

## ARTICLE

# The Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation: An Assessment of Its First Dozen Years

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The Special Rapporteur for Safe Drinking Water and Sanitation is a norm entrepreneur, both as a norm monitor and clarifier, as well as an advocate for reparative action for victims. Two incumbents have identified fundamental principles of these two human rights and many implementation requirements for their protection. Appropriate attention has been placed on various vulnerable groups that require greater efforts at norm compliance through policy responses. However, many countries have tremendous inequalities in access to water and sanitation, which are largely unacknowledged and even unnoticed, for which states have a positive responsibility, but which are not easily noticed because of weak civil society monitoring. Both mandate holders have much of their efforts on country visits with governments interested in improvement—which is desirable for both the countries concerned and for the development of rubrics for institutionalized lessons learned, best practices and methodologies for information collection and analysis. Considerable efforts have also been made on norm development that hopefully encourages emulation. More emphasis is needed to identify and clarify legally-binding, hard law requirements in implementation, not just soft-law non-legally binding recommendations to governments and their public and private partners, as well as specifying the binding rights of the vulnerable. Also needed are more cataloguing of government violations of the human rights to safe drinking water and sanitation, especially outside of Latin America, from where the two mandate holders come. Particular attention should be paid to countries that refuse country visits. Greater use of reliable information concerning pollution of drinking water, poor sanitation, economic development without consultation or impact analysis, exorbitant pricing of water, and inadequate sanitation that allows public defecation. This office should also coordinate generally more often with other Special Procedures on many inter-sectional issues, but above all else, on climate change issues, which present an existential threat to rights protection. While there are many competing claims for resources, important issues regarding access to safe drinking water and sanitation go unnoticed by this office because of its insufficient attention to early warning and urgent action procedures for these violations. However, the contributions of the two mandate holders to norm development has been clear, effective and deserving of praise.

**Keywords:** United Nations; special procedures; drinking water; sanitation; human rights; sustainable development goals

## 1. Introduction

Established in 2008, the UN Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation (SRWS)<sup>1</sup> was one of the first 'Special Procedures,' established by the new United Nations Human Rights Council, after the latter enacted its quasi-constitution, its 'Institution Building Package' in 2007 in the year

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<sup>1</sup> The predecessor organization, the Human Rights Commission, established the system of Special Procedures and approved the predecessor mandate of the Independent Expert on Clean Water. The Special Rapporteur on the Human Rights of Clean Water and Sanitation mandate was extended in 2011, 2013 and 2016 on an interim basis. For an overview of the office, see: 'Special Rapporteur on the human rights to safe drinking water and sanitation,' <<https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx>>.

after that UN Council replaced the UN Human Rights Commission.<sup>2</sup> Special Procedures generally and Special Rapporteurs specifically had been legal institutions developed by the predecessor Commission with precursors to the SRWS took similar form<sup>3</sup> as a different type of special procedure, an Independent Expert with essentially the same substantive responsibility in safe drinking water and sanitation. The SRWS has been quite active and visible without the attendant controversies with many of the current 56 Special Procedure mandates, of which 44 are thematic and 12 country-specific, such as on Torture or Freedom of Expression and the other Special Rapporteurs, as well as Independent Experts and Working Groups.<sup>4</sup> A similar and inter-related special procedure mandate, the Special Rapporteur on Human Rights and the Environment, has operated over the same time period.<sup>5</sup>

There have been two SRWS mandate holders, Catarina de Albuquerque, a lawyer from Portugal, from 1 November 2008 to 2014 and from 1 December 2014 to 2020. Léo Heller, a professor and policy analyst of water and sanitation from Brazil, the latter nearing the end of his second, three-year term, at the time of writing.<sup>6</sup> What has been the SRWS record in its charge to promulgate non-binding ('soft law') norms of human rights law; make and monitor individual 'communications' (complaints) about urgent or serious situations; and provide technical assistance to improve safe drinking water and sanitation? This essay will demonstrate that both mandate holders have made important advances in norms and their implementation of both hard (binding) law and soft law needed to implement incipient, legally-binding, customary international law. However, how to realize this combined human right to clean water for drinking via sanitizing or production from natural sources needs spelling out. Unlike the thirty-plus UN bodies focused on these two human rights, the two mandate holders as Special Rapporteurs have focused on the *legal* aspects of clean water and sanitation obligations. The other two main legal monitors and norm promulgators, the ESCRs Committee and the Universal Periodic Review of the Human Rights Council, have much broader mandates covering dozens of human rights, and lack the concerted focus of the SRCWS.

