

the SDGs. Indeed, it is not clear how the SDGs can be and are being embedded in the international law framework, especially in the area of human rights, and overcome the different focus of the SDGs on aggregate outcomes and human rights on the individual or groups. These issues were even more evident during the COVID-19 pandemic and the responses to it. It seemed that a new approach should promote the respect of international law in development activities, mitigate human rights risks explicitly, and ensure a more cohesive and less fragmented approach to international law in development.

## THE SUSTAINABLE DEVELOPMENT GOALS (SDGs) AND THE RULE OF LAW: A PROPOS SDG 6 ON ACCESS TO WATER AND SANITATION

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### I. INTRODUCTION

The rule of law and the Sustainable Development Goals (SDGs) are mutually supportive. Respect for the rule of law is indeed crucial for development issues. The 2030 Agenda for Sustainable Development itself acknowledges, through SDG 16, that access to justice and the rule of law foster sustainable development.<sup>1</sup> The latter ensures that all individuals are treated alike, that they are entitled to the respect of human rights and that the rule of law informs the satisfaction of social, economic, and cultural needs as well as the development of public policies and the governance of competent institutions.

When speaking of the rule of law from an international law perspective, I have a broad understanding of it. It is substantive, it is procedural, it is also process oriented. This means that we should go beyond the traditional binary approach based on the distinction between binding law and non-binding law when promoting the rule of law. The addressees of the rule of law at the international level are varied and diverse. They include states but also a wide array of non-state actors. With these features in mind, we need to grasp the rule of law through its various shades (they are not only gray . . .). These multiple shades can have a nurturing effect on each other in promoting respect for the rule of law. The SDGs offer an interesting prism for analyzing the interplay of these various legal shades of the rule of law. Indeed, these shades are reflected in the fabric of the SDGs as well as in their implementation.

The 2030 Agenda for Sustainable Development in many ways reflects and reinforces existing international law.<sup>2</sup> Moreover, some of the individual SDGs align closely with individual human rights. It is also important to recall that the 2030 Agenda was adopted by all UN member states<sup>3</sup> and applies universally. Its implementation rests on acceptance rather than enforcement.

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<sup>1</sup> SDG 16 is available at: <https://sdgs.un.org/goals/goal16>; Irene Khan, *How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?*, 13 MCGILL J. SUSTAINABLE DEV. L. 211 (2017).

<sup>2</sup> Markus Kaltborn & Heike Kuhn, *SDGs: Acceptance, Not Enforcement*, D+C (Apr. 6, 2017), at <https://www.dandc.eu/en/article/2030-agenda-largely-reflects-and-reinforces-existing-international-law>.

<sup>3</sup> GA Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Sept. 25, 2015). The Resolution was unanimously adopted by the UN General Assembly through raucous cheers and a standing ovation by representatives of the 193 UN member states. For further details, see United Nations Population Fund, *Historic New Global*

My focus will be on SDG 6 which deals with water and sanitation, while taking into account that water is a cross-sectoral issue. Without access to water, a number of other SDGs cannot be fulfilled.<sup>4</sup> In particular, I will highlight the interfaces between SDG 6 and the human right to water (II), before addressing the role of the non-discrimination principle in access to water and sanitation (III) and the issue of accountability of the private sector (IV).

## II. THE MANY INTERFACES BETWEEN SDG 6 AND THE RIGHT TO WATER AND SANITATION

There are several interfaces between SDG 6 and the right to water and sanitation. One can speak of a mutual nurturing process which is benefitting both the fulfillment of SDG 6 and respect for the right to water and sanitation. I will highlight this mutual nurturing process through four points:

