national reform<sup>18</sup>. Recognition of the human need for water as a human right would make water a legal entitlement<sup>19</sup> and States would finally be held accountable to the international community to respect, protect and fulfil the HRtW<sup>20</sup>. This would consequently encourage and pressure States to make the imperative changes to their national systems,<sup>21</sup> such as establishing redistribution,<sup>22</sup> management<sup>23</sup> and allocation strategies<sup>24</sup>, to realise the right. Recognising the HRtW is undoubtedly “a building block to initiate the chain of decisions necessary” to resolve the water crisis<sup>25</sup> that has escalated to be of critical status.

Unfortunately, the acceptance of the HRtW is not as straightforward as one might hope.<sup>26</sup> With the legal and technical difficulties that come with the implementation of such a right,<sup>27</sup> world leaders are eager to shy away from responsibility<sup>28</sup> and are unwilling to recognise the right. However, with the water crisis costing the world billions of lives each year,<sup>29</sup> widespread recognition of the HRtW is urgently needed; the problem must be tackled and can no longer be avoided.

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<sup>15</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 291.

<sup>16</sup> *McCaffrey*, Geo. Int'l Envtl. L. Rev. 5/1992, p. 1, 7; *Arden*, I.C.L.Q. 65/2016, p. 771, 772.

<sup>17</sup> *Curry*, Nw. U. J. Int'l Hum. Rts., 9/2010, p. 103, 121.

<sup>18</sup> *Militaru*, Jur. Trib., 7/2017, p. 89, 93; *Curry*, Nw. U. J. Int'l Hum. Rts., 9/2010, p. 103, 121.

<sup>19</sup> *Bluemel*, Ecology L.Q. 31/2004, p. 957, 973; *Scheuring*, UCL J.R., 15/2009, p. 147, 148.

<sup>20</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 293; *Qureshi*, U. Denv. Water L. Rev., 21/2018, p. 137, 145

<sup>21</sup> *Snell*, Appeal: Rev. Curr. L. & L. Ref., 19/2014, p. 131, 137; *Scheuring*, UCL J.R., 15/2009, p. 147, 148.

<sup>22</sup> *Militaru*, Jur. Trib., 7/2017, p. 89, 108.

<sup>23</sup> *Obani/ Gupta*, R.E.C.I.E.L., 24/2015, p. 27, 33.

<sup>24</sup> *Snell*, Appeal: Rev. Curr. L. & L. Ref., 19/2014, p. 131, 137.

<sup>25</sup> *Curry*, Nw. U. J. Int'l Hum. Rts., 9/2010, p. 103, 121.

<sup>26</sup> *Bluemel*, Ecology L.Q. 31/2004, p. 957, 1006.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Howard*, Seattle J. Envtl. L., 1/2011, p. 123, 124.

<sup>29</sup> *World Health Organization*, Drinking-Water, <https://www.who.int/news-room/fact-sheets/detail/drinking-water>, (last accessed on 16/4/2019).

### **III. Limitations and structure of the paper**

While acknowledging that the HRtW and the Human Right to Sanitation (HRtS) are closely related<sup>30</sup> and often dealt with together, this paper will solely focus on the HRtW because the HRtS has distinct features, therefore ought to be dealt with separately from the HRtW.<sup>31</sup> Additionally, this paper will only examine the substantive aspects of the right because, as the spotlight of many debates, it requires special attention.

This paper will examine the HRtW both internationally and in the EU, by first scrutinising the recognition of the HRtW in both spheres. Subsequently, the content of the HRtW will be briefly analysed and a conclusion will be drawn as to whether State obligations internationally as compared to that in the EU, correspond. Finally, the future of the HRtW both internationally and in the EU will be evaluated.

## **B. Recognition internationally**

The uncertainty of the existence of the HRtW largely stems from the lack of express recognition of a universal HRtW in any human right treaty and that a majority of instruments alluding to the HRtW are non-binding.<sup>32</sup> However, the exclusion of its explicit recognition does not preclude the HRtW from existing, with some rationalising the omission as the legislator's ignorance that water would become so scarce or that "its inclusion was...assumed...just as for air".<sup>33</sup>

### **I. Explicit in Human Right Treaties**

There are 3 fundamental human right treaties that correspond with certain elements of the HRtW, but they fail to explicitly recognise the right of access to water and the right itself.<sup>34</sup> First, there is the Convention on the Elimination of All Forms of Discrimination against Women, that obliges States to ensure that women "enjoy adequate living conditions, particularly in relation to... water supply".<sup>35</sup> Next, there is the Convention on the Rights of the Child, that compels States to protect the health of a child by providing "adequate... clean drinking-water".<sup>36</sup> Finally, there is the Convention on the Rights of Persons with Disabilities, whereby to safeguard a disabled person's right to an adequate standard of living and social protection,

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<sup>30</sup> UN GA, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking and sanitation*, Catarina de Albuquerque of 1 July 2009, UN Doc. A/HRC/12/24; UN GA 70<sup>th</sup> session, Agenda item 72(b), *The human rights to safe drinking water and sanitation*, 18 November 2015, UN Doc. A/C.3/70/L.55/Rev. 1.

<sup>31</sup> UN GA, *Report of the independent expert on the issue of human rights obligations related to access to safe drinking and sanitation*, Catarina de Albuquerque of 1 July 2009, UN Doc. A/HRC/12/24; UN GA 70<sup>th</sup> session, Agenda item 72(b), *The human rights to safe drinking water and sanitation*, 18 November 2015, UN Doc. A/C.3/70/L.55/Rev. 1; *Cornea*, Cross-Border J. For Int'l Stud., 1/2016, p. 47, 48.

<sup>32</sup> *Obani/ Gupta*, R.E.C.I.E.L., 24/2015, p. 27, 31.

<sup>33</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 303.

<sup>34</sup> *Cavallo*, Pace Int'l Rev. Online Companion, 3/2012, p. 136, 151.

<sup>35</sup> UN General Assembly, Convention on the Elimination of all Forms of Discrimination Against Women, 34/180, 3/9/1981, Art. 14(2)(h).

<sup>36</sup> UN General Assembly, Convention on Rights of the Child, 44/25, 2/9/1990, Art. 24(2)(c).

States must “ensure equal access by persons with disabilities to clean water services”.<sup>37</sup> While each of these treaties lends support to the idea that there exists a HRtW, they fail to endorse the notion that water is a universal individual right,<sup>38</sup> and set no criteria or limits with respect to the right<sup>39</sup>. Moreover, these treaties only protect specific vulnerable people.<sup>40</sup> Therefore, these treaties alone are ultimately unhelpful as sources to or recognition of the universal HRtW.

## **II. Implied into Human Right Treaties**

Consequently, as McCaffrey rightfully observed “if there is a right to water under the basic instruments of international human rights law, ..., it must be inferred”.<sup>41</sup>

### **1. International Covenant on Civil and Political Rights (ICCPR)**

Some contend that the HRtW is derived from the right to life as protected by the ICCPR<sup>42</sup>, since the correlation between life and water is unequivocal.<sup>43</sup> Furthermore, when recognising the HRtW, the UN General Assembly did allude to it stemming from the right to life but fell short from establishing a clear connection between the two.<sup>44</sup> Some States adopt this idea too, for example, the High Court in India held that the right to life guaranteed in the Indian Constitution includes the HRtW.<sup>45</sup> The axiomatic relationship between one’s survival and water further promoted by the UN General Assembly and various national legal systems, indicates the possibility that the HRtW is derived from Art. 6 ICCPR.