The literature on the right to water does not yet include an evaluation of the SRWS,<sup>7</sup> which this essay seeks to fill. We will see how the SRWS compares with other UN Special Procedures, which is the term for the office and the individual; its dilemmas in choosing confrontational or cooperative approaches to alleged rights violations; how the SRWS has and could interact with other special procedures on inter-sectional issues, especially those concerned with water supply and cleanliness, such as disposal of toxic waste, mining and indigenous rights; how it could leverage even more technical expertise from other UN agencies and NGOs. While hardly invisible, the two mandate holders could have increased the number of press conferences of condemnation and/or emergency appeals to governments, without feeling obliged to submit a comprehensive, official UN report. For countries willing to allow country visits, by contrast, 'constructive engagement' based on a friendly relationship can be effective. The latter approach might frustrate some *stakeholders*, who might prefer more critical relationships.

<sup>2</sup> UN Human Rights Council Resolution 5–1, UN Document A/HRC/RES/5/1 (7 August 2007), at <https://unispal.un.org/UNISPAL.NSF/0/325B5DF6ABBFBF268525734100634561>.

<sup>3</sup> Special procedures, in UN nomenclature, can refer to either an individual or the office. They consist of special rapporteurs, independent experts, and working groups, who have, as UN Charter-based bodies, universal jurisdiction, unlike for UN treaty-based bodies. Special procedures consist most often of special rapporteurs, but also independent experts, and working groups, who have, as UN Charter-based bodies, universal jurisdiction of 193 UN Member States plus affiliated authorities like the Vatican and Palestine, a controversial area involving use of the Jordan River. For more background, See 'Special Procedures of the Human Rights Council,' <<https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>>. For background on how mandate holders of special procedures are appointed, see, 'Nomination, Selection and Appointment of Mandate Holders,' <<https://www.ohchr.org/EN/HRBodies/HRC/SP/Pages/Nominations.aspx>>.

<sup>4</sup> 'Facts and Figures with regard to the Special Procedures in 2019,' UN Document A/HRC/43/64/Add.1 (10 March 2020) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/065/25/pdf/G2006525.pdf?OpenElement>>.

<sup>5</sup> The current incumbent is John Knox, who was independent expert from 2012–2015 and was the first Special Rapporteur from 2015–2018, followed by David Boyd when that mandate was extended another three-year term. <<https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>>.

<sup>6</sup> Most Special Procedure Mandates are limited to two, three-year terms. For background on how mandate holders of special procedures are appointed, see, 'Nomination, Selection and Appointment of Mandate Holders,' <<https://www.ohchr.org/EN/HRBodies/HRC/SP/Pages/Nominations.aspx>>. See also, 'Communications Report of Special Procedure' UN Document A/HRC/43/77 (19 February 2020) <<https://undocs.org/en/A/HRC/43/77>> and 'Facts and Figures with regard to the Special Procedures in 2019' UN Document A/HRC/43/64/ADD.1 (10 March 2020) <<https://undocs.org/A/HRC/43/64/Add.1>>; and 'Twenty-sixth annual meeting of special rapporteurs, special representatives, independent experts and chairs of working groups of the special procedures of the Human Rights Council, held in Geneva from 17 to 21 June 2019, including updated information on special procedures' UN Document A/HRC/43/64 (20 April 2020) <<https://undocs.org/en/A/HRC/43/64>>. See, for more on de Albuquerque, <<https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/CatarinaDeAlbuquerque.aspx>> Since 2018, she has been the chief executive at Sanitation and Water for All <[www.sanitationforall.org](http://www.sanitationforall.org)>. For more on Heller, see <<https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/LeoHeller.aspx>>.

<sup>7</sup> Lindsay Knight, *the Right to Water* (World Health Organization 2003).

