

THE HUMAN RIGHT TO WATER AND ITS RELEVANCE IN TRANSBOUNDARY CONTEXTS

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Key takeaways

- Despite the enormous progress made in recognizing and defining the scope and nature of the human rights to water and sanitation, there is still a long way to go in terms of ensuring universal access to water services as envisioned in the SDG Goal 6.
- The recognition of the human right to water (HR2W) could open opportunities for international cooperation and assistance, contribute to structuring transboundary water cooperation and become a guiding principle at the basin level.
- There are challenges in the implementation of the right to water at the domestic and international levels.
- At the international level, the general concept of ‘progressive realization’ may represent a challenge; at the domestic level, the lack of sufficient human and financial resources and weak laws, policies and strategies may hamper the implementation of the HR2W.

Introduction

In the last two decades, the HR2W has gained increasing visibility. Such evolution is illustrated in multiple ways, with impacts at the domestic and international levels but also with the implementation of new institutional arrangements. In other words, the HR2W evolved dramatically and substantially from being an implicit responsibility of states to an independent right that can be implemented at any level of reference. Evidently, such a crystallization process of the HR2W as an operational principle brings different challenges and possible impacts on the evolution of water-related negotiation and arbitration of interests. A process of clarification is taking shape with domestic levels of intervention that allows, in an iterative manner, to gradually inform the very nature of HR2W in practice.

As a result, one can observe different mechanisms being implemented to support the realization of HR2W. For instance, at the global level, the nomination of a special rapporteur on the rights to water and sanitation provided a powerful champion for the recognition and integration of HR2W

in existing normative frameworks. Furthermore, HR2W has been clarified by regional human rights mechanisms (including the European, Inter-American and African systems) and national legislation.

The HR2W may raise some specific challenges in the use and management of transboundary water resources. The implications of the right to water at the transboundary level are not yet tested in practice, and, as we will see, we currently see the first instances of frameworks that include HR2W in transboundary contexts (one can cite Basin Water Charters [the Senegal or Niger basins] or agreements on specific transboundary rivers [the Dniester] that have been in force for only a few years). Dealing with HR2W at the transboundary level entails some challenges related to the definition of roles and responsibilities within but also beyond national territories. The consideration of HR2W can potentially have an impact on how transboundary frameworks are defined, how priorities are set and, by doing so, on existing negotiations, not only considering state-to-state interactions but also a wide range of potential stakeholders.

This chapter examines the evolution and crystallization of HR2W and its possible effects on transboundary water cooperation. To do so, we structure the chapter as follows. First, we highlight the emergence of a human rights discourse on water and identify the key milestones and steps of such a process. Then, we analyze the manifold legal dimensions of the HR2W and the intersections between human rights law and international water law. Third, we explore the key features of the right in the transboundary contexts and, as we will see, some innovative frameworks allow to include this right as part of transboundary water cooperation frameworks. Fourth, we identify some key challenges for the effective implementation of the HR2W.

The emergence and consolidation of a human rights discourse on water

The right to water emerged as an international agenda in the 1970s via various conferences, social movements and non-governmental organizations for different practical (climate change and scarcity of water resources) and ideological reasons (Langford and Russell 2017, p. 11, Fantini 2020). In 1972, the UN Conference on the Human Environment, held in Stockholm, identified water as one of the natural resources that needed to be safeguarded (Principle 2). The 1977 Conference on Water in Mar del Plata was devoted to discussing water issues and under Resolution II declared for the first time that ‘all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs’ and ‘it is universally recognised that the availability to man of that [water] resource is essential both for life and his full development, both as an individual and as an integral part of the society’ (United Nations 1977, pp. 66–67). These early UN conferences could be seen as the genesis of the human right to access safe drinking water.

This section illustrates how the right to water is included, either implicitly or explicitly, in human rights treaties that are binding on states parties. It also discusses how the monitoring mechanisms established by these instruments identified the lack of compliance by states parties concerning this right. While the recommendations by the human rights treaty bodies are not binding on the states, they influence the behavior of states, indicate ways to improve domestic laws and provide information to the civil society on the status of implementation of the right to water.

