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A TENTATIVE DRAFT TREATY ON THE HUMAN RIGHT
TO WATER AND SANITATION

In 2014 the non-governmental organization *The Italian Committee for Global Water Contract* entrusted the Department of Law of the University of Milano-Bicocca with the academic exercise of preparing a tentative draft treaty on the human right to water and sanitation. The task was accomplished, on behalf of the Department, by Gabriella Citroni and Tullio Scovazzi.

The draft was circulated to a number of governments and received by them different reactions, ranging from constructive comments to negative attitude and indifference. It is reproduced hereunder in the English text (versions in French and Spanish are also available)³.

DRAFT OF A
SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
ON THE RIGHT TO WATER AND SANITATION
Text and Commentary

INTRODUCTION TO THE DRAFT

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³ After the completion of the draft, the United Nations General Assembly adopted other relevant instruments, including Resolution 70/169 of 17 December 2015 and Resolution 72/178 of 19 December 2017, both on *The Human Rights to Safe Drinking Water and Sanitation*. The Human Rights Council adopted Resolutions 33/10 of 29 September 2016 and 39/8 of 27 September 2018, also on *The Human Rights to Safe Drinking Water and Sanitation*. The Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation presented other reports, relating respectively to *Different levels and types of services and the human rights to water and sanitation* (U.N. doc. A/70/203 of 27 July 2015), *Affordability of water and sanitation services* (UN doc. A/HRC/30/39 of 5 August 2015), *Gender equality in the realization of the human rights to water and sanitation* (UN doc. A/HRC/33/49 of 27 July 2016), *Development cooperation and the realization of the human rights to water and sanitation* (UN doc. A/71/302 of 5 August 2016), *Development cooperation* (UN doc. A/72/127 of 13 July 2017), *Principle of accountability* (UN doc. A/73/162 of 16 July 2018), *Forcibly displaced persons* (UN doc. A/HRC/39/55 of 3 August 2018). Through Resolution 71/222 of 21 December 2016, the General Assembly proclaimed 2018-2028 the International Decade for Action 'Water for Sustainable Development', starting on World Water Day, 22 March 2018.

The draft aims at filling an evident gap in international human rights law. It is intended to be a possible basis for an international treaty of binding character and not a declaration of principles, good practices or policies. It is structured as a second Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. This would allow taking advantage of the competences already entrusted to the Committee on Economic, Social and Cultural Rights. However, subject to some inevitable modifications, the draft could become also a self-standing treaty.

While avoiding commitments that are not likely to be accepted by sovereign States, the draft is based on an advanced level of protection of the human right to water and sanitation under both the substantive and procedural levels (see, for example, Arts. 2, para. 5, 3, 4, 8, 14, 15, 21 and 23). Nevertheless, taking into account the difficulty that some States, in particular developing States, may face in implementing the human right to water and sanitation, the draft text envisages a progressive implementation of the measures to ensure such right (see Art. 7).

In the drafting a number of instruments relevant for the human right to water and sanitation have been taken into account as sources of inspiration or references. They are the following:

International treaties:

- Four Geneva Conventions of 12 August 1949 (Art. 3 common and Arts. 20 and 46 of the Third Convention);
- International Covenant on Economic, Social and Cultural Rights (New York, 1966);
- African Convention on the Conservation of Nature and Natural Resources (Algiers, 1968, Art. VII);
- Additional Protocol I to the Four Geneva Conventions (1977, Arts. 54 and 56);
- Additional Protocol II to the Four Geneva Conventions (1977, Art. 54);
- Convention on the Elimination of All Forms of Discrimination against Women (New York, 1979, Art. 14, para. 2, h);
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, 1988, Art. 11);
- Convention on the Rights of the Child (New York, 1989, Art. 24, para. 2);
- African Charter on the Right and Welfare of the Child (Addis Ababa, 1990, Art. 14);
- Convention to Combat Desertification (Paris, 1994);
- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 1998);
- Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 1999);
- Convention on the Rights of Persons with Disabilities (New York, 2006, Art. 28);
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (New York, 2008).

International non-binding instruments, reports, guidelines:

- General Comment No. 15 of the Committee on Economic, Social and Cultural Rights - The Right to Water, 2002;
- Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation, prepared by the Special Rapporteur Mr. El Hadji Guissé and presented to the Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2005/25 of 11 July 2005;
- Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation under International Human Rights Instruments, UN doc. A/HRC/6/3 of 16 August 2007;