1. SDG 6 did not come out of nowhere. A number of international binding and non-binding instruments have played a critical role in its shaping. These include human rights instruments, such as the Convention on the Rights of the Child (Article 24(2)) or the Convention on the Elimination of Discrimination Against Women (Article 14(2)(h)). One should also mention the resolutions of the UN General Assembly,<sup>5</sup> of the UN Human Rights Council,<sup>6</sup> as well as general comments and reports of human rights bodies, especially the Committee on Economic, Social, and Cultural Rights.<sup>7</sup> This nurturing process is reflected in the content of SDG 6 which reiterates the human right to water and sanitation. However, interestingly, SDG 6 goes further by aiming for access to water in all settings, including schools, health-care facilities, work places, and other institutional settings. In other words, SDG 6 does not only focus on households and domestic settings and thus pushes further the boundaries of the right to water and sanitation.
2. SDGs include a plural dimension. State and non-state actors are involved in their fulfillment.<sup>8</sup> This means that actors not traditionally involved in the promotion and protection of human rights are involved in the implementation of the SDGs. This is done through a target-oriented approach to which all actors have committed in one way or another. Looking more particularly at the private sector, various techniques are resorted to, such as the Corporate Water Stewardship promoted by the UN Water Compact,<sup>9</sup> as well as various types of public-private partnerships. The SDGs offer an experimentation ground for committing the private sector toward the satisfaction of both SDG 6 and of the human right to water and sanitation.
3. The SDG approach contributes to the development and hardening of international law in terms of effectiveness. While there are examples of disconnection between the rule of law and development activities, there are also examples that show that the SDGs can go hand in hand with the promotion of the rule of law, as is the case in the water context. The

*Goals Unanimously Adopted by United Nations* (Sept. 25, 2015), at <https://www.unfpa.org/news/historic-new-global-goals-unanimously-adopted-united-nations>.

<sup>4</sup> UN-Water, *Water and Sanitation Interlinkages Across the 2030 Agenda for Sustainable Development* 16 (2016).

<sup>5</sup> GA Res. 64/292, § 1 (July 28, 2010).

<sup>6</sup> Human Rights Council Res. 15/9 on Human Rights and Access to Safe Drinking Water and Sanitation, § 3 (Sept. 30, 2010).

<sup>7</sup> See, in particular, Committee on Economic, Social and Cultural Rights, General Comment No. 15 on the Right to Water (Arts. 11 and 12 of the Covenant), § 2 (Jan. 20, 2003).

<sup>8</sup> United Nations, *Addis Ababa Action Agenda*, § 35 (2015).

<sup>9</sup> Pacific Institute, *Corporate Water Stewardship*, at <https://pacinst.org/corporate-water-stewardship>.

objective, targets, and indicators as promoted by the SDGs are result oriented, with a specific focus on what is happening on the ground. If well conducted and implemented, they have a mobilization power that human rights can benefit from.

4. There are of course weaknesses, as in the case of compliance. Several follow-up and review mechanisms have been put in place for tracking progress in the implementation of SDG 6.<sup>10</sup> But these have shortcomings. Briefly noted, it should be stressed that the follow-up and review processes are voluntary and country-led.<sup>11</sup> No recommendations are made as a follow-up to their submission. There are also ambiguities regarding the measurement of the accessibility, availability, and affordability of drinking water.<sup>12</sup> Some indicators need to be refined. Indeed, the Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development, developed by the Inter-Agency and Expert Group on SDG Indicators (IAEG-SDGs) and agreed upon at the forty-eighth session of the United Nations Statistical Commission held in March 2017, did not contain an indicator dedicated to measuring access to hygiene.<sup>13</sup> That is why the WHO/UNICEF Joint Monitoring Programme<sup>14</sup> has proposed a new basic indicator which aims at measuring the “percentage of population with handwashing facilities with soap and water at home.”<sup>15</sup> At its fifty-first session in March 2020, the United Nations Statistical Commission included the newly proposed indicator for measuring access to handwashing facilities in the Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development.<sup>16</sup> Lastly, the 2030 Agenda did not provide for a follow-up and review mechanism aiming at ensuring that other stakeholders, such as private actors, align their activities and policies with the SDGs. It is a process approach that has been put in place. Checks and balances and peer pressure need to find their place to adjust and correct weaknesses. In addition, in the context of the mutual nurturing process I referred to above, one would hope that human rights bodies rely on the SDG reports when interacting with member states. These interactions could strengthen the SDG process.