The role of the United Nations in the recognition of the right to water

During the 1990s, the evolution of the human rights to water and sanitation (RTWS) was accelerated. In 1997, the UN Sub-Commission on the Promotion and Protection of Human

Rights drafted a working paper on promoting the realization of the right of access of everyone to drinking water and sanitation services (Misiedjan and Obani 2021, p. 168). This formed the basis for linking HR2W to the UN bodies, and in 2002, the UN Committee on Economic, Social and Cultural Rights (CESCR) through its General Comment No. 15 clearly formulated it. The General Comment does not represent a binding text for states but reflects an authoritative interpretation of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) (McCaffrey 2016, p. 229). The CESCR indicated that the HR2W has its legal basis on the human right to an adequate standard of living and the human right to health respectively enshrined under Articles 11 and 12 of the ICESCR (these provisions do not explicitly mention the right to water). Even before 2002, states were submitting information on their domestic legislations dealing with the right to water in their reports to the CESCR, based on which the CESCR adopted concluding observations and recommended to states to improve their legislations that may have impact on the realization of the right to water.

Besides, the HR2W is *explicitly* mentioned in a number of global and regional human rights instruments such as the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1989 Convention on the Rights of the Child, the 2006 Convention on the Rights of Persons with Disabilities and the 1990 African Charter on the Rights and Welfare of the Child. Furthermore, in the area of international water law, there are regional and basin-specific instruments addressing the right to water (OAS 1988, OAU 1990, UNECE 1999, OMVS 2002, African Union 2003, Niger Basin Authority 2008, Dniester Commission 2012, Lake Chad Basin Commission 2012). These treaties are binding on states that have ratified them and should be considered in the negotiations and implementation of agreements on transboundary waters. Accordingly, states parties to ICESCR, CEDAW and Convention on the Rights of the Child (CRC) are required to report on the implementation of these agreements and have to indicate progress they have made in that regard, including the HR2W.

The CESCR and the Committee on the Rights of the Child (CRC Committee) have dealt with the right to water in some of their concluding observations to states' reports. They could point out violations of the right to water by states and request them to take immediate steps in order to redress them. For instance, in its 2003 concluding observations on Israel's report, the CESCR noted the limitations on the access to water resources suffered by Palestinians and requested Israel to take immediate steps to ensure equitable access to and distribution of water to all populations living in the occupied territories and to ensure that all parties concerned participate fully and equally in the process of water management, extraction and distribution (CRC 2002, para. 51, CESCR 2003a, para. 41). In 2017, in its concluding observations to Colombia, the CESCR considers that the state party should 'intensify its efforts to ensure that its water resources are duly protected and that it takes the necessary measures to ensure that the use of water by the mining industry does not jeopardize access to safe drinking water, particularly for the communities that may be affected' (CESCR 2017, para. 60). While not legally binding as such, the Committee referred to its General Comment No. 15 on the right to water in both concluding observations.

Moreover, in its concluding observations on the report of Uganda, the CRC Committee noted its concerns that 'increasingly that large numbers of children (...) do not enjoy the right to an adequate standard of living, including access to food, clean drinking water, adequate housing and latrines' and recommended that Uganda 'reinforce its efforts to provide support and material assistance, with a particular focus on the most marginalized and disadvantaged families, and to guarantee the right of children to an adequate standard of living' (CRC 2005, para. 58). In a similar way, the 2006 CRC Committee's country report on Peru indicated that lack of access to water posed problems in attaining an adequate standard of living (CRC 2006, para. 59). The CRC

Committee also expressed concern ‘about environmental health problems arising from a lack of access to safe drinking water, inadequate sanitation, and contamination by extractive industries’, and it recommended an increased effort by the State to provide ‘sanitation and safe drinking water to all the population’ (CRC 2006, paras 51–52). The practices of these treaty bodies illustrate the role such mechanisms can play in the recognition and national implementation of the right to water.

In addition to the international agreements containing explicitly or implicitly the HR2W, in 2010, the UN General Assembly (by a vote of 122 in favor to none against and with 41 abstentions) (UNGA 2010a) and the Human Rights Council adopted two resolutions signaling the recognition of the RTWS in international law (UNGA 2010b, UNHRC 2010). In 2015, the UN General Assembly adopted the 2030 Agenda for Sustainable Development and under its Goal 6, it indicated the need to achieve ‘universal and equitable access to safe and affordable drinking water for all’ (UNGA 2015, p. 18). Since 2010 (and until 2021), the UN General Assembly and the Human Rights Council adopted 14 resolutions without the need for a formal procedure of voting (UNHRC 2011a, 2011b, 2012, 2013, 2014, 2016, 2018, 2019, 2020, UNGA 2014, 2016, 2018, 2020, 2022). The resolutions show the increasing support of states to the RTWS.