- UN-Habitat, Centre on Housing Rights and Evictions (COHRE), American Association for the Advancement of Science, Swiss Agency for Development and Cooperation, *Manual on the Right to Water and Sanitation*, 2007;
 - UN-Habitat, Swiss Agency for Development and Cooperation, COHRE, WaterAid, *Sanitation: A Human Rights Imperative*, 2008;
 - Council of Europe, Parliamentary Assembly, Resolution No. 1693/2009 of 2 October 2009;
 - United Nations Education, Scientific and Cultural Organization, *Outcome of the International Experts' Meeting on the Right to Water*, 2009;
 - General Assembly, United Nations, Resolution 64/292, *The Human Right to Water and Sanitation*, 28 July 2010;
 - Human Rights Council, United Nations, Resolution 15/9, *Human Rights and Access to Safe Drinking Water and Sanitation*, 30 September 2010;
 - Office of the High Commissioner for Human Rights, UN-HABITAT, and World Health Organization (WHO), *The Right to Water*, Fact Sheet No. 35, 2010;
 - Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Report on Human Rights Obligations Related to Non-State Service Provision in Water and Sanitation*, UN doc. A/HRC/15/31 of 29 June 2010;
 - Council of Europe, Parliamentary Assembly, Resolution No. 1809/2011 of 15 April 2011;
 - Human Rights Council, United Nations, Resolution 18/1, *The Human Right to Safe Drinking Water*, 28 September 2011;
 - Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Report on Financing for the Realization of the Rights to Water and Sanitation*, UN doc. A/66/255 of 3 August 2011;
 - WHO, *Guidelines for Drinking Water Quality*, 2011;
 - Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *On the Right Track. Good Practices in Realising the Rights to Water and Sanitation*, 2012;
 - Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Report on Sustainability and Non-Retrogression in the Realisation of the Rights to Water and Sanitation*, UN Doc. A/HRC/24/44 of 11 July 2013;
 - *Outcome Document* issued by the Open Working Group on Sustainable Development Goals, July 2014.
- Domestic Legislation or Draft Legislation:*
- Ecuador, *Proyecto de Ley orgánica sobre recursos hídricos, uso y aprovechamiento del agua*, June 2014;
 - European Union, Council Directive 98/83/EC of 3 November 1998 on *The Quality of Water Intended for Human Consumption*;
 - European Union, Directive of the Parliament and the Council 2000/60/EC of 23 October 2000, *Establishing a Framework for the Community Action on the Field of Water Policy*.

The States Parties to the present Protocol,

Considering that, in accordance with the principles of the Charter of the United Nations, recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Noting that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set

forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms,

Recalling that each State Party to the International Covenant on Economic, Social and Cultural Rights undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures,

Aware that water is the source of life,

Considering that the right to drinking water and sanitation is unquestionably a human right, is inextricably related to the right to the highest attainable standard of physical and mental health, as well as to the right to life and human dignity, and constitutes a prerequisite for the realization of other human rights,

Stressing that fresh and ground-waters and water resources in general constitute both a public good and a common concern and must be used in an equitable manner for the common benefit and managed in cooperation with the users in a spirit of solidarity,

Recalling General Assembly Resolutions 54/175 of 17 December 1999, 58/271 of 23 December 2003, and 64/292 of 28 July 2010, and emphasising that the latter recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights;

Recalling that the Action Plan adopted at the United Nations Water Conference of 1977, as well as the guiding principles expounded by the Conferences on water and sanitation, held at Dublin, Marrakesh, Paris and Rio de Janeiro respectively in 1992, 1997, 2005 and 2012, and in the Declaration on the Right to Development adopted by the General Assembly Resolution 41/128 of 4 December 1986,

Recalling in particular Articles 11 and 12 of the Covenant, Article 14, paragraph 2 (h), of the Convention on the Elimination of All Forms of Discrimination against Women, Article 24, paragraph 2 (c) and (e), of the Convention on the Rights of the Child, and Article 28, paragraph 2, of the Convention on the Rights of Persons with Disabilities,

Noting that in its General Comment No. 15, the Committee on Economic, Social and Cultural Rights stated that the human right to water is indispensable for leading a life in human dignity and it is a prerequisite for the realization of other human rights,

Recalling the obligation to ensure the right to water also in times of war as confirmed by the relevant provisions of the Four Geneva Conventions of 12 August 1949 and their 1977 Additional Protocols I and II,

Taking note of the draft guidelines for the realization of the right to drinking water and sanitation adopted in 2005 by the Sub-Commission on the Promotion and Protection of Human Rights,

Noting regional instruments promoting the further realization of human rights obligations related to access to safe drinking water and sanitation, including the Protocol on Water and Health, adopted by the Economic Commission for Europe in 1999, the European Charter on Water Resources, adopted by the Council of Europe in 2001, the Abuja Declaration, adopted at the first Africa-South America summit in 2006, the message from Beppu, adopted at the first Asian-Pacific Water Summit in 2007, the Delhi Declaration, adopted at the third South Asian Conference on Sanitation in 2008, and the Sharm el-Sheikh Final Document, adopted at the Fifteenth Summit Conference of Heads of State and Government of the Movement of Non-Aligned Countries in 2009,

Deeply concerned that more than 880 million people lack access to improved water sources as defined by the World Health Organization and the United Nations Children’s Found in their 2010 Joint Monitoring Programme report, that over 2.6 billion people do not have access to basic sanitation, which is the primary cause of water contamination and diseases linked to water, and that approximately 1.5 million children under 5 years of age die and 443 million school days are lost every year as a result of water and sanitation-related diseases, as reported in 2013 by the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation,

Recalling Human Rights Council Resolutions 7/22 of 28 March 2008, 12/8 of 1 October 2009, and, in particular, 15/9 of 30 September 2010, which reaffirms the fact that international human rights law instruments “entail obligations for States parties in relation to access to safe drinking water and sanitation” and that “States have the primary responsibility to ensure the full realization of all human rights, and that the delegation of the delivery of safe drinking water and/or sanitation services to a third party does not exempt the State from its human rights obligations”;

Taking note of the Outcome Document adopted in July 2014 by the Open Working Group on Sustainable Development Goals established after Rio+20, which includes the goal to ensure availability and sustainable management of water and sanitation for all,

Have agreed as follows:

COMMENT

To meet, as far as possible, the usual style of international human rights law treaties, the preamble should remain as synthetic as possible and avoid the mere reproduction of lengthy excerpts from other documents, such as reports and resolutions. In these cases, cross-reference is sufficient.