### **2. International Covenant on Economic, Social and Cultural rights (ICESCR)**

Alternatively, one could adopt the prevailing approach of recognising the HRtW as derived from Art. 11 and Art. 12 ICESCR.<sup>46</sup> Despite its relation to the right to life, multiple UN organs, such as the Committee on Economic, Social and Cultural Rights (CESCR) and the UN Human Rights Council (UN HRC) have all endorsed this idea that the HRtW is implicitly protected by the ICESCR.<sup>47</sup>

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<sup>37</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 61/106, 3/5/2008, Art. 28(a).

<sup>38</sup> *Militaru*, Jur. Trib., 7/2017, p. 89, 98.

<sup>39</sup> *Belinskij/ Kotze/ Fuo*, A.J.I.C.L 25/2017, p. 261, 266.

<sup>40</sup> *Militaru*, Jur. Trib., 7/2017, p. 89, 98.

<sup>41</sup> *McCaffrey*, Geo. Int’l Envtl. L. Rev. 5/1992, p. 1, 7.

<sup>42</sup> UN General Assembly, International Covenant on Civil and Political Rights, 2200A(XXI), 23/3/1976, Art. 6.

<sup>43</sup> *Thielborger*, Hum. Rts. L. Rev. 15/2015, p. 225, 232.

<sup>44</sup> *Hartley/ Van Meter*, Williamette J. Int’l L. & Dis. Res 19/2011, p. 66, 73.

<sup>45</sup> Kerala High Court, *F.K. Hussain vs Union of India (Uoi) and Others*, AIR 1990 Ker 321, 26 February 1990, para. 7.

<sup>46</sup> *Bulto*, Melb. J. Int’l L. 12/2011, p. 290, 294.

<sup>47</sup> UN Economic and Social Council 29<sup>th</sup> session, General Comment 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, UN Doc. E/C.12/2002/11; UN GA, Res. 15/9, *Human Rights and access to safe drinking water and sanitation*, 6/10/2010, UN Doc. A/HRC/RES/15/9.

### a) CESCR – General Comment 15 (GC 15)

In response to the global water deprivation epidemic, the CESCR issued GC 15.<sup>48</sup> While the CESCR had previously recognised water as a human right in GC 6<sup>49</sup>, GC 15 is more significant legally, because it not only “formally recognised the right to water as an independent human right”<sup>50</sup> implied from Art. 11 and Art. 12 ICESCR but also clarified State obligations under this right. The CESCR noted that the HRtW is “inextricably related to the right to the highest attainable standard of health (art. 12, para. 1)”,<sup>51</sup> however, focused more on Art. 11(1) when recognising the HRtW. Art. 11(1) “recognise(s) the right of everyone to an adequate standard of living..., including adequate food, clothing and housing”.<sup>52</sup> In GC 15, the CESCR asserted that the use of the word “including” in Art. 11(1) indicates that the list of guarantees provided, i.e. food, clothing and housing, is non-exhaustive.<sup>53</sup> After which, the CESCR then persuasively contended that water is clearly included in this list as it is “one of the most fundamental conditions for survival”<sup>54</sup>, and therefore, concluded that the HRtW is implied into the ICESCR, as derived from Art. 11 ICESCR.

This drew a multitude of criticisms, with many arguing that the CESCR had arbitrarily exceeded its interpretive competence by implying the HRtW into the ICESCR.<sup>55</sup> Tully believes that the broad approach adopted by the CESCR should be replaced with a narrower one.<sup>56</sup> He contends that the word “including” is too imprecise for the CESCR to draw the inference that the ICESCR implicitly recognises the HRtW.<sup>57</sup> To him, approving such an expansive approach would mean that the list of guarantees would also include internet and postal services.<sup>58</sup> He therefore coined the GC 15 as “revisionist” and an “approach [that] undermines the principle of legal security by reading into a legal text a content which simply is not there”.<sup>59</sup> However, this can be strongly counter-argued on 2 grounds. Firstly, as highlighted by both Bulto and Scheuring, it is evident from the wording of GC 15 that the CESCR careful-

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<sup>48</sup> Bulto, *Melb. J. Int'l L.* 12/2011, p. 290, 293.

<sup>49</sup> UN Economic and Social Council 13<sup>th</sup> session, General Comment 6, *The Economic, Social and Cultural Rights of Older Persons*, 8 December 1995, E/1996/22, Para. 32.

<sup>50</sup> Bluemel, *Ecology L.Q.* 31/2004, p. 957, 971.

<sup>51</sup> UN Economic and Social Council 29<sup>th</sup> session, General Comment 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, UN Doc. E/C.12/2002/11, Para. 3.

<sup>52</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 2200A(XXI), 3/1/1967, Art. 11(1).

<sup>53</sup> UN Economic and Social Council 29<sup>th</sup> session, General Comment 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, UN Doc. E/C.12/2002/11, Para. 3.

<sup>54</sup> *Ibid.*

<sup>55</sup> Bulto, *Melb. J. Int'l L.* 12/2011, p. 290, 292; Thielborger, *Hum. Rts. L. Rev.* 15/2015, p. 225, 230; Gerber/Chen, *Alternative L.J.* 36/2011, p. 21, 21.

<sup>56</sup> Tully, *Neth. H. Hum. Rts.*, 23/2005, p. 35, 42.

<sup>57</sup> Tully, *Neth. H. Hum. Rts.*, 23/2005, p. 35, 37.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

ly inferred water into the list of guarantees based on its genuinely fundamental nature.<sup>60</sup> Per contra, internet and postal services are presumably less essential and according to the approach by the CESCR, would definitely be excluded from the list of guarantees.<sup>61</sup> The cautious nature of the CESCR would mean that there would not be an influx of new rights,<sup>62</sup> hence quashing Tully's concerns. Secondly, per the Vienna Convention on the Law of Treaties (VCLT), which endorses a teleological approach of treaty interpretation,<sup>63</sup> "a treaty shall be interpreted...in accordance with the ordinary meaning to be given to the terms of the treaty... and in the light of its object and purpose".<sup>64</sup> Therefore, excluding the HRtW from the list of guarantees and instead adopting the restrictive approach proposed by Tully, would be contrary to the teleological approach, in breach of the VCLT.<sup>65</sup> Accordingly, the CESCR's approach of implying the HRtW into the ICESCR through Art. 11 is convincing and ought to be accepted.

Although the GC 15 is non-binding, "it is the official interpretation of a binding convention by the authorised monitoring body"<sup>66</sup> and thus has considerable legal, political and moral weight<sup>67</sup>. Politically and morally, the GC 15 would provide the impetus and pressurise States into attempting to combat the global water crisis.<sup>68</sup> Legally, the CESCR relies on their General Comments to interpret the ICESCR, which they then apply when enforcing the ICESCR, monitoring State parties implementation of the ICESCR<sup>69</sup> and when reviewing State reports<sup>70</sup>. This suggests that States party to the ICESCR would be held accountable to the standard set by General Comments, which are ergo extremely legally valuable. The legal significance of GC 15 is further exemplified by the fact that it has influenced various national courts in cases involving the HRtW.<sup>71</sup> For example, courts in both Argentina and South Africa have explicitly referred to GC 15 when rendering their decisions in such cases.<sup>72</sup> Consequently, despite the lack of binding effect, the significance of GC 15 in its representation of the recognition and implication of the HRtW derived from the ICESCR should not be underestimated.