The other effort at the UN level that enhanced the crystallization of the HR2W was the decision of the Human Rights Council in 2008 to appoint an independent expert on the issue of human rights relating to access to drinking water and sanitation who became in 2011 the Special Rapporteur on the right to safe drinking water and sanitation. As evidenced in the works of the former and current Special Rapporteur on the human rights to safe drinking water and sanitation, the effective realization of the HR2W also corresponds with the need to address different challenges such as climate change, justice and equity and ensuring accountability (Langford and Russell 2017, p. 11).

The HR2W in the jurisprudence of international and domestic courts

International and domestic courts play a significant role in identifying, clarifying and enforcing the HR2W (de Chazournes 2021, pp. 195–198). For instance, the Inter-American bodies on human rights have rendered important decisions in this regard, in particular concerning Indigenous populations. In its decision in *Xákmok Kásek Indigenous Community v. Paraguay*, the Inter-American Court discussed the right to access to water as part of the right to a decent existence (Inter-American Court of Human Rights 2010, para. 174). In other cases, the Court has acknowledged the importance of natural resources, such as freshwater, for preserving the identity and survival of Indigenous populations (Inter-American Court of Human Rights 2007, para. 122). The African Commission of Human and Peoples’ Rights has also contributed to the recognition of the HR2W. In the *Centre for Minority Rights Development* case, it linked the right of access to sources of water with respect for freedom of religion and the right to development (African Commission on Human and Peoples’ Rights 2010, para. 173). In the case of Indigenous populations, their access to water and involvement in water management issues have been taken very seriously, with the result that these groups have often been endowed with specific rights in this respect. In 2015, the Commission adopted a resolution on ‘the right to water obligations’ (African Commission on Human and Peoples’ Rights 2015), which urges the African Union member states to meet their obligations in providing clean drinking water for all their populations, recognize, protect and develop traditional and local water management systems for Indigenous populations on their ancestral lands as well as local communities and protect water resources from abusive use and pollution.

The European Court of Human Rights has recognized the right to access clean water under Article 8 of the European Convention on Human Rights. Article 8 is concerned with the right

to respect for private and family life. In the cases *Tătar v. Romania*, *Dubetska and Others v. Ukraine* and *Dzemyuk v. Ukraine*, and *Solyanik v. Russia* (European Court of Human Rights 2009, paras 97, 124–125, 2011, paras 155–156, 2014, para. 92, 2022, paras 37, 43), the European Court of Human Rights has found violations of Article 8 for pollution of water and has held in these cases that such pollution interfered with a person's private and family life by harming their well-being.

At the domestic level, for instance, the Court of Appeal of Botswana has not hesitated to refer to the Committee's General Comment as well as the resolution adopted by the UN General Assembly in 2010 to justify the applicants' right to access to water sources for their personal use (Dinokopila 2011, pp. 289–292). In the *Narmada Bachao Andolan* case, the Indian Supreme Court decided that 'water is the basic need for survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India' and that there is a positive obligation for the state to provide a source of water where there is none (Supreme Court of India 2000, p. 72).

The above cases demonstrate that the right to water included in international instruments is applicable at the domestic level and is enforceable before national and regional courts. Besides these cases, constitutional and legislative acts that provide for the recognition of an explicit right to water have increased in number.¹ These practices further solidify the legal status of this right at the domestic level.

The multiple legal dimensions of the HR2W: Intersections between human rights law and international water law