The preambular paragraphs mainly reproduce those contained in the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation, in Human Rights Council Resolution 15/9 and in General Assembly Resolution 64/292.

PART I - DEFINITIONS

Article 1 - Definitions

For the purposes of this Protocol:

1. “Drinking water” means water which is used, or intended to be available for use, by humans for drinking, cooking, food preparation, personal hygiene or similar purposes.

2. “Sanitation” means the collection, transport, treatment and disposal or reuse of human excreta or domestic waste water, whether through collective systems or by installations serving a single household or undertaking.

3. “Collective system” means, whether provided by a body in the public sector, by an undertaking in the private sector, by a partnership between the two sectors or by a local community:

(a) A system for the supply of drinking water to a number of households or undertakings; or

(b) A system for the provision of sanitation which serves a number of households or undertakings and, where appropriate, also provides for the collection, transport, treatment and disposal or reuse of industrial waste water.

4. “Water-related disease” means any significant adverse effects on human health, such as death, disability, illness or disorders, caused directly or indirectly by the condition, or changes in the quantity or quality, of any waters.

5. “Water-management plan” means a plan for the development, management, protection or use of the water within a territorial area or groundwater aquifer, including the protection of the associated ecosystems.

6. “Covenant” means the International Covenant on Economic, Social and Cultural Rights.

7. “Committee” means the Committee on Economic, Social and Cultural Rights.

COMMENT

The definitions here reproduced are based on those given by the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

PART II – GENERAL PRINCIPLES AND SUBSTANTIVE PROVISIONS

Article 2 – General Principles on the Human Right to Water and Sanitation

1. Everyone has the right to water for personal and domestic uses as provided for in this Protocol.

2. Everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment as provided for in this Protocol.

3. The human right to water and sanitation shall be exercised in a manner that is sustainable for present and future generations.

4. States Parties shall take all necessary measures to promote hygienic use of water and sanitation services, including through collective systems.

5. States Parties shall refrain from taking deliberately retrogressive measures in relation to the right to water and sanitation.

6. Water and sanitation facilities shall be designed to take account of the needs of women, children, and other vulnerable individuals and groups.

7. States Parties undertake to guarantee that the rights enunciated in this Protocol will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

8. No one shall be denied access to water and sanitation because of his or her housing or land status. Informal human settlements shall be upgraded through the provision of water and sanitation services and through assistance with the construction of their own collective systems and water and sanitation facilities.

9. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for violations of the right to water and sanitation for personal and domestic uses and the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.

COMMENT

This provision represents a major innovation in international human rights treaty law, as it establishes an autonomous human right to water and sanitation. The provision is mainly based on the wording of Art. 1 of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

Paras. 1 and 2 set forth the human right to water and sanitation. The contents and terms of this human right are spelled out in the subsequent provisions.

Para. 3 introduces the principle of sustainability, that is further developed in Art. 5, and is mainly based on the 2013 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation on *Sustainability and Non-Retrogression in the Realisation of the Rights to Water and Sanitation*.

Para. 4 is based on Art. 5, para. 2, of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

The prohibition of retrogressive measures, contained in para. 5, is taken from the 2013 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation on *Sustainability and Non-Retrogression in the Realisation of the Rights to Water and Sanitation*. As indicated in this report, “a retrogressive measure is one that, directly or indirectly, leads to backward steps in the enjoyment of human rights. Examples include raising the price of services disproportionately so that poor people can no longer afford water and sanitation, and letting infrastructure deteriorate due to a lack of investment in operation and maintenance”. This is further supported by the 2011 *Report on Financing for the Realization of the Rights to Water and Sanitation* of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (para. 13).

Para. 6 is based on Art. 5, para. 3, of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

Para. 7 is the classical non-discriminatory clause, contained in all international human rights treaties. In particular here the wording refers to Art. 3, para.1, of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation. It also takes into account the wording of General Comment No. 15 (paras. 13-16).

Para. 8 is based on Art. 5.4 of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

Para. 9 reproduces the classic non-derogatory clause contained in international human rights treaties. It is essential to ensure that the right to water and sanitation is recognized as a non-derogable right, including in case of war.

Article 3 – Quantity

1. Everyone has the right to a minimum quantity of clean water free of charge for personal and domestic uses, corresponding to between 50 and 100 litres per person per day.

2. Beyond such minimum quantity and up to 250 litres per person per day, water for personal and domestic uses may be subjected to a system of progressive pricing, provided that it is supplied at a price that everyone can afford without compromising his or her ability to acquire other basic goods or services.

3. In order to prevent wastes and to promote a sustainable use, States Parties may subject to sanctions consumption of water beyond 250 litres per person per day.

COMMENT

This provision is a substantive innovation, insofar as it establishes a minimum quantity of free drinking water per person, per day. The minimum quantity of water for personal and domestic uses that must be granted to each person per day (between 50 and 100 litres) is based on the 2011 WHO Guidelines.