## 2. Special procedures in general

The most important effort of any human rights special procedure, which refers again to both the office and the individual 'mandate holder' or incumbent, is to contribute to further legalization of human rights in specificity. This requires the specification of the unwritten norms that make actual protection possible. Just as there is an 'unwritten constitution' that may not be written in text, they remain as fundamental to the effective rules of a 'small-c' constitution; human rights imply many rules that must be observed, as legally binding rules, if the specified human rights are to be achieved. If rights are to remain rights, then the rules that are needed to protect them must also be part of rules emanating from those specified human rights. If there is a right to life, then states parties need to provide the essentials for life, positive rights like taking action to either prevent pollution or to cleaning water exposed to fecal matter, urination, other water-borne diseases and toxic chemicals, as well as stopping harm caused by governments, such as licensing mining contracts to companies that pollute. There can certainly be non-legally binding content, as well as sensible public policies that are not part of the human rights, as such, that the Special Rapporteur might also consider, analyze, and/or recommend, as part of the ambit of the office's authority. These would include sensible accounting, budgeting, data-gathering policies, as well as evaluating illogical, contradictory, or dangerous legislative, executive or even judicial actions, which affect the human rights to water and sanitation. Thus, the tasks of a mandate holder like for Safe Drinking Water and for Sanitation, including many actions that reflect legally mandatory and merely desirable actions, even if her or his words carry no mandatory legal compliance because she said so—though human rights violations might or will occur if these non-legally finding recommendations are not followed.

## 3. The SRWS

Early on in the new Human Rights Council's first session, it created the new special procedure, initially named as the Independent Expert on the issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation, which initially appointed Caterina de Albuquerque for three years in Resolution 7/22 in 2008,<sup>8</sup> to: 1) specify the obligations of all states to protect the human rights to safe drinking water and sanitation; and 2) recommend policies to realize the Millennium Development Goals (MDG) generally, and Goal number 7 in particular, to prepare a compendium of good practices related to access to safe drinking water and sanitation. It is noteworthy that a) no mention was made as to whether these human rights were binding hard law or soft law and b) no effort to define the human right precisely in terms of immediately enforceable hard law component of the right, as do many ESCRs as explained in various general comments by the ESCRs Committee.<sup>9</sup> As the first incumbent Special Rapporteur, she at once sought normative clarity to join two distinct, but equal and interdependent rights to safe water and to sanitation,<sup>10</sup> while also connecting with other related rights for safe water by protection from toxic and other pollutants to water, or the right to development, which would include constructing infrastructure needed for cleaning or excluding water exposed to feces or chemicals, as well as developing irrigation for the right to food and agricultural development— even though special rapporteurs were established on these inter-related rights. In her first year of work, she argued forcefully that all states should also recognize a human right to clean sanitation.<sup>11</sup>

In March 2011, the specific focus on safe drinking water and sanitation was institutionalized with the renewal for her second three-year term, with her title renamed as the Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation.<sup>12</sup> As Special Rapporteur, she addressed in separate, comprehensive handbooks, issues such as: Human Rights Obligations Related to Non-State Service Provision in Water and Sanitation (2010);<sup>13</sup> financing for the Realization of the Rights to Water and Sanitation;<sup>14</sup>

<sup>8</sup> Human Rights Council Resolution 7/22 'Human rights and access to safe drinking water and sanitation,' <[http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_22.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf)>.

<sup>9</sup> Henry F. Carey, 'Economic, Social and Cultural Rights' in Henry F. Carey and Robert J. Beck (eds), *ISA Compendium on International Law* (Oxford: Blackwell 2010) 1261–1283.

<sup>10</sup> As a 2015 General Assembly Resolution emphasized these two rights as distinct but equivalent. 'The Human Rights to Safe Drinking Water and Sanitation,' UN Document A/C.3/70/L.55/Rev.1 (18 November 2015).

<sup>11</sup> 'Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque' UN Document A/HRC/12/24 (1 July 2009) <[http://www.ohchr.org/Documents/Press/IE\\_2009\\_report.pdf](http://www.ohchr.org/Documents/Press/IE