The economic, social and cultural rights are still often considered as having a programmatic nature and lacking a coherent and precise content and are often wrongly considered as social policy issues without a legal standing (UN Office of the High Commissioner for Human Rights 1996, p. 2). This is partly because of the manner in which Article 2 is formulated regarding how states parties should approach the implementation of substantive rights. Such a view not only ignores the fundamental tenets of international human rights law that civil and political rights and economic, social and cultural rights are indivisible and interdependent (UNGA 1977) but also undermines the 'minimum core obligations' under the ICESCR. Regarding the latter, the CESCR indicated that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party' (CESCR 1990, para. 10). The fact that states parties are required to take steps to the maximum of their available resources with a view to achieving *progressively* the full realization of ICESCR rights, as the immediate 'full realization' of all the rights is materially impossible for most states due to the limits of available resources, does not deprive the legally binding nature of the convention. That is, states parties have the responsibility to implement and maintain the rights guaranteed in the convention as expeditiously and effectively as possible and avoid deliberate retrogressive measures (CESCR 1990, paras 2, 9). In relation to HR2W, states assume various obligations that are of immediate effect including making water available on a non-discriminatory basis, refrain from actively depriving the HR2W or withdrawing legal and other protection relating to the right.

The right has multiple dimensions – an individual right, a collective right (the right to development, to participation in cultural life, or to Indigenous people's rights) and an environmental right (Fantini 2020). This makes determining the scope and core content of the HR2W a delicate exercise (Cahill 2005, p. 389). Yet, defining these elements is vital for the effective implementation

of the right at the domestic and transboundary levels. The CESCR has specified the normative content of the right to water (Keller and Hefti 2022, p. 50). The right ‘entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements’ (CESCR 2003b, para. 2). This scope is relatively modest as it is framed primarily within the constraints of personal and domestic uses (Kiefer and Brolmann 2005, pp. 183, 199–202, Langford and Russell 2017, p. 21). Moreover, the CESCR demonstrated uses of water protected by other human rights, including water necessary to produce food (right to food), to ensure environmental hygiene (right to health) and to secure one’s livelihood (right to gain a living by work) (Langford and Russell 2017, p. 6).

Besides, states parties to the ICESCR have obligations toward third countries. Financial and technical resources should be made available to developing countries through bilateral or multilateral assistance in order to implement the right to water (CESCR 1990, para. 10, 2003b, para. 38). According to the ICESCR, ‘international assistance and co-operation’ is to be ensured in order to implement Covenant rights including the right to water (Articles 2 (1) and 23). The Committee’s General Comment No. 15 explicitly called for international cooperation: ‘[T]o comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries’ (CESCR 2003b, para. 31).

Moreover, although the UN General Assembly and Human Rights Council have recognized that the right to water should not be viewed by states as having impacts on the law of transboundary water resources, it is difficult to operate a separation between these two areas of international law. There can be cases where riparian states have ratified human rights agreements and freshwater agreements, which both contain the HR2W. Moreover, the Committee’s General Comment No. 15 does not make a distinction between waters that cross state boundaries and those that do not. It is argued that the minimum core obligations of the HR2W apply both to national and transboundary water resources.

Furthermore, there is an emerging international practice calling for the inclusion of HR2W in transboundary water agreements. For example, the Guidelines on the HR2W in Africa adopted by the African Commission on Human and Peoples’ Rights in 2020 encourage states to ‘explicitly recognise the right to water in transboundary water agreements’ and considers the right to water as ‘as one of the relevant factors that determine whether the use of the resource is equitable and reasonable’ (African Commission on Human and Peoples’ Rights 2020, para. 35).

The normative content of the right to water

As underscored by the CESCR, the right to water contains both freedoms (the right to maintain access to existing water supplies necessary for the right to water and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies) and entitlements (the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water) (CESCR 2003b, para. 10). The elements of the right to water must be adequate for human dignity, life and health, in accordance with articles 11 (1) and 12 of ICESCR, and the adequacy of water required for the right to water is framed under the broad three substantive standards – availability (sufficient quantity and continuous for personal and domestic uses), quality (safe and acceptable color, odor and taste) and

accessibility (physical, economic (affordable), non-discrimination and information) (CESCR 2003b, para. 12).

Availability

States parties to the ICESCR are required to ensure that the ‘water supply for each person must be sufficient and continuous for personal and domestic uses’, that is, the right to equal and non-discriminatory access to water (physical availability) for drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene – to sustain life and health (CESCR 2003b, para. 12). There is no specific amount of water set in law, but the World Health Organization guidelines specify the quantity of water that must be made available for each person and could serve as the basis for national water standards. This obligation applies to both domestic and transboundary water resources. For instance, the Niger Water Charter clearly affirms the fundamental human right to sufficient water for everyone in order to cover personal and domestic uses (Niger Basin Authority 2008, Article 1). These uses include water for drinking, personal sanitation, washing clothes, food preparation, personal and household hygiene. It should be noted that a deviation of an international watercourse that would deprive a local community of the quantity of water necessary to cover its personal and domestic uses would be not only against the HR2W but also the principle of equitable and reasonable use under customary international water law. This principle includes the duty to take into account the ‘social and economic needs of the watercourse States concerned’ and ‘the needs of the population dependent on the watercourse in each watercourse State’ (UNGA 1997, Article 6).