It is further specified that, beyond the minimum quantity and up to 250 litres per day, per person, progressive pricing for water can be introduced.

Para. 3 aims at countering water-waste and at promoting sustainable use, imposing obligations in this sense to States Parties and introduces the ratio of 250 litres per day per person as over-consumption to be sanctioned.

Article 4 - Access and Quality

Everyone has the right to a water and sanitation service that is:

(a) Physically accessible within no more than 1,000 metres, in case of water, and no more than 500 metres, in case of sanitation, from the household, educational institution, workplace or health institution;

(b) Culturally acceptable in quality, that is of an acceptable colour, odour and taste, and free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health;

(c) In a location where physical security can be guaranteed.

COMMENT

This provision is inspired by Art. 1, para. 3, of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

It is further provided that “immediate vicinity” of the water source to the household means “within 1,000 metres”. This measure is based on the 2011 WHO Guidelines. The formula “within no more than 500 metres” referred to access to sanitation is a relevant innovation.

This provision also takes into account the wording of General Comment No. 15 (para. 12).

Article 5 – Adoption of Domestic Legislation and Plans of Action

1. In order to ensure the human right to water and sanitation, States Parties shall:

(a) adopt the necessary legislative measures to formally recognize and implement the right to water and sanitation;

(b) adopt and implement public water-management plans for the full realization of the right to water and sanitation which establish specific targets, indicators and time frames and identify the necessary national and international resources;

(c) integrate water and sanitation in plans adopted for other purposes, as appropriate;

(d) refrain, and ensure that private persons and organizations refrain from interfering with the enjoyment of the right to water and sanitation, unless such interference is permitted by law and includes appropriate procedural protection;

(e) establish a regulatory system for public or private water and sanitation service providers that requires them to provide physical, affordable and equal access to safe, acceptable and sufficient water and to appropriate sanitation and includes mechanisms to ensure genuine public participation, independent monitoring and compliance with regulations;

(f) carry out human rights impact assessments before and throughout the process of service provision, building these assessments into the process of deciding on the means of service provision as well as a monitoring provision to determine the actual and potential impact on the realization of the rights to water and sanitation;

(g) adopt the adequate legislative measures to ensure that service providers are also bound to carry out human rights impact assessments; and

(h) promote and strengthen the establishment of public or community-based services for the provision of water and sanitation.

2. No one whose access to water and sanitation may be legally curtailed after the appropriate procedures have been followed shall be deprived of the minimum essential amount of water or of minimum access to basic sanitation services as provided for in Article 3, paragraph 1.

COMMENT

This provision takes into account the wording of General Comment No. 15 (paras. 26-28, 37 and 46-52).

The 2010 report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation on *Human Rights Obligations Related to Non-State Service Provision in Water and Sanitation* (para. 63, h) has also been used as a reference to draft this provision.

Article 6 – Measures to Ensure the Right to Water and Sanitation

1. States Parties shall ensure that everyone has access to the amount of safe water referred to under Article 3, including by adopting and implementing integrated water-management

plans and water efficiency plans, combating the depletion of water resources due to unsustainable extraction, diversion and damming, reducing water wastage during distribution and establishing mechanisms to respond to emergency situations.

2. States Parties shall adopt measures to prevent over-consumption and promote efficient water use, such as public education, dissemination of appropriate conservation technologies and, as necessary, restrictions on water use beyond an acceptable consumption threshold, including through the imposition of charges and taxes.

3. States Parties shall prevent loss of water in collective systems that exceeds the ratio of 20% of water effectively available in such systems.

4. The priority in water distribution shall be for essential personal and domestic uses for all, rather than for industrial, agricultural, recreational or other purposes. In order to realize the right to adequate nutrition and the right to earn a living through work, marginalized or disadvantaged farmers and other vulnerable groups should be given priority in access to water resources for their basic needs.

COMMENT

The main source of inspiration for this provision is Art. 4 of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

Para. 3 of this provision introduces a substantial innovation by requiring States Parties to prevent the loss of water in collective systems that exceeds the ration of 20% of water effectively available in such systems. This provision aims at fostering effective and responsible use of water supplies.

Article 7 – Progressive Implementation of the Measures to Ensure the Right to Water and Sanitation and Sustainability

1. States Parties cannot justify neglect of their obligations related to right to water and sanitation based on assertions that they lack the necessary funds or human resources.

2. States Parties shall progressively ensure that everyone has access to water and sanitation services and that these services are equitably distributed across the country. Where available resources are not sufficient to guarantee the delivery of high-quality services, States Parties shall invest in infrastructure that give priority to the needs of those without basic access, normally through low-cost services that can be upgraded, rather than through expensive services that would only benefit a small section of the population.

3. The progressive implementation of the right to water and sanitation shall in no circumstances be interpreted as implying that States Parties have the right to delay indefinitely measures to ensure the full realization of all rights recognized in the Protocol. States Parties shall move as expeditiously and effectively as possible towards the goal of full realization, using the maximum available resources.

4. The progressive realization of the right to water and sanitation shall be sustainable, ensuring that the right can be realized for present and future generations.

5. Even where resources are tightly constrained, States Parties must adopt targeted programmes aimed at those most at risk.