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<sup>60</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 301; *Scheuring*, UCL J.R., 15/2009, p. 147, 166.

<sup>61</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 301; *Scheuring*, UCL J.R., 15/2009, p. 147, 166.

<sup>62</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 301.

<sup>63</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 299.

<sup>64</sup> UN, Vienna Convention on the law of treaties, TS 1155, 27/1/1980, Art. 31(1).

<sup>65</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 302.

<sup>66</sup> *Beail-Farkas*, Wis. Int'l L.J., 30/2013, p. 761, 776.

<sup>67</sup> *Arden*, I.C.L.Q, 65/2016, p. 771, 784; *Scheuring*, UCL J.R., 15/2009, p. 147, 153.

<sup>68</sup> *Fitzmaurice*, Fordham Envtl. L. Rev. 18/2007, p. 537, 554.

<sup>69</sup> *Arden*, I.C.L.Q, 65/2016, p. 771, 784.

<sup>70</sup> *McCaffrey*, The U. of Pac. L. Rev. 47/2016, p. 221, 47.

<sup>71</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 302.

<sup>72</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 302.



## *b) UN HRC Resolution 15/9*

The UN HRC echoed the CESCR's GC 15 and confirmed that the HRtW "is derived from the right to an adequate standard of living"<sup>73</sup>, thereby bolstering the CESCR's claims that the HRtW is implicitly protected by Art. 11 ICESCR<sup>74</sup>.

Much like the GC 15, this Resolution is non-binding but still of considerable influence in recognising and establishing the source of the HRtW.<sup>75</sup> This Resolution was adopted with no State demanding a vote be held, hinting that States agreed with this Resolution to a certain extent,<sup>76</sup> and as Beail-Farkas accurately observed, the potential of such non-binding resolutions must not be undervalued<sup>77</sup>.

### **3. ICCPR or ICESCR?**

The significance of GC 15 coupled with HRC Resolution 15/9 and the substantial bearing they both have legally, politically and morally are therefore strong indicators that the international community does recognise the HRtW and derives it primarily from Art. 11 ICESCR as opposed to Art. 6 ICCPR. Moreover, this approach reflects reality – ICCPR rights demand immediate realisation<sup>78</sup>, which would be impossible with the HRtW. Per contra, the HRtW can only be progressively implemented in States due to various constraints and lack of capacity, thereby mirroring the nature of ICESCR rights under Art. 2(1) ICESCR.<sup>79</sup> Should the HRtW be derived solely from Art. 11 ICESCR, only State parties to the ICESCR would be bound by the right, which is worrisome and not ideal since the water crisis does not only affect those States, it is a global emergency. Therefore, further alternatives must be explored.

### **III. Customary International law**

International law can be created through international custom.<sup>80</sup> Evidence that a significant number of states participate in the practice (i.e. State practice)<sup>81</sup> and proof that this practice is accepted by States as law (i.e. *Opinio juris*)<sup>82</sup> are required to establish customary international law. If the HRtW is customary law, States could be bound by the right, even if they are neither party to the ICESCR nor ICCPR nor any other human right treaty.<sup>83</sup> Since the International Court of Justice (ICJ) has rejected single incident customs numerous times,<sup>84</sup> a broad

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<sup>73</sup> UN GA, Res. 15/9, *Human Rights and access to safe drinking water and sanitation*, 6/10/2010, UN Doc. A/HRC/RES/15/9, Para. 3.

<sup>74</sup> Arden, I.C.L.Q., 65/2016, p. 771, 786.

<sup>75</sup> Beail-Farkas, Wis. Int'l L.J., 30/2013, p. 761, 769.

<sup>76</sup> Thielborger, Hum. Rts. L. Rev. 15/2015, p. 225, 242.

<sup>77</sup> Beail-Farkas, Wis. Int'l L.J., 30/2013, p. 761, 770.

<sup>78</sup> UN General Assembly, International Covenant on Civil and Political Rights, 2200A(XXI), 23/3/1976, Art. 2(2).

<sup>79</sup> McCaffrey, The U. of Pac. L. Rev. 47/2016, p. 221, 47, 47; Hayward, M.S.P., 40/2016, p. 217, 221.

<sup>80</sup> UN, Statute of the International Court of Justice, 18/4/1946, Art. 38(1)(b).

<sup>81</sup> Cassese, p. 157.

<sup>82</sup> Thielborger, Hum. Rts. L. Rev. 15/2015, p. 225, 234.

<sup>83</sup> Arden, I.C.L.Q., 65/2016, p. 771, 786.

<sup>84</sup> Thielborger, Hum. Rts. L. Rev. 15/2015, p. 225, 234.

range of sources will be analysed to ascertain whether the HRtW has gained customary international law status.

## 1. UN General Assembly Resolution 64/292 (UN GA Resolution 64/292)

UN GA Resolution 64/292 recognised the “right to safe and clean drinking water... as a human right that is essential for the full enjoyment of life and all human rights”.<sup>85</sup> It is generally accepted that this further solidified the existence of the HRtW.<sup>86</sup> However, in contrast to CESCR and the HRC, the GA did not derive this right from the ICESCR or any treaty. While the GA did recall the CESCR and HRC’s approach,<sup>87</sup> it was careful not to expressly endorse the derivative approach when formally recognising the HRtW, thereby signalling that the GA regarded the HRtW as a stand-alone right, as opposed to a right expressed or implied in a treaty.<sup>88</sup> This implies that the GA was convinced that the HRtW is rooted in customary international law.

Despite its non-binding nature, it is widely accepted that GA Resolutions are extremely persuasive and relied on when establishing the *opinio juris* needed for evidencing customary international law.<sup>89</sup> Even the ICJ has expressly stated so<sup>90</sup> and heavily relied on GA Resolutions to establish a customary law against the use of force and the principle of non-intervention<sup>91</sup>. Hence, Resolution 64/292 must be given considerable regard as it indicates the opinion of the international community.<sup>92</sup>

The GA Resolution received 122 votes in favour, 41 abstentions and no opposition votes, although 29 States were absent.<sup>93</sup> It is necessary to examine the State’s reasonings for their vote to properly ascertain their position on the HRtW. Many key States in the water sector, like the US, UK and Canada all refused to accept that there was legal basis and sufficient consensus to recognise the HRtW in international law,<sup>94</sup> especially since the GA had not established the scope of the right, which was a major concern for the US.<sup>95</sup> Many States that abstained did clarify that it was “not to be understood as a vote against the right to water *per se*”<sup>96</sup>, making it clear that many States that abstained were simply not ready to recognise

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<sup>85</sup> UN GA, Res. 64/292, *The human right to water and sanitation*, 3 August 2010, UN Doc. A/RES/64/292, Para.1.

<sup>86</sup> *Cavallo*, Pace Int’l Rev. Online Companion, 3/2012, p. 136, 169; *Bulto*, Melb. J. Int’l L. 12/2011, p. 290, 309; *Gerber/ Chen*, Alternative L.J. 36/2011, p. 21, 21 *Arden*, I.C.L.Q. 65/2016, p. 771, 786.

<sup>87</sup> UN GA, Res. 64/292, *The human right to water and sanitation*, 3 August 2010, UN Doc. A/RES/64/292.

<sup>88</sup> *Gerber/ Chen*, Alternative L.J. 36/2011, p. 21, 24; *Hall/ Van Koppen/ Van Houweling*, S.E.E., 20/2014, p. 849, 852.