Quality

The right to water requires that the water used for personal and domestic uses must be *safe* (‘free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health’) and should be of an *acceptable* color, odor and taste (CESCR 2003b, para. 12). The water for personal and domestic uses must be safe, water facilities and services must be of sufficient quality and states must prevent, control and treat water-related diseases (polluted water resources may have an impact not only on the HR2W but also on the human right to health). Also, water facilities and services must be culturally appropriate and sensitive to gender and privacy requirements.

There are transboundary water agreements that emphasize the duty of riparian states to safeguard the human health of riparian communities. For example, the Niger Water Charter establishes that everyone has the right to safe water (Article 1 (11)), and the Senegal Water Charter considers that pollution also covers risks to human health (Article 1 (15)). The provisions of freshwater agreements regarding the prevention of pollution may contribute to the implementation of the right to water by riparian countries. For example, the UN Watercourses Convention under Article 21 provides that riparian countries must individually or jointly ‘prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including *harm to human health or safety*’. The obligation not to cause significant harm includes the prevention of negative impacts on human health. In this manner, the no-harm rule may indirectly contribute to the realization of the right to water ensuring the quality of water resources. Moreover, under the United Nations Economic Commission for Europe (UNECE) Water Convention, the term ‘transboundary impact’ includes any significant adverse impact on human health (UNECE 1992, Article 1 (2)).

Accessibility

The concept of accessibility covers various aspects: physical accessibility, economic accessibility, non-discrimination and information accessibility (CESCR 2003b, para. 12). This means that water must be physically accessible – within safe physical reach for all in immediate vicinity, physical security must not be threatened during access, and affordable for all, including the most vulnerable groups. Water should also be economically accessible, that is, water services must be affordable for all, and both direct and indirect costs must not threaten the realization of other covenant rights or basic needs. The non-discrimination component indicates that access to all, including the most vulnerable or marginalized, in law and in fact must be ensured. Finally, information accessibility relates to the right to seek, receive and impart information concerning water issues and participate in decision-making processes concerning water.

Some freshwater agreements include the principle of non-discrimination. For example, Article 32 of the UN Watercourses Convention ensures equality of access to remedies which means that where domestic remedies are already available, these remedies should be used by both national and transboundary claimants. Article 32 sets out the basic principle that watercourse states are to grant access to their judicial and other procedures without discrimination on the basis of nationality. Another aspect of the concept of accessibility included in freshwater agreements is related to public information. The main aim of Article 16 of the UNECE Water Convention is to raise the citizens' awareness of – the conditions of transboundary waters; the measures taken or planned to be taken to prevent, control and reduce transboundary impact and the effectiveness of those measures. No similar provision on access to information is provided for in the UN Watercourses Convention, although it could be argued that public participation is an important means by which states sharing transboundary waters fulfill their commitment under the Convention to take 'all appropriate measures' to prevent significant harm. In this context, the 2012 Dniester Treaty which stipulates that 'each Contracting Party shall ... ensure public access to information on the status of the Dniester River Basin and public participation in decision-making related to protection and sustainable development of the Dniester basin, as well as projects likely to have significant impact on the status of water and other natural resources and ecosystems' (Dniester Commission 2012, Article 21).

The nature of obligations under the HR2W

As stated above, states parties have a continuing duty to move as expeditiously and effectively as possible toward the full realization of the right to water. Also, states are obligated to give an immediate effect to the minimum core obligations in relation to the right to water, such as the guarantee that the right will be exercised without discrimination of any kind (Article 2 (2) of ICESCR). This section reflects on the general legal obligations of states and the minimum core obligations pertaining to the right to water.