COMMENT

The notion of progressive implementation of the measures to ensure the right to water and sanitation is inspired by Art. 2, para. 1, of the International Covenant on Economic, Social and Cultural Rights. The principle of progressive implementation is contained also in Arts 2, para. 1, and 5, para. 1, of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

The notion of sustainability in relation to progressive implementation is taken from the 2013 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation on *Sustainability and Non-Retrogression in the Realisation of the Rights to Water and Sanitation*.

The impossibility to invoke the lack of resources to implement the right to water and sanitation is inspired by the practice and jurisprudence of the Committee on Economic, Social and Cultural Rights⁴ and has been reaffirmed, among others, in the 2011 *Report on Financing for the Realization of the Rights to Water and Sanitation* of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (para. 14).

The provision also takes into account the wording of General Comment No. 15 (paras. 11, 17-19).

Article 8 – Special Measures for Vulnerable Groups

1. States Parties shall give particular attention to the needs of individuals or groups who are vulnerable or who have traditionally faced difficulties in exercising their right to water and sanitation, including women, children, the elderly, prisoners and detainees, indigenous peoples, persons living in rural and deprived urban areas, nomadic and traveller communities, refugees, asylum-seekers, internally displaced persons, migrant workers, as well as other groups facing difficulties with gaining access to water.

2. States Parties shall give priority to providing water and sanitation services to institutions serving vulnerable groups, such as schools, hospitals, prisons and refugee camps.

3. States Parties shall enact and implement legislation to protect access by persons to traditional water sources in rural areas.

COMMENT

The wording of this provision is based on Arts. 3, para. 2, to 3, para. 4, of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

The provision also takes into account the wording of General Comment No. 15 (paras. 7 and 16).

⁴ See, among others, *Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3* (1990), para. 1; *General Comment No. 4* (1991), para. 8; *General Comment No. 9* (1998), para. 10; *General Comment No. 13* (1999), paras. 31 and 43; *General Comment No. 14* (2002), para. 30; *General Comment No. 15* (2002), paras. 17 and 37; *General Comment No. 16* (2005), paras. 16, 32 and 40; *General Comment No. 17* (2005), paras. 25 and 39; *General Comment No. 18* (2006), paras. 19 and 33; *General Comment No. 19* (2008), para. 40; *General Comment No. 20* (2009), para. 7; and *General Comment No. 21* (2009), paras. 25, 44, 55, 66 and 67.

Article 9 – Obligation to Refrain from Interferences

1. States Parties shall refrain from unduly interfering directly or indirectly with the enjoyment of the right to water and sanitation.

2. In particular, States Parties shall refrain from:

(a) engaging in any practice or activity that denies or limits equal access to adequate water;

(b) arbitrarily interfering with customary or traditional arrangements for water allocation;

(c) unlawfully diminishing or polluting water, including through waste from State-owned facilities or through use and testing of weapons;

(d) destroying, damaging or limiting access to water services and infrastructure, including during armed conflicts;

(e) issuing concessions for the exploitation of natural or mineral springs, without ensuring the proper restrictions and controls.

3. States Parties shall discourage and subject to environmental impact assessment practices of water-grabbing and activities, such as fracking or the construction of dams, that can deny or limit equal access to adequate water and sanitation.

4. States Parties shall prevent third parties, including individuals, groups or corporations, from interfering in any way with the enjoyment of the right to water and sanitation.

5. In consideration of the State responsibility to ensure the human right to water and sanitation, where water services are operated by third entities, States Parties shall prevent them from compromising equal, affordable and physical access to sufficient, safe and acceptable water and to sanitation.

COMMENT

This provision is based on Art. 2, para. 3 (d), of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

The provision also takes into account the wording of General Comment No. 15 (paras. 21 and 23).

The provision contains two substantive innovations: namely, in para. 2 (e), which limits unrestricted concessions for the exploitation of springs; and in para. 3, where activities such as water-grabbing, fracking, and the construction of dams are explicitly mentioned as something to be discouraged and subjected to environmental impact assessment.

Article 10 – Water-Quality Standards

1. States Parties shall establish water-quality standards on the basis of the World Health Organization guidelines, taking into account the precautionary approach, as established in Principle 15 of the 1992 Rio Declaration on Environment and Development, as well as the needs of vulnerable groups and upon consultation with users.

2. Water-quality standards shall give priority to the elimination of the pollutants with the most significant impact on health in the particular country or context, rather than to the setting of high-

quality thresholds that cannot be attained immediately within the available resources. Such standards shall be periodically reviewed and progressively raised, on the basis of the available parametric values

3. States Parties shall devise regulations and policies to control pollution of water resources by all persons and organizations, both public and private, including surveillance, disincentives, pollution penalties and assistance with compliance.

4. States Parties shall prevent, control, and progressively reduce contamination of watersheds and aquatic ecosystems by substances such as bacterial pathogens and chemical pollutants that could harm human health. They shall monitor water quality in reservoirs and distribution systems.

5. States Parties shall provide financial and technical assistance, including information and training, to communities which depend on small-scale water supply systems, particularly low-income communities.

COMMENT

This provision is mainly based on Art. 7 of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation. Reference to the precautionary approach affirmed in Principle 15 of the Rio Declaration on Environment and Development is also made.