<sup>89</sup> *Thielborger*, Hum. Rts. L. Rev. 15/2015, p. 225, 240; *Kaczorowska*, p. 29; *Cavallo*, Pace Int’l Rev. Online Companion, 3/2012, p. 136, 190; *Bulto*, Melb. J. Int’l L. 12/2011, p. 290, 311.

<sup>90</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, para. 70.

<sup>91</sup> ICJ, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, [1986] ICJ Rep 14, para. 184.

<sup>92</sup> *Cavallo*, Pace Int’l Rev. Online Companion, 3/2012, p. 136, 189.

<sup>93</sup> GA 108<sup>th</sup> Plenary meeting, Agenda item 12, A/64/PV.108.

<sup>94</sup> GA 108<sup>th</sup> Plenary meeting, Agenda item 12, A/64/PV.108; *Gerber/ Chen*, Alternative L.J. 36/2011, p. 21, 26

<sup>95</sup> *Howard*, Seattle J. Envtl. L., 1/2011, p. 123, 130.

<sup>96</sup> *Thielborger*, Hum. Rts. L. Rev. 15/2015, p. 225, 241.

the HRtW. The refusal to officially recognise the HRtW is exacerbated by the fact that some States that did vote in favour, such as Guatemala, Egypt, Columbia and Liechtenstein, did so with the understanding that their recognition did not create new obligations.<sup>97</sup> Prima facie, purely based off numbers, it appears as though the majority of States do recognise the HRtW, therefore contributing to the notion that the HRtW is customary law. However, upon closer inspection, since some States that recognised the right failed to commit to realising it, and major players in the water sector refused to recognise the HRtW, serious doubt can be cast on the international community's position on the existence of the HRtW. Nevertheless, the fact remains that no State was willing to oppose this resolution, preferring to abstain,<sup>98</sup> and abstaining States clarified that they were not against the HRtW per se. This hints that the international community endorses the resolution to some extent. The lack of opposition arguably conveys a "widespread legal belief on an individual entitlement to access to water",<sup>99</sup> and considering the value of GA Resolutions in establishing customary law, Resolution 64/292 seemingly is compelling evidence that the HRtW is recognised by the international community and there is the *opinio juris* needed to establish customary international law.

## 2. Other Soft law instruments

The following soft laws are not legally binding, but they do "play an important role in international law"<sup>100</sup> and "a catalytic role for the development of international custom"<sup>101</sup> because they reflect State practice and international opinion<sup>102</sup>. The following soft law instruments are not as influential as the GA Resolution when considered separately. However, taken together, they demonstrate a trend of international consensus<sup>103</sup> that can be "potential proof of an emergent customary rule"<sup>104</sup>.

### *a) Mar del Plata Conference (1977)*

At this conference, it was declared that "all peoples, whatever their stage of development and their social and economic conditions, have the right to access to drinking water in quantities and of a quality equal to their basic needs".<sup>105</sup> This definitively endorses the notion that the HRtW exists, and that it is an autonomous right that every individual and group enjoys<sup>106</sup>, as opposed to a right implied in a human rights treaty like the ICCPR or the ICESCR.

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<sup>97</sup> GA 108<sup>th</sup> Plenary meeting, Agenda item 12, A/64/PV.108.

<sup>98</sup> *Gerber/ Chen*, Alternative L.J. 36/2011, p. 21, 26; *Cavallo*, Pace Int'l Rev. Online Companion, 3/2012, p. 136, 170.

<sup>99</sup> *Cavallo*, Pace Int'l Rev. Online Companion, 3/2012, p. 136, 190.

<sup>100</sup> *Cavallo*, Pace Int'l Rev. Online Companion, 3/2012, p. 136, 184.

<sup>101</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 310.

<sup>102</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 310.

<sup>103</sup> *Beail-Farkas*, Wis. Int'l L.J., 30/2013, p. 761, 778.

<sup>104</sup> *Cavallo*, Pace Int'l Rev. Online Companion, 3/2012, p. 136, 186.

<sup>105</sup> Report of the United Nations Water Conference: Mar del Plata, E/CONF.70/29, 25/3/1977, Resolution II (a).

<sup>106</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 309.

### *b) Dublin Statement (1992)*

The 4<sup>th</sup> Dublin Principle expressed in the Dublin Statement seemingly recognises water as an economic good, which conflicts with it being a human right.<sup>107</sup> However, upon closer examination, it did continue on to declare that “within this principle, it is vital to recognise first the basic right of all human beings to have access to clean water... at an affordable price”<sup>108</sup>, thereby confirming that water is to be treated as a human right first and foremost<sup>109</sup> and one that is not derived from any other right or treaty.

### *c) Rio Summit (1992)*

Agenda 21 of the Rio Summit reiterated the principle from the Mar del Plata Conference, thereby affirming the existence of a free-standing HRtW.<sup>110</sup> It went on and called this principle the “commonly agreed premise”<sup>111</sup>.

### *d) Johannesburg Summit (2002)*

At the Johannesburg Summit, States declared the access to clean water as a basic requirement<sup>112</sup> and reaffirmed their commitment to Agenda 21 of the Rio Summit<sup>113</sup>, hence confirming that years later, they still fully support with the Mar del Plata principle, and agree that the HRtW is a stand-alone human right.

### *e) Berlin Rules on Water Resources (2004)*

The Berlin Rules on Water Resources was adopted by the International Law Association (ILA), which also recognised the HRtW in a similar fashion as the Mar del Plata principle,<sup>114</sup> lending further support to the notion that there is an autonomous HRtW.

Considering the consistent endorsement by the international community for over 2 decades, the above soft law instruments provide strong evidence of the *opinio juris* of the international community – that there exists an autonomous HRtW, one that has emerged as customary international law.

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<sup>107</sup> The Dublin Statement and Report of the Conference, 71-ICWE92-9739, 31/1/1992; *Fitzmaurice*, Fordham Envtl. L. Rev. 18/2007, p. 537, 546.

<sup>108</sup> The Dublin Statement and Report of the Conference, 71-ICWE92-9739, 31/1/1992, Para. 2.5

<sup>109</sup> *Bluemel*, Ecology L.Q. 31/2004, p. 957, 964.

<sup>110</sup> UN Sustainable Development, United Nations Conference on Environment & Development Rio de Janeiro, Brazil, Agenda 21, 14/6/1992 Para.18.47.

<sup>111</sup> *Ibid.*

<sup>112</sup> UN, Johannesburg Declaration on Sustainable Development, A/CONF.199/20, 4/9/2002, Para. 18.

<sup>113</sup> UN, Johannesburg Declaration on Sustainable Development, A/CONF.199/20, 4/9/2002, Para. 8.

<sup>114</sup> International Law Association, Berlin Conference Water Resources Law: Berlin Rules on Water Resources, 21/8/2004, Art. 17.

### 3. National constitutions and regional systems

However, *opinio juris* alone is not enough for the HRtW to gain customary law status, there must also be State practice. Further scrutiny into national constitutions and regional systems is required, to determine whether State practice has been sufficiently evidenced.<sup>115</sup> If the necessary State practice does exist, it would warrant the establishment of the HRtW as customary international law.