### III. NON-DISCRIMINATION AND ACCESS TO WATER AND SANITATION AND SDG 6

In contrast to the Millennium Development Goals (MDGs), the SDGs have a much stronger focus on inequalities. Goal 10 is dedicated to “reducing inequalities between and within

<sup>10</sup> GA Res. 70/1, Declaration, § 47 (Sept. 25, 2015).

<sup>11</sup> *Id.*, § 74.

<sup>12</sup> World Health Organization, Safely Managed Drinking Water-Thematic Report on Drinking Water 22, 26, 32 (2017); Johanna Weststrate, Geske Dijkstra, Jasper Eshuis, Alberto Gianoli & Maria Rusca, *The Sustainable Development Goal on Water and Sanitation: Learning from the Millennium Development Goals. Social Indicators Research*, 143 SOC. INDICATORS RES. 795, 804 (2019); Programme Solidarité-Eau, *WASH Services in the Sustainable Development Goals: Working Document 25* (Oct. 2016), at [https://www.pseau.org/outils/ouvrages/ps\\_eau\\_wash\\_services\\_sdgs\\_2016\\_october2.pdf](https://www.pseau.org/outils/ouvrages/ps_eau_wash_services_sdgs_2016_october2.pdf).

<sup>13</sup> The global indicator framework was later adopted by the General Assembly on July 6, 2017 and is contained in the Resolution adopted by the General Assembly on Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development (GA Res. 71/313, Annex (July 6, 2017)).

<sup>14</sup> The WHO/UNICEF Joint Monitoring Programme (JMP) is the custodian of global data on Water Supply, Sanitation and Hygiene (WASH). For further details, see <https://washdata.org/data>.

<sup>15</sup> Programme Solidarité-Eau, *supra* note 12, at 25.

<sup>16</sup> GA Res. 71/313, Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development, E/CN.3/2018/2, E/CN.3/2019/2, E/CN.3/2020/2, 7 (July 6, 2017) at <https://unstats.un.org/sdgs/indicators/indicators-list>.

countries.”<sup>17</sup> The 2030 Agenda further commits member states to “leave no one behind”<sup>18</sup> and outlines that SDG indicators should be disaggregated, where relevant, by income, sex, age, race, ethnicity, migratory status, disability, and geographic location.<sup>19</sup> In the area of water, these features are crucial for ensuring access to water and sanitation for everybody.

The MDGs’ target aimed to halve the proportion of the population without access to drinking water and sanitation services by focusing on aggregate coverage. In a different way, the global indicators for SDG targets 6.1 and 6.2 play a key role in the elimination of discrimination and inequalities in access to water and sanitation by revealing and tracking inequalities through the use of data disaggregated by income, sex, age, race, ethnicity, migration status, disability, and geographic location in national contexts.

This means that significant inequalities in water and sanitation services should be overcome at the international level, but also within individual countries, in urban and rural areas, and in the various subnational regions. Marginalized communities and disadvantaged groups, such as women, children, or poor people, should be a focus of attention, notably taking into account that they are more susceptible to the impacts of pollution and water-related disasters.<sup>20</sup>

Race, ethnicity, and religion are also grounds of discrimination in access to water and sanitation, as illustrated in the case law of human rights bodies.<sup>21</sup> In some countries, indigenous peoples, pastoralists, and/or nomadic communities lack access to safe water and sanitation in disproportionate numbers.

Disaggregation of data is important in that it reveals the various forms of discrimination that may exist. However, disaggregated data alone does not automatically result in reduction of inequalities. Governments and other stakeholders need to take measures to tackle the inequalities that are revealed.<sup>22</sup> This is where non-discrimination—as understood in human rights terms—can help, in particular by highlighting the need for proactive actions for addressing and combatting inequalities.