The provision also takes into account the wording of General Comment No. 15 (para. 8).

Article 11 – Public Awareness, Education, Training, Research and Development

1. The States Parties to the Protocol shall take steps designed to enhance the awareness of all sectors of the public regarding:

(a) the importance of a national policy on water and sanitation which embodies and implements the principles set forth in this Protocol;

(b) the close relationship between water management and public health;

(c) the rights and entitlements to water and corresponding obligations under private and public law of natural and legal persons and institutions, whether in the public sector or the private sector, as well as their moral obligations to contribute to the protection of the water environment and the conservation of water resources.

2. The States Parties shall promote:

(a) understanding of the public-health aspects of their work by those responsible for water management, water supply and sanitation; and

(b) understanding of the basic principles of water management, water supply and sanitation by those responsible for public health.

3. The States Parties shall encourage the education and training of the professional and technical staff who are needed for managing water resources and for operating systems of water supply and sanitation, and shall encourage the updating and improvement of their knowledge and skills. This education and training shall include relevant aspects of public health.

4. The States Parties shall encourage:

(a) research into, and development of, cost-effective means and techniques for the prevention, control and reduction of water-related disease;

(b) development of integrated information systems to handle information about long-term trends, current concerns and past problems and successful solutions to them in the field of water and health, and provision of such information to competent authorities.

COMMENT

This provision is based on Art. 9 of the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

For the drafting of the provision also the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters has been taken into account.

Article 12 – Pricing Policies

1. States Parties shall, through appropriate legislative or regulatory measures, ensure that the provision of a minimum quantity of 50 litres per person per day is granted also to insolvent persons.

2. States Parties shall ensure that they have appropriate water and sanitation pricing policies, including through flexible payment schemes and cross-subsidies from high-income users to low-income users.

3. States Parties shall subsidize water and sanitation services for low-income households and poor areas that lack the means to secure access to such services. Subsidies should normally be used for connection to distribution networks or for the construction and maintenance of small-scale water supply and sanitation facilities, such as wells, boreholes and latrines.

4. States Parties shall ensure, before a person's access to water and sanitation services is reduced owing to non-payment, that account is taken of that person's ability to pay. No one shall be deprived of the minimum essential amount of drinking water or access to basic sanitation facilities.

5. Where public resources cannot guarantee high-quality services for all, States Parties shall offer a range of services, including low-cost technology options, to promote affordable access for low-income households.

COMMENT

Para. 1 represents a substantive innovation insofar as it guarantees the right to a minimum quantity of water also to people who cannot pay for it.

This provision is mainly based on Art. 6 of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

Para. 4 of the provision is a substantive innovation, aiming at ensuring also to insolvent persons the right to a minimum quantity of water.

Article 13 – Information and Participation in the Decision-making Processes

1. Everyone shall be given equal access to full and transparent information concerning water, sanitation and the relevant environment held by public authorities or third parties.

2. Everyone has the right to participate in decision-making processes that affect their right to water and sanitation. Special efforts must be made to ensure the equitable representation in decision-making of communities, vulnerable groups and sections of the population that have traditionally been marginalized, in particular women.

3. States Parties shall ensure that decision to delegate or not delegate service provision is taken in a democratic and participatory process. All those concerned must be enabled to participate throughout the process and to monitor, evaluate and report on possible human rights abuses. Participation has to be active, free and meaningful, and allow for a genuine opportunity to influence decision-making.

4. Communities have the right to determine what type of water and sanitation services they require and how those services should be managed and, where possible, to choose and manage their own services with assistance from the State.

COMMENT

This provision mainly based on Art. 8 of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

The notion of participation in the decision-making processes is also encouraged in the 2013 Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation on *Sustainability and Non-Retrogression in the Realisation of the Rights to Water and Sanitation* (para. 76).

The 2010 report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation on *Human Rights Obligations Related to Non-State Service Provision in Water and Sanitation* (para. 63, c) is also taken as a reference.

For the drafting of this provision also the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters has been taken into account.

Given that the draft text aims at being an international human rights treaty, it is not possible to enter into details concerning the form that participation in the decision-making process shall take in each State. As this subject falls under the margin of appreciation of each State, it is impossible to refer to notions that are peculiar to single domestic systems, but would not be generally acceptable at the world level. A rather general and open formula ensures that every person and communities are granted the right to participate in the decision-making process, leaving to domestic legislation the determination of the modalities to implement this right.

Article 14 – Access to Effective Domestic Remedies

1. States Parties shall adopt all necessary measures to ensure that everyone has access to administrative or judicial procedures for the making of complaints about acts or omissions committed by persons or public or private organizations in contravention of the right to water and sanitation.

2. States Parties shall monitor the implementation of obligations concerning the right to water and sanitation, including by establishing or authorizing independent institutions, such as national

human rights commissions or regulatory agencies, to carry out monitoring activities in a manner that ensures full transparency and accountability.

COMMENT

The main reference for this provision is Art. 9 of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

This provision also takes into account the wording of General Comment No. 15 (para. 55).

Article 15 – Right to Compensation and Other Measures of Reparation

1. States Parties shall ensure in their legal systems that the victims of a violation of the right to water and sanitation have the right to obtain reparation and prompt, fair and adequate compensation.