#### *a) National constitutions*

Some national constitutions explicitly recognise the HRtW. For example, Mexico, Uruguay, Uganda, South Africa, Nicaragua, Ecuador, Maldives, Bolivia, Kenya, Niger, Morocco, Somalia, Zimbabwe, Tunisia and a couple more.<sup>116</sup> Considering that only a handful of national constitutions do recognise the HRtW, it is not compelling enough to establish State practice,<sup>117</sup> which would require a substantial number of States to participate consistently in the practice<sup>118</sup>.

#### *b) Regional systems*

The Inter-American system has never explicitly recognised the HRtW,<sup>119</sup> and although the Inter-American Court of Human Rights has on multiple occasions endorsed some aspects of the HRtW,<sup>120</sup> it was always only in the context of indigenous people's rights. Likewise, the African system has also failed to explicitly recognise the HRtW. Although it does arguably imply the right in some legislation,<sup>121</sup> there is insufficient proof to claim that the African system endorses the HRtW. Per Contra, in Asia, the Message from Beppu, which expressly recognised the HRtW as a fundamental human right, was adopted by 37 States from the Asia-pacific region.<sup>122</sup> Similarly, in the Africa-South America Summit, it was declared that participating States had to ensure the access to clean and safe water domestically.<sup>123</sup> This hints that all States at this summit believed that the autonomous HRtW exists. The European system will be discussed later.

When observing the global scale, only a small minority of States and regions recognise the HRtW. This is undoubtedly inadequate and wholly inconclusive evidence in proving the re-

<sup>115</sup> *Obani/ Gupta*, R.E.C.I.E.L., 24/2015, p. 27, 30.

<sup>116</sup> *Obani/ Gupta*, R.E.C.I.E.L., 24/2015, p. 27, 34.

<sup>117</sup> *Hartley/ Van Meter*, Williamette J. Int'l L. & Dis. Res 19/2011, p. 66, 85.

<sup>118</sup> *Cassese*, p. 157.

<sup>119</sup> *Hartley/ Van Meter*, Williamette J. Int'l L. & Dis. Res 19/2011, p. 66, 81.

<sup>120</sup> Inter-American Court of Human Rights (IACtHR), *Case of Yakye Axa Indigenous Community v Paraguay*, Merits, [2005] IACHR Series C No 125; IACtHR, *Case of the Saramaka People v Suriname*, Merits, [2008] IACHR Series C No 185; IACtHR, *Case of the Xakmok Kasek Indigenous Community v Paraguay*, Merits, [2010] IACHR Series C No 214.

<sup>121</sup> Organisation of African Unity, African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49, 29/11/1999, Art. 14(2)(c); Organisation of African Unity, African Charter on Human and Peoples' Rights, CAB/LEG/67.3 rev. 5, 21 I.L.M. 58, 21/10/1986, Art. 16(1).

<sup>122</sup> *Bulto*, Melb. J. Int'l L. 12/2011, p. 290, 310.

<sup>123</sup> Africa-South America Summit, Abuja Declaration, ASA/Summit/Doc.01(I), 30/11/2006, para. 18.

quired State practice to establish customary international law. Consequently, it can be contended that while there is strong evidence of *opinio juris*, there is a serious lack of uniform and widespread State practice<sup>124</sup>; both elements are equally crucial in establishing a customary international law. As such, contrary to Cavallo's belief that the HRtW "has developed enough" for it to have customary international law status,<sup>125</sup> as Thielborger accurately asserts "the right [to water] has not yet materialised as custom"<sup>126</sup>.

#### **IV. ICESCR or Customary International law?**

Overall, due to its widespread and abundant recognition, it is axiomatic that a HRtW does exist. With regards to its source, due to the notable absence of consistent State practice, the right has conceivably not yet attained customary international law status. However, State practice "steadily growing"<sup>127</sup>. Thielborger accurately notes that "a strong and ever strengthening, *opinio juris* in favour of the human right [to water] is currently paving the way for State practice" which is still developing.<sup>128</sup> Therefore, the perpetual debate as to whether the HRtW has reached customary international law status, ought to be revisited in some years. Nevertheless, for now, there are compelling reasons to believe that, internationally, this right is implied into the ICESCR and is derived from Art. 11 ICESCR as justly identified by the CESCR in GC 15.

### **C. Recognition of the HRtW in Europe**

With no EU State voting in favour of the GA Res 64/292<sup>129</sup> and no national constitution in Europe expressly recognising the HRtW<sup>130</sup>, scrutiny is required to ascertain the genuine attitudes of EU States.

#### **I. The Council of Europe (CoE)**

Since all EU States are party to the CoE, it is crucial to examine their attitude toward the HRtW, to gain insight into the opinions of EU States.<sup>131</sup>

The European Convention of Human Rights (ECHR), adopted by the CoE, admittedly does not expressly recognise the HRtW, however the European Court of Human Rights (ECtHR) has developed its case law to incorporate the "right to an acceptable living environment" into the right to private life (Art. 8 ECHR)<sup>132</sup>, and subsequently used Art. 8 multiple times to deal

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<sup>124</sup> *Hartley/ Van Meter*, Williamette J. Int'l L. & Dis. Res 19/2011, p. 66, 84; *Cavallo*, Pace Int'l Rev. Online Companion, 3/2012, p. 136, 174.

<sup>125</sup> *Cavallo*, Pace Int'l Rev. Online Companion, 3/2012, p. 136, 200.

<sup>126</sup> *Thielborger*, Hum. Rts. L. Rev. 15/2015, p. 225, 235.

<sup>127</sup> *Cavallo*, Pace Int'l Rev. Online Companion, 3/2012, p. 136, 174.

<sup>128</sup> *Thielborger*, p. 86.

<sup>129</sup> UNGA 64<sup>th</sup> session, 108<sup>th</sup> plenary meeting, *Official Records*, 28 July 2010, UN Doc. A/64/PV.108.

<sup>130</sup> *Obani/ Gupta*, R.E.C.I.E.L., 24/2015, p. 27, 34.

<sup>131</sup> *Deloge*, N.Z. J. Env'tl. L., 16/2012, p. 1, 35.

<sup>132</sup> *Arden*, I.C.L.Q., 65/2016, p. 771, 778.

with cases involving water deprivation<sup>133</sup>. Additionally, according to these cases, Art. 8 invokes positive obligations on States to take measures to secure the right.<sup>134</sup> The ECHR approach signals the recognition of the HRtW, implicitly protected by Art. 8 ECHR.

Further cementing the notion that the CoE recognises the HRtW is the European Water Charter (1967), which is now revised to the European Charter of Water Resources (2001). Art. 5 declares that “everyone has the right to a sufficient quantity of water for his or her basic human needs”, which “include[s] the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene”.<sup>135</sup> Therefore, it is undeniable that the CoE recognises the HRtW and derives it from the right to an “adequate standard of living”<sup>136</sup>, which corresponds with the ECtHR approach.

The CoE’s stance was equally evident in 2009, when it urged for the recognition of the HRtW<sup>137</sup> - “access to water must be recognised as a fundamental human right because it is essential to life on earth and is a resource that must be shared by humankind”<sup>138</sup>.

With the CoE’s undeniable recognition of the HRtW, it can be contended that the EU States largely have a similar understanding as compared to the international community.