#### IV. SDG 6 AND THE ACCOUNTABILITY OF THE PRIVATE SECTOR

The role of both public and private actors is crucial when it comes to mobilizing financial resources. Indeed, while sustainable service delivery for water and sanitation relies primarily on domestic public resources and international development aid, private investments are critical to achieving universal access to safe and affordable drinking water, sanitation, and hygiene by 2030, as public resources, be they domestic or international, do not suffice. National governments and international financial institutions have been called upon by the UN General Assembly to improve the efficiency of existing financial resources, while increasing innovative sources of financing.<sup>23</sup> There is a need for commitments from economic actors. They can do so as independent power producers or through partnerships.

The idea of encouraging commitments in one way or another to abide by principles or initiatives is important, as it pushes for accountability. Codes of conduct and other normative

<sup>17</sup> GA Res. 70/1 (Sept. 25, 2015).

<sup>18</sup> *Id.*, Declaration, § 4.

<sup>19</sup> *Id.*, § 74(g).

<sup>20</sup> UN-Water, *supra* note 4, at 9.

<sup>21</sup> LAURENCE BOISSON DE CHAZOURNES, FRESH WATER IN INTERNATIONAL LAW 153–55 (2013).

<sup>22</sup> UN-Water, Eliminating Discrimination and Inequalities in Access to Water and Sanitation 31–32 (2015).

<sup>23</sup> GA Res. 70/1, 27 (Sept. 25, 2015).

instruments, such as the UN Guiding Principles on Business and Human Rights,<sup>24</sup> go in the same direction.

Two initiatives related to private companies and water governance have been developed by the UN Global Compact. First, one should mention the CEO Water Mandate, a public-private initiative launched in 2007 that mobilizes business leaders on water, sanitation, and the SDGs.<sup>25</sup> In particular, it gathers a number of business leaders to address global water challenges through corporate water stewardship. Upon signing the Mandate, companies of all industries and locations make a public commitment across six commitment areas and report annually on progress.<sup>26</sup> These include: direct operations; supply chain and watershed management; collective action; public policy; community engagement; and transparency.

Second, the CEO Water Mandate developed and published in 2010 the Guide to Responsible Business Engagement with Water Policy.<sup>27</sup> This Guide aims to make a compelling case for responsible water policy engagement and to support it with insights, strategies, and tactics to do so effectively.<sup>28</sup> The Guide is centered on five aspirational principles that underpin responsible engagement. First, responsible corporate engagement in water policy must be motivated by a genuine interest in furthering efficient, equitable, and ecologically sustainable water management.<sup>29</sup> Second, responsible corporate engagement in water policy entails ensuring that activities do not infringe upon—but rather support—the government’s mandate and responsibilities to develop and implement water policy.<sup>30</sup> Third, responsible engagement in water policy promotes inclusiveness and meaningful partnerships across a wide range of interests.<sup>31</sup> Fourth, responsible engagement in water policy proceeds in a coherent manner that recognizes the interconnectedness between water and many other policy arenas.<sup>32</sup> Fifth, companies engaged in responsible water policy are fully transparent and accountable for their role in a way that ensures alignment with sustainable water management and promotes trust among stakeholders.<sup>33</sup>

These initiatives are based on commitments. However, a question remains as to the effects deriving from these commitments. Building on commitments through programs and activities is a way to take private operators at their word and to build effectiveness. A dialogue can then be engaged and accountability helps assess these commitments. Whether this is sufficient remains to be seen.

<sup>24</sup> United Nations Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (2011).

<sup>25</sup> See CEO Water Mandate, *What is the Mandate?*, at <https://ceowatermandate.org/about/what-is-the-mandate>.

<sup>26</sup> CEO Water Mandate, *Water Security Through Stewardship: An Action Platform of the CEO Water Mandate 2018–2020*, 1, at Overview: 2018–2020 Action Platform Water Security Through Stewardship.

<sup>27</sup> CEO Water Mandate, *Guide to Responsible Business Engagement with Water Policy* (2010).

<sup>28</sup> *Id.* at 12.

<sup>29</sup> *Id.* at 36.

<sup>30</sup> *Id.* at 37.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 38.

<sup>33</sup> *Id.*