General legal obligations

Like any other human right, the HR2W imposes three types of obligations on states: the obligations to respect, obligations to protect and obligations to fulfill (Salman 2012). The obligation to respect requires states to refrain from interfering directly or indirectly with the enjoyment of the right to water. For instance, states should refrain from arbitrarily interfering with customary or existing water allocation, denying or limiting equal access to adequate water, unlawfully diminishing or

polluting water or destroying water services and infrastructure (CESCR 2003b, para. 21). The obligations to protect refer to preventing third parties (e.g., individuals, groups, corporations and other entities) from interfering in any way with the enjoyment of the right to water. To that end, states should take the necessary and effective legislative and other measures to ensure that third parties, including when they operate or control water supply services, do not interfere with equal access to adequate water, affordability, and inequitably extracting from water resources (CESCR 2003b, paras 23–24). And, the obligations to fulfill the right require states to facilitate, promote and provide the right and take positive measures to assist individuals and communities to enjoy the right without discrimination and with equitable distribution (CESCR 2003b, para. 25). According to the CESCR, states should also ‘adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations’ (CESCR 2003b, para. 28).

The minimum core obligations

As indicated earlier, it is ‘incumbent’ upon every state party to ensure, at the very least, the minimum essential levels of each of the rights included in the ICESCR. In this regard, the CESCR has specified the minimum core obligations relating to the right to water that are of immediate effect. Among others, states should ensure access to the minimum essential amount of water sufficient and safe for personal and domestic uses to prevent disease, ensure the right of access to water and water facilities and services on a non-discriminatory basis, adopt and implement a national water strategy and plan of action addressing the whole population, monitor the extent of the (non) realization of the right, adopt relatively low-cost targeted water programs to protect vulnerable and marginalized groups and take measures to prevent, treat and control diseases linked to water (CESCR 2003b, para. 37).

The CESCR underscored that states cannot justify their non-compliance with these core obligations, which are non-derogable (one whose infringement is not justified under any circumstances) (CESCR 2003b, para. 40). This assertion makes it clear that there is a minimum standard that must be achieved by states parties and that states cannot attribute failure to meet their minimum core obligations to a lack of availability. The CESCR further stressed that states parties, and other actors in a position to assist, need to provide international assistance and cooperation, especially economic and technical, which enables developing countries to fulfill these minimum core obligations (CESCR 2003b, para. 38).

The HR2W as a means to reinforce the diversity of actors involved in negotiations and implementation of treaties on transboundary waters

The right to water confers special protection to groups who are more exposed to the risks of the lack of water. These groups include women, children, minority groups, Indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners, detainees and persons with disabilities. The right of Indigenous peoples to participate in decision-making, including in water resources, is enshrined in the 2007 UN Declaration on the Rights of Indigenous Peoples, which requires states to consult and cooperate in good faith with Indigenous peoples to obtain ‘free, prior and informed consent’ before adopting and implementing activities that may affect them.

The right to water requires that the formulation and implementation of national water strategies and plans of action should respect the principles of non-discrimination and public participation.

Individuals and groups should participate in decision-making processes that may affect their exercise of the right to water. Moreover, they should also be given full and equal access to information concerning water held by public authorities or third parties (CESCR 2003b, para. 48). Some freshwater agreements contain provisions that are relevant to ensure diversity in the stakeholders participating in the management of transboundary water resources. For example, the Niger Water Charter requires riparian parties to define the procedures for the participation of water users in decision-making processes regarding basin-water resources management (Niger Basin Authority 2008, Articles 2, 26). The public should be informed about a project at the beginning of a procedure, and the results of the public participation process should be duly taken into account.

The extraterritoriality of the HR2W

The HR2W applies first and foremost in the relationship between individuals and states. Human rights law obligations are owed by states to the individuals in their territory and under their jurisdiction. However, the obligations under human rights agreements may also arise in extraterritorial contexts. In the section below, we highlight the key features of the HR2W in a transboundary context and some gray areas.

The human rights obligations, including those related to water, that are enshrined in ICESCR and CRC apply not only to individuals within the territory of a state but also to individuals who are outside a state's territory but under its effective control. This was confirmed by the International Court of Justice (ICJ) in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (International Court of Justice 2004, p. 136, para. 111). Thus, a state should ensure that the right to water is protected and respected toward the individuals who are outside its territory but under its effective control.