## II. The EU

### 1. European Parliament

In the EU, the European Parliament has, on multiple occasions, recognised the HRtW.<sup>139</sup> In 2006, the Parliament strongly recommended the EU and EU States to request, at the international level, “the drafting of an international treaty on water... which recognises the right to access to drinking water”.<sup>140</sup> Later in 2009, the Parliament reiterated this proposal and urged EU States to take “political and diplomatic initiatives” toward recognising the right of access to water.<sup>141</sup> On another occasion, the Parliament adopted a non-binding resolution declaring that “access to water should constitute a fundamental and universal right”<sup>142</sup> and “is assumed

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<sup>133</sup> ECtHR, *Hatton and Others v The United Kingdom*, App. No. 36022/97, 8 July 2003, para. 96 ff. ; ECtHR, *Guerra and Others v Italy*, App. No. 14967/89, 19 February 1998, para 57 ff.; ECtHR, *Taskin and Others v Turkey*, App. No. 46117/99, 30 March 2005, para 113, ff.; *Smets*, Evtl. Pol’y & L., 30/2000, p. 248, 249.

<sup>134</sup> *Barral*, I.C.L.Q 67/2018, p. 931, 942; *Smets*, Evtl. Pol’y & L., 30/2000, p. 248, 249.

<sup>135</sup> Council of Europe, European Charter on Water Resources, Rec. (2001)14, 17/10/2001, Art. 5.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Hartley/ Van Meter*, Williamette J. Int’l L. & Dis. Res 19/2011, p. 66, 80.

<sup>138</sup> *Council of Europe Committee on the Environment, Agriculture and Local and Regional Affairs*, Water: A strategic Challenge for the Mediterranean Basin, Doc. 12004, 14/9/2009, Draft Resolution Para. 2.

<sup>139</sup> *Deloge*, N.Z. J. Evtl. L., 16/2012, p. 1, 35 ff.

<sup>140</sup> European Parliament, Resolution on the 4<sup>th</sup> World Water Forum in Mexico City, P6\_TA(2006) 0086, 15/3/2006, Para. 2.

<sup>141</sup> European Parliament, Resolution on water in the light of the 5<sup>th</sup> World Water Forum to be held in Istanbul on 16-22 March 2009, P6\_TA(2009)0137, 12/3/2009, Para. 30.

<sup>142</sup> *European Parliament Committee on Development*, Motion for a Resolution on water in light of the 5<sup>th</sup> World Water Forum to be held in Istanbul on 16-22 March 2009, B6-0113/2009, 9/3/2009, Para. 1.

as a public good<sup>143</sup> not subject to domestic market rules.<sup>144</sup> The European Parliament regards access to water as so fundamental that it called for States to ensure the poor have access to water and work toward that goal despite the economic crisis.<sup>145</sup> Purely from their statements, it is unclear whether the European Parliament recognises the HRtW as a whole or just one aspect of it – the right of access to water.

## **2. EU Directives / EU Initiative**

Further clarity on the EU's recognition of the HRtW is granted through the Drinking Water Directive, the Water Framework Directive and the EU Water Initiative.

### *a) Drinking Water Directive (80/778/EEC revised by 98/83/EC)*

The Drinking Water Directive stipulated water quality standards States had to abide by, to safeguard public health.<sup>146</sup> This was revised in 1998, which introduced more chemical parameters to “protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring it is wholesome and clean”.<sup>147</sup> Although the Drinking Water Directive never explicitly recognised the HRtW, it did recognise a key aspect of it – the protection and provision of a certain quality of water intended for consumption.

### *b) Water Framework Directive (2000/60/EC)*

The Water Framework Directive afforded a broader scope of protection and did not simply focus on water quality. Firstly, stipulated that “water is not a commercial product”.<sup>148</sup> Secondly, although it did reiterate the protection and amelioration of water quality as one of its aims<sup>149</sup>, it referred to all forms of water and not simply water meant for consumption<sup>150</sup>. Finally, another indirect aim was to ensure States provide an adequate quantity of water.<sup>151</sup> While this Directive failed to expressly recognise the HRtW, it did offer protection to fundamental components of the HRtW.

### *c) EU Water Initiative (2002)*

Established by the European Commission, the EU Water Initiative aimed to “reinforce political commitment to action”, “promote better water governance arrangements”, “improve co-

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<sup>143</sup> *European Parliament Committee on Development*, Motion for a Resolution on water in light of the 5<sup>th</sup> World Water Forum to be held in Istanbul on 16-22 March 2009, B6-0113/2009, 9/3/2009, Para. 2.

<sup>144</sup> *Cornea*, Cross-Border J. For Int'l Stud., 1/2016, p. 47, 50.

<sup>145</sup> *Ibid.*

<sup>146</sup> Directive (EU), 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption, OJ L 229, 30/8/1980, p. 11.

<sup>147</sup> Directive (EU), 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, OJ L 330, 05/12/1998, p. 0032 (Art. 1(2)).

<sup>148</sup> Directive (EU), 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22/12/2000, p. 1 (Recital (1)).

<sup>149</sup> *Anches*, Cross-Border J. For Int'l Stud 2/2017, p. 1, 12.

<sup>150</sup> *Anches*, Cross-Border J. For Int'l Stud 2/2017, p. 1, 13.

<sup>151</sup> Directive (EU), 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22/12/2000, p. 1 (Art. 7, 19, 25).



ordination and co-operation in the way that water-related interventions are developed and implemented” and “encourage ... co-operation on water management issues”.<sup>152</sup> Since the EU evidently recognised States’ obligations to protect water management, which would automatically include central elements of the HRtW such as availability, quality and accessibility, this Initiative was a clear implication that the EU recognised a HRtW.

Unfortunately, neither the EU directives nor the proposed EU strategy included any explicit recognition of the HRtW. However, this does not indicate a complete denial of the HRtW. In fact, since the directives and initiative combined tackle all crucial aspects protected by the HRtW, it is cogent that the EU does recognise the HRtW.

### **3. Statement by EU representative**

The gap left by the lack of explicit recognition of the HRtW by the EU, is subsequently filled by Catherine Aston, the previous High Representative of the Union for Foreign Affairs and Security Policy. She, on behalf of EU States, declared in 2011 at the 13<sup>th</sup> World Water Day that “the European Union reaffirms that all States bear human rights obligations regarding access to safe drinking water, which must be available, physically accessible, affordable and acceptable”.<sup>153</sup>

The statements by the European Parliament and Catherine Aston along with the directives and Initiatives makes it unequivocal that the EU does recognise an autonomous HRtW.

## **D. Content of the HRtW**

Similar to any other human right, States have the duty to respect, protect and fulfil the HRtW.<sup>154</sup> According to the CESCR in GC 15, the substantive dimension of the HRtW has 3 basic features – availability: it safeguards the provision of an adequate amount of water per person,<sup>155</sup> quality: it dictates that the water must be safe to consume and be of “an accepta-

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<sup>152</sup> *European Commission*, Communication from the Commission to the Council and the European Parliament – Communication on the future development of the EU Water Initiative and the modalities for the establishment of a Water Facility for ACP countries, COM(2004) 0043 final, Point 3.

<sup>153</sup> *Council of the European Union*, Declaration by the High Representative, Catherine Ashton, on behalf of the EU to commemorate the World Water Day, 7810/10 P 12/10 Press 71, 22 March 2010, para. 2.

<sup>154</sup> UN Economic and Social Council 29<sup>th</sup> session, General Comment 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, UN Doc. E/C.12/2002/11, Para. 20.

<sup>155</sup> UN Economic and Social Council 29<sup>th</sup> session, General Comment 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, UN Doc. E/C.12/2002/11, Para. 12(a).

ble colour, odour and taste”<sup>156</sup>, and accessibility: it includes physical and economic accessibility<sup>157</sup>.