2. The right to obtain reparation referred to in paragraph 1 covers material and moral damages and other forms of reparation such as:

- (a) restitution;**
- (b) rehabilitation;**
- (c) satisfaction; and**
- (d) guarantees of non-repetition.**

COMMENT

This provision, besides recalling the general concepts of the right to an effective remedy and the general principle of compensation and reparation for damages, refers to the notions developed in the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

This provision also develops the recommendation contained in General Comment No. 15 of the Committee on Economic, Social and Cultural Rights (para. 55).

Article 16 – Sanctions

States Parties shall establish in their domestic legislation sanctions of adequate gravity to discourage the waste, the pollution, the limitation of the access to water, as well as the destruction and damaging of water services, infrastructures, and water basins in general.

COMMENT

In a number of international treaties it is provided that States Parties are bound to establish sanctions for those who do not comply with the obligations set forth in the treaties. Although States Parties are entitled to discretionally determine the range of the sanctions, they are nonetheless obliged to set forth criminal sanctions for activities related to waste, pollution, limitation of the access to water, as well as to the destruction and damaging of water services and infrastructures.

This is in line with considerations contained in the 2013 Report of the Special Rapporteur on the Human right to Safe Drinking Water and Sanitation on *Sustainability and Non-Retrogression in the Realisation of the Rights to Water and Sanitation* and in General Comment No. 15 (paras. 55).

PART III – INTERNATIONAL COOPERATION

Article 17 – International Cooperation to Ensure the Right to Water and Sanitation

1. States Parties shall refrain from actions that interfere with the enjoyment of the right to water and sanitation in another State and shall prevent individuals and companies under their jurisdiction from taking such actions.

2. States Parties shall refrain at all times from imposing on another State embargoes or similar measures, that prevent from the supply of water, as well as goods and services essential for securing the right to water.

3. Depending on the availability of resources, developed countries shall provide sufficient financial and technical assistance to supplement the resources of developing States with a view to ensuring that everyone has access, as promptly as possible, at least to basic water and sanitation services. Developed States Parties shall undertake to allocate a portion of their official development assistance proportional to its gross national product to achieving the goals set out in the United Nations Millennium Declaration and the Johannesburg Plan of Implementation adopted by the World Summit on Sustainable Development concerning access to water and sanitation.

4. Bilateral and multilateral assistance for the water and sanitation sector shall be channelled, as a matter of priority, towards States that are unable to achieve the essential aspects of the right to water and sanitation for their people. Such assistance shall focus on bringing tangible benefits to those with no basic access to water and sanitation.

5. States Parties shall take account of the right to water and sanitation when negotiating and implementing international agreements that have an impact on this right.

6. States Parties shall ensure that agreements concerning liberalization of trade or services do not curtail or inhibit a State's capacity to ensure the full realization of the right to water.

7. A conference of the States Parties will take place within two years from the entry into force of this Protocol to evaluate the feasibility and the conditions for the establishment of an International Fund for the Right to Water and Sanitation that, *inter alia*, would finance projects to ensure the human right to water and sanitation in developing States.

COMMENT

This provision is mainly based on Art. 10 of the 2005 Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation.

The provision also takes into account the wording of General Comment No. 15 (paras. 31-36).

Para. 7 binds States Parties to discuss, within a short delay from the entry into force of the Protocol, the opportunity to establish an International Fund for the Right to Water and Sanitation, that could become a powerful means to achieve the fulfilment of such right in developing States.

Article 18 – Cooperation in Relation to Transboundary Waters

Where any States Parties border the same transboundary waters, as a complement to their obligations under Article 12, they shall cooperate and, as appropriate, assist each other to prevent, control and reduce transboundary effects of water-related disease and, in general, to ensure the human right to water and sanitation, as recognized under Article 2. In particular, they shall:

(a) exchange information and share knowledge about the transboundary waters and the problems and risks which they present with the other Parties bordering the same waters;

(b) endeavour to establish with the other States Parties bordering the same transboundary waters joint or coordinated water-management plans, and early-warning systems and contingency plans;

(c) On the basis of equality and reciprocity, adapt their agreements and other arrangements regarding their transboundary waters in order to eliminate any contradictions with the basic principles of this Protocol and to define their mutual relations and conduct regarding its object and purposes.

COMMENT

This provision is mainly inspired by Art. 13 of the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

PART IV – COMPETENCES OF THE COMMITTEE

Article 19 – Reports

1. Any State Party shall submit, within two years following the entry into force of the Protocol for it, a report to the Committee, providing comprehensive information on the measures it has taken to implement the provisions of the Protocol.

2. Following the submission of the comprehensive report provided for in paragraph 1, States Parties shall include in the reports they submit to the Committee, in accordance with Article 17 of the Covenant, any further information with respect to the implementation of the Protocol.

3. The Committee may request from States Parties further information relevant to the implementation of this Protocol.

Article 20 – Friendly Settlement

The Committee shall make available its good offices to the States Parties concerned with a view to reaching a friendly settlement of the disputes relating to the application or interpretation of this Protocol on the basis of the respect for the obligations set forth in this Protocol.

Article 21 – Country Visits

1. If the Committee receives reliable information indicating that a State Party is seriously violating the provisions of this Protocol, it may, after consultation with the State Party concerned, request one or more of its members to undertake a visit and report back to it without delay.