There could also be a transboundary dimension related to the right to water when this right is included in agreements on transboundary water resources. This is the case of the Senegal, Niger and Lake Chad Basin Charters as well as the Dniester agreement. This is especially important since transboundary water resources, including rivers, lakes and aquifers, supply drinking water to communities living in different states. The uses of water by one state may have a direct impact on the quantity and quality of water available to the individuals and local communities of other riparian states. The question is therefore whether a state is bound not only by the obligation to ensure access to safe drinking water supplies to individuals and communities living in its territory and under its jurisdiction but also to take into account the right to water of the communities living in other riparian states. If that is the case, a state would have two kinds of obligations: vertical obligations toward its population and horizontal obligations toward other states sharing a transboundary water resource in relation to the water demands of their population (Leb 2012, p. 640).

A first key feature of the integration of the HR2W in transboundary water agreements is the establishment of legal standards in the relationship between riparian states concerning the right to water (Bluemel 2004, pp. 972–977, Salman and McInerney-Lankford 2004, pp. 65–83, UNHRC 2011b, para. 7, Tiboris 2019, pp. 920–921). This recognition may empower vulnerable and marginalized groups to combat exclusion and discrimination in states sharing a water resource. Second, the entitlement to safe drinking water supplies implies a change in the dynamic of negotiations and allocation choices (Bluemel 2004). This is the case of the Water Charters in West Africa. These treaties, recognizing expressly the right to water, go beyond the protection of 'vital human needs' through general principles of international water law. These instruments establish positive obligations to provide water for the satisfaction of vital human needs in a transboundary

context and also cover specific elements of the HR2W. In particular, the Niger Basin Charter affirms that the right to water is a principle guiding the cooperation between riparian states in managing the shared resources (Preamble). The right is defined as the fundamental right to sufficient physically accessible water at affordable cost and of a quality that is acceptable for personal and domestic use by everyone (Article 1). Similarly, the Senegal Water Charter recognizes the enjoyment of the right to water as an explicit objective of any repartition of the water of the river. Furthermore, the Water Charter for the Lake Chad Basin considers the right to water as one of the factors to be taken into account in implementing the obligation of equitable and sustainable use of the Lake Chad Basin (Article 13 (o)). In addition, a specific provision in this Charter ensures that states parties recognize, for the benefit of populations, the right to water and sanitation as a fundamental right of the human person and necessary to ensure its dignity. This article also adds that states parties to the Charter take the normative, institutional and operational measures necessary to ensure the effective implementation of this right (Article 72). In another region of the world, the agreement on the Dniester river between Ukraine and Moldova recognizes the right to water as a key principle of cooperation between the two countries (Article 5 (2)). In addition to these aspects, which are specific to the Water Charters, Article 2 of the ICESCR requires all member states ‘to take steps, individually and through international assistance and cooperation, especially economic and technical’ for the full realization of the Convention rights. Hence, the recognition of the HR2W does trigger this aspect of international cooperation and development assistance (Matthews 2017, p. 8).

Generally, such transboundary water agreements are becoming a concrete tool for ensuring the effectiveness of the HR2W both at the domestic and transboundary levels. The right to water is viewed by the riparian states as an area of cooperation and not as an instrument of potential tensions between the various uses of a transboundary water resource. The basin organizations, such as the *Organisation pour la mise en valeur du fleuve Sénégal*, the Niger Basin Authority, the Lake Chad Basin Commission and the Dniester Commission monitor the implementation of this right, providing additional institutional protection.

Challenges in the effective implementation of the HR2W

Despite the progress observed so far, there remain considerable challenges to ensure the effective implementation of the HR2W. The challenges could be seen at two levels – domestic and international. At the international level, the first point that should be mentioned relates to the nature of the obligation – ‘progressive realization’ and ‘core obligation’ debate (Salman 2012, Villanueva and García 2016, pp. 343–345). In the CESCR’s view, there are core obligations related to the right to water, requiring immediate implementation (CESCR 2003b, para. 37). The other issue relates to the vertical nature of human rights obligations (human rights protect individuals against their government, not against actions of governments of other countries per se) (Russell and McCaffrey 2017, p. 1). This has significant implications on the potential obligations of states in relation to the rights of individuals living in other states where conduct attributable to it affected the HR2W of individuals. Under General Comment No. 15, it is indicated that ‘[a]ny activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction’ and that they ‘should refrain at all times from imposing embargoes or similar measures, that prevent the supply of water ... for securing the right to water’ (CESCR 2003b, paras 31–32). Though not yet entirely accepted, some argued that, at least concerning the duty to respect and protect the HR2W, there is a strong case for the existence of an obligation that has a transboundary dimension (Russell and McCaffrey 2017).