Even though, unlike the CESCR, the EU does not consider the HRtW as implicitly protected by the ICESCR, the EU does equally regard the 3 fundamental components of the HRtW identified by the CESCR. As demonstrated above, both the Drinking Water and Water Framework Directive ensure acceptable water quality, with the latter equally securing adequate water quantity. Additionally, the EU Water Initiative implicitly secures all 3 features. Coupled with Ashton’s statement that explicitly noted these fundamental features, a deduction that the HRtW internationally and in the EU are analogous, can convincingly be made.

## **E. The future of the HRtW Internationally**

The main reasons States are hesitant toward recognising the international HRtW are still prevalent. They require resolution before progress in the recognition of the HRtW can be made.

The most prominent challenge for States is the lack of adequate definition and understanding as to what the right entails within and beyond borders.<sup>158</sup> The right was introduced “without a blueprint for success”.<sup>159</sup> Consequently, there is considerable debate surrounding the scope of the right and the obligations it imposes on States.<sup>160</sup> This is exacerbated by the fact that the HRtW is context-driven,<sup>161</sup> which implies that the right must be tailored to each State<sup>162</sup> and could even vary between different regions in the same State<sup>163</sup>. Closely related to this obstacle is the absence of prioritisation.<sup>164</sup> The relationship between water and other human rights are so intimate that they are often in conflict<sup>165</sup>, for instance between water needs and environmental protection<sup>166</sup>. Furthermore, considering that water is a limited resource, even the variety of water uses, within the HRtW, must be prioritised;<sup>167</sup> for example, to address clashes between water for personal and for agricultural use.<sup>168</sup> All these challenges are cur-

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<sup>156</sup> UN Economic and Social Council 29<sup>th</sup> session, General Comment 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, UN Doc. E/C.12/2002/11, Para. 12(b).

<sup>157</sup> UN Economic and Social Council 29<sup>th</sup> session, General Comment 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, UN Doc. E/C.12/2002/11, Para 12(c).

<sup>158</sup> *Howard*, Seattle J. Envtl. L., 1/2011, p. 123, 127; *Snell*, Appeal: Rev. Curr. L. & L. Ref., 19/2014, p. 131, 138; *Simmons*, N.T.f.M., 27/2009, p. 64, 66; *Langford*, N.T.f.M., 27/2009, p. 1, 3.

<sup>159</sup> *Howard*, Seattle J. Envtl. L., 1/2011, p. 123, 135.

<sup>160</sup> *Howard*, Seattle J. Envtl. L., 1/2011, p. 12, 128; *Simmons*, N.T.f.M., 27/2009, p. 64, 66; *Militaru*, Jur. Trib., 7/2017, p. 89, 112.

<sup>161</sup> *Mirosa/ Harris*, Antip., 44/2012, p. 932, 943.

<sup>162</sup> *Mirosa/ Harris*, Antip., 44/2012, p. 932, 944.

<sup>163</sup> *Snell*, Appeal: Rev. Curr. L. & L. Ref., 19/2014, p. 131, 134.

<sup>164</sup> *Militaru*, Jur. Trib., 7/2017, p. 89, 114.

<sup>165</sup> *Bluemel*, Ecology L.Q. 31/2004, p. 957, 962.

<sup>166</sup> *Militaru*, Jur. Trib., 7/2017, p. 89, 112.

<sup>167</sup> *Way*, E.H.R.L.R., 2/2013, p. 229, 230.

<sup>168</sup> *Ibid.*

rently unresolved, and the HRtW remains clouded with extreme ambiguity as to what it entails, causing States to be unwilling to commit to recognising the HRtW.

A practical and feasible first step would be to encourage and empower individuals to utilise the Optional Protocol to the ICESCR(OP) where possible.<sup>169</sup> The OP establishes an individual complaint mechanism, which gives individuals, or grounds of individuals standing to submit to the CESCR, claims that their rights under ICESCR, such as the HRtW, has been violated.<sup>170</sup> An increased utilisation of the OP allows the CESCR to discuss the right in concrete cases, which would, slowly but surely, through the CESCR's interpretations, contribute to the clarity and understanding of the HRtW<sup>171</sup>. Subsequently, with the growing CESCR interpretation and use of the OP, many African and Asian countries, who are presently believably adopting a wait-and-see approach<sup>172</sup>, would have their worries quashed and be more inclined to ratifying the OP as well. The escalating ratification numbers would then have a domino effect on the rest of the world, because there is evidence to suggest that "States tend to ratify optional protocols when their neighbouring peers do so"<sup>173</sup>. The more the OP is ratified, the more likely the OP would be used, which would thereby increase the number of opportunities the CESCR has to interpret and clarify the HRtW, consequently leading to a more defined HRtW – one that States would be more eager to recognise. However, until it is sufficiently coherent, States would understandably be averse to accepting an international HRtW, one that is plagued with ambiguity.<sup>174</sup> Through proper definition and clarification, this complexity must urgently be addressed, as the water crisis is a global emergency that requires international cooperation and willingness to recognise this right.

## **F. Future of the HRtW in the EU**

In the EU, there is currently, EU-wide attention on the HRtW, triggering possibilities for significant developments that could bolster the right. The Right2Water was the first European Citizens Initiative that satisfied the necessary requirements<sup>175</sup> and had its proposal submitted to the European Commission for its formal consideration<sup>176</sup>. The Right2Water's goals were for the explicit recognition of the HRtW, "to guarantee water (safe, clean and affordable)... to all... EU Member States", to not turn water into a commodity by excluding it from internal

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<sup>169</sup> UN GA, *Report of the Special Rapporteur on the human rights to safe drinking water and sanitation* of 16 July 2018, UN Doc. A/73/162.

<sup>170</sup> UN GA, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Res 63/117, 5/3/2013, Art. 2.

<sup>171</sup> *Simmons*, N.T.f.M., 27/2009, p. 64, 65 ff.

<sup>172</sup> *Forman*, Ottawa. L. Rev., 47/2016, p. 561, 572.

<sup>173</sup> *Simmons*, N.T.f.M., 27/2009, p. 64, 66.

<sup>174</sup> *Militaru*, Jur. Trib., 7/2017, p. 89, 121; *Simmons*, N.T.f.M., 27/2009, p. 64, 66.

<sup>175</sup> Treaty on European Union, OJ C 326, 26/10/2012, p. 13, Art. 11; Regulation (EC)(EP), No. 211/2011 of 16 February 2011 on the Citizens' Initiative, OJ L 65, 11/3/2011, p. 1.

<sup>176</sup> *Carlson*, P.L. 2013, p. 669, 670.

market rules and from liberalisation.<sup>177</sup> Consequently, in February 2018, based on studies that proved the existing Drinking Water Directive to be outdated<sup>178</sup> and had its deficiencies<sup>179</sup>, the European Commission proposed for a recast of the Drinking Water Directive.<sup>180</sup> Their proposal had 2 main aims: to improve the drinking water quality to reflect new standards and to oblige States to improve access to water for all, especially for marginalised groups.<sup>181</sup>

Although the organisers of the Right2Water called it a “positive step” and welcomed the special attention toward marginalised groups, they did request for the Commission to ban the disconnection of water to ensure that even those who could not afford it, could still access it.<sup>182</sup> Both the European Economic and Social Committee and the European Public Service Union were disappointed by the lack of explicit recognition of the HRtW.<sup>183</sup> Additionally, The European Water Movement was equally saddened because they believed that “the proposal did not meet any of the demands made” by the Right2Water, and that the proposal was inadequate to deal with the accessibility problems in the EU.<sup>184</sup> Most States too, were not too pleased with the proposal; both Ireland and the UK complained about the proposal overregulating, leaving States too restrictive a scope of discretion.<sup>185</sup> Germany’s Bundesrat plainly asserted that the some provisions of the proposal would be “disproportionately difficult, or even partially impossible” to implement.<sup>186</sup>

The Commission’s proposal was submitted to both the European Parliament and the European Council, who must come to an agreement on the proposal and any amendments made,

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<sup>177</sup> *Right2Water*, Water and Sanitation are a Human Right!, <https://www.right2water.eu>, (last accessed on 16/4/2019).