2. The Committee shall notify the State Party concerned, in writing, of its intention to organize a visit, indicating the composition of the delegation and the purpose of the visit. Within three months from the notification, the State Party shall notify the Committee in writing whether it agrees to the visit.

3. If the State Party agrees to the visit, the Committee and the State Party concerned shall work together to define the modalities of the visit.

4. The State Party concerned shall provide the Committee with all the facilities needed for the successful completion of the visit.

5. Following its visit, the Committee shall communicate to the State Party concerned its observations and recommendations.

Article 22 – Information to the General Assembly

If the Committee receives information which appears to it to contain well-founded indications that a State Party is violating the right to water and sanitation in a widespread or systematic basis in the territory under its jurisdiction, it may, after seeking from the State Party concerned all relevant information on the situation, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations.

Article 23 – Individual and Inter-State Communications

1. States Parties to the First Optional Protocol to the Covenant recognize the competences of the Committee also for any matter related to this Protocol.

2. A State that is not a Party to the First Optional Protocol to the Covenant may at any time declare that it recognizes the competence of the Committee to receive and consider individual and inter-State communications for any matter related to this Protocol, as provided for under Articles 1 to 10 of the First Optional Protocol.

COMMENT TO ARTS. FROM 19 TO 23

These provisions represent the procedural part of the treaty and concern the competences that would be entrusted to the Committee on Economic, Social and Cultural Rights (“the Committee”).

Art. 19 establishes the classic function of receiving and examining periodic reports from States Parties, which allows also civil society organizations to submit their alternative reports. Consideration has been given to the fact that States Parties to the Protocol are also Parties to the International Covenant on Economic, Social and Cultural, where a reporting obligation is also provided for.

Art. 20 establishes that the Committee may facilitate friendly settlement between Parties. This provision is inspired by Art. 7 of the First Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

Art. 21, relating to the possibility of the Committee to conduct a country visit in a State Party if it receives reliable information that the latter is seriously violating the provisions of the Protocol, is inspired by Art. 33 of the International Convention on the Protection of All Persons from Enforced Disappearance.

Art. 22 is inspired by Art. 34 of the International Convention on the Protection of All Persons from Enforced Disappearance and would allow the Committee to seize the General Assembly, through the Secretary-General, in case widespread or systematic violations of the right to water and sanitation are taking place.

Art. 23 aims at entrusting the Committee with the competence to receive and examine individual and inter-state communications. For States that are already Parties to the First Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, this competence operates automatically. States that, at the moment of ratification of or accession to the draft Protocol are not yet Parties to the First Optional Protocol can at any time deposit a declaration whereby they acknowledge the competence of the Committee with regard to the mentioned communications.

Article 24 - Dissemination and Information

Any State Party undertakes to make widely known and to disseminate the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party, and to do so in accessible formats for persons with disabilities.

PART V – FINAL PROVISIONS

Article 25 – Signature, Ratification and Accession

- 1. The present Protocol is open for signature from [DATE] to [DATE] by any State that has signed, ratified or acceded to the Covenant.**
- 2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Covenant.**
- 3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Covenant.**
- 4. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.**

Article 26 - Entry into Force

- 1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.**
- 2. For each State ratifying or acceding to the present Protocol, after the deposit of the tenth instrument of ratification or accession, the Protocol shall enter into force three months after the date of the deposit of its instrument of ratification or accession.**

Article 27 – Best Protection

Nothing in the Protocol shall affect any provisions which are more conducive to the protection of the right to water and sanitation and which may be contained in:

- (a) the legislation of a State Party;**
- (b) applicable rules of international law.**

Article 28 - Amendments

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of

States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of the present article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

Article 29 - Denunciation

Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect twelve months after the date of receipt of the notification by the Secretary-General.

Article 30 – Notification by the Secretary-General

The Secretary-General of the United Nations shall notify all States referred to in Article 26, paragraph 1, of the Covenant of the following particulars:

- (a) signatures, ratifications and accessions under the present Protocol;**
- (b) the date of entry into force of the present Protocol and of any amendment under Article 28;**
- (c) any denunciation under Article 29.**

Article 31 - Reservations

No reservations to the present Protocol shall be permitted.

Article 32 – Official Languages

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in Article 26 of the Covenant.

Done at [PLACE] on [DATE]

COMMENT TO ARTS: FROM 25 TO 32

These are the classic final clauses regulating aspects related to the law of the treaties, such as signature, ratification and accession, entry into force, amendments, denunciation and official languages. In order to ensure the highest possible level of coherence, these provisions mostly reproduce those contained in the First Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

The proposed number of ratifications or accessions necessary for the draft Protocol to enter into force is ten. This number is suggested to facilitate an early entry into force of the legal instrument. It is in line with the most recent trend in universal human rights law treaties (e.g., *inter alia*, Art. 18 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Art. 13 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, and Art. 14 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography).

The only provision that departs from the majority of human rights treaty is Art. 31, which prohibits reservations to the Protocol. The only precedent that can be quoted in this sense is Art. 17 of the 1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. In case this option is not accepted, it is recommended that, as in the majority of other human rights treaties, no provision relating to reservations is included, so that the rules on reservations established under the Vienna Convention on the Law of the Treaties are applied.