The observable challenges at the domestic level include lack of sufficient human and financial resources; lack of appropriate laws, policies and strategies to institutionalize and implement the HR2W; lack of a sustainable and human rights-based approach to water management; insufficient technical capacity; corrupted system and challenges relating to water scarcity compounded by climate change and steady population growth (Salman 2012, Meier *et al.* 2013, p. 14, Nanda 2018, p. 31, UNHRC 2021, para. 6). It is also mentioned that challenges relating to competing demands of the different uses and users and how to guarantee access for all adversely impact realizing the HR2W (Salman 2012, pp. 44–46).

Furthermore, at the conceptual level, there is a claim that the introduction of ‘rights’ or ‘human rights’ discourse in the management and protection of transboundary water resources might not deliver the desired outcomes and could potentially derail the efforts for water justice (Donoho 2012, p. 91). First, the scope of the HR2W seems limited to personal and domestic uses, and the recognition also opens Pandora’s box about how to address such uses vis-à-vis other uses, particularly when a transboundary dimension is involved. For instance, in relation to water use from transboundary sources, does the HR2W possibly require upstream countries to address the human rights claims from residents in downstream countries (McCaffrey 1992, p. 24, Donoho 2012, pp. 107–108)?² Second, ensuring access to safe drinking water requires empowering and supporting public authorities and local actors and the ‘rights’ approach might not suit the cause, particularly in situations where enforcing rights is not a priority (McCaffrey and Neville 2009, p. 679, Miroso and Harris 2012, pp. 923, 934). Third, introducing the rights approach might promote inappropriate governance, that is, it might secure increased power to specific groups at the expense of others and make negotiations on water sharing and management more delicate.

Conclusion

The objective of this chapter was to examine the evolution of the HR2W, its ongoing processes of crystallization and its possible effects on transboundary water cooperation. Despite the enormous progress made in recognizing and defining the scope and nature of HR2W, there is still a long way to go in terms of ensuring universal access to water services as envisioned in the SDG Goal 6 (Spijkers 2020, p. 18, Tignino *et al.* 2022). Today, the HR2W is already recognized as a distinct human right; nevertheless, as we saw, its nature and scope continue to get gradually crystallized. Such recognition has positive impacts on the realization of access to safe drinking water, obliges states to respect, protect and fulfill the right and entitles individuals to claim such a right. In addition, the recognition of the right could also open opportunities for international cooperation and assistance. The examples provided in this chapter illustrate how HR2W can contribute to structure transboundary water cooperation and become a guiding principle at the basin level. In the cases of the Niger, Senegal and Lake Chad basins, the Water Charters take into consideration the HR2W to ensure inclusion and avoid discrimination, to frame how allocation decisions are made and to define equitable and sustainable use of water.

Our contribution opens up new research avenues on how HR2W can contribute to transboundary water management. It notably demonstrates the added value of HR2W for structuring up-front the way countries collaborate at the transboundary level. In this sense, HR2W can contribute as a guiding principle and prerequisite for developments being implemented at the basin level. This being said, the focus on the right should be carefully implemented. In fact, one should also consider the potential impacts that such an entry point might have on existing power relations. Decisions related to HR2W will redefine priorities at the basin level. It will empower certain groups with new capacities, reshuffling the existing balance of power. Such evolution will have to

be accommodated with possible needed readjustment regarding water sharing and management. As a result, legal recognition alone is certainly not sufficient for its realization. States, international organizations, regional organizations such as river basin commissions and stakeholders should strive together to address these challenges that might impact the effective institutionalization and operationalization of the HR2W and ensure that everyone enjoys it, within and across administrative borders.

Notes

- 1 See The Constitution of the Republic of South Africa, as last amended by Amendment Act No. 3 of 2003, Article 27; The Constitution of the Republic of Kenya 2010, Article 43 (1) (d) and Uruguay's Constitution of 1966, Reinstated in 1985, with Amendments through 2004, Article 47.
- 2 McCaffrey argues such duty exists in international law because 'human life and even health should take precedence over economic development'.

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