<sup>178</sup> *European Commission*, REFIT Evaluation of the Drinking Water Directive 98/83/EC, SWD(2016) 428 final, p. 31.

<sup>179</sup> *Directorate-General for Environment (European Commission) et al.*, Study supporting the revision of the EU drinking water directive, <https://publications.europa.eu/en/publication-detail/-/publication/9f2d594a-1832-11e7-808e-01aa75ed71a1>, (last accessed on 16/4/2019).

<sup>180</sup> *European Commission*, Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (Recast), COM(2017) 753 final.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Rios*, Proposal on access to water will challenge Member States, <https://euranetplus-inside.eu/proposal-on-access-to-water-will-challenge-member-states/>, (last accessed on 16/4/2019).

<sup>183</sup> *European Economic and Social Committee*, Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (Recast) OJ C 367, 10/10/2018, p. 107; *EPSU*, Recast Drinking Water Directive step forward but misses the opportunity to recognize Human Right to Water, <https://www.epsu.org/article/recast-drinking-water-directive-step-forward-misses-opportunity-recognize-human-right-water>, (last accessed 16/4/2019).

<sup>184</sup> *European Water Movement*, The European Commission once again disappoints citizens that supported the Initiative for the Right to Water, <http://europeanwater.org/news/press-releases/770-drinking-water-directive-initiative-for-the-right-to-water>, (last accessed 16/4/2019).

<sup>185</sup> *Houses of the Oireachtas Joint Committee on Housing Planning and Local Government*, Report under Dail Standing Order 114 and Seanad Standing Order 116 on Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (Recast), 32/HPLG/09, 27/3/2018, Para. 4; *UK House of Commons*, Reasoned Opinion of the House of Commons concerning a Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (Recast), 7/3/2018.

<sup>186</sup> *Bundesrat*, Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über die Qualität von Wasser für den menschlichen Gebrauch (Neufassung), 5846-18, Para. 11 (Translated from German “den späteren Vollzug durch die Länder unverhältnismäßig erschweren oder teilweise sogar unmöglich machen”)

before the proposal could become legislation<sup>187</sup>. The Committee on Environment, Public Health and Food Safety in the European Parliament, on 10 September 2018, adopted the Dantin Report, which made 160 amendments to the proposal.<sup>188</sup> This was subsequently adopted by the plenary on 28 March 2019, which would constitute the Parliament's first-reading position.<sup>189</sup> The report demonstrates 2 main themes: the explicit and increased promotion of the universal access to clean water, reference was even made to the UN GA's recognition of the HRtW,<sup>190</sup> and that the "requirements set out in the Directive should reflect national situations and conditions of water suppliers" in States<sup>191</sup>. Per Contra, on 27 February 2019, the Council appears to take a drastically different position.<sup>192</sup> Unsurprisingly, in their proposal, the Council deleted provisions they considered as too demanding, replacing it with a requirement on States to do what they can, based on their context, and inserted a provision stipulating that some goals, including the HRtW, fall outside of the EU's competence to regulate and any requirements ought to respect the principle of subsidiarity.<sup>193</sup> Unlike the European Parliament, the Council chose to focus on water quality, while amending, even deleting many provisions relating to the improvement and promotion of universal access to water.<sup>194</sup> Furthermore, the Council deleted various clauses relating to the extra consideration granted for vulnerable and marginalised groups.<sup>195</sup> Organisers of the Right2Water called the Council's proposal a "very much watered-down text".<sup>196</sup> By resisting to enhance the HRtW for vulnerable and marginalised groups coupled with the lack of "clear and ambiguous legal obligations on Member States to ensure people access to safe and clean drinking water in line with the HRtW as adopted by the UN", they concluded that the Council's proposal had "too many loopholes" and was "disappointing".<sup>197</sup>

Now, we await the Council's first-reading position. However, it is likely that their proposal, per 27 February 2019, be an accurate prediction of their position. If so, it would mean that both the Council and the Parliament have extremely different positions that would require signifi-

<sup>187</sup> Treaty of the Functioning of the European Union, OJ C 326, 26/10/2012, p. 47, Art. 294.

<sup>188</sup> *European Parliament Committee on the Environment, Public Health and Food Safety*, Report on the proposal for a directive of the European Parliament and of the Council on the quality of water intended for human consumption (Recast) by Michael Dantin, 1/4/2018, A8-0288; *European Parliamentary Research Service*, Revision of the Drinking Water Directive, 10/2018, PE 628.279.

<sup>189</sup> *Council of the European Union*, Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (Recast), Outcome of the European Parliament's first reading, 4/4/2019, 7750/19.

<sup>190</sup> *Council of the European Union*, Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (Recast), Outcome of the European Parliament's first reading, 4/4/2019, 7750/19, Amendment 1,3,7,8,28.

<sup>191</sup> *European Parliamentary Research Service*, Revision of the Drinking Water Directive, 02/2019, PE 625.179.

<sup>192</sup> *Council of the European Union*, Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (Recast), General Approach, 27/2/2019, 6876/1/19 Rev 1.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

<sup>196</sup> *Right2Water*, Member States deny citizens right2water in Drinking Water Directive – ECI campaigners disappointed, <https://www.right2water.eu/news/member-states-deny-citizens--right2water-in-drinking>, (last accessed 16/4/2019).

<sup>197</sup> *Ibid.*

cant time to resolve. The Parliament elections scheduled to happen in May 2019, will further complicate matters, because there is no way of knowing the new Parliament's position before they are elected. Nevertheless, it is undeniable that the European Citizen's Initiative, The Right2Water, which was signed by almost 2 million EU citizens across at least 7 Member States<sup>198</sup> sparked a chain that would eventually, no matter how long it takes, lead to the strengthening of the HRtW in the EU.

## **G. Conclusion**

As illustrated above, the intensity and urgency of the global water crisis, that will continue to escalate, necessitates an immediate response from States. Thankfully, the first step has been taken by both the international community and the EU, through their recognition of the HRtW, the former doing so by implying it into Art. 11 ICESCR, while the latter treats it as an autonomous right. The limitations of the CESCR's approach and developing State practice warrants a future re-visitation of the HRtW's (lack of) customary law status. Regarding the future of the HRtW, we ought to remain hopeful. Internationally, should the recommendations proposed above be adopted, the scope and content of the HRtW will be further clarified and more States would be willing to recognise the HRtW, which would be helpful in combatting the global water crisis. In the EU, with the Drinking Water Directive being recast, a strengthened HRtW is on the horizon.

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<sup>198</sup> *Right2Water*, Water and Sanitation are a Human Right!, <https://www.right2water.eu>, (last accessed on 16/4/2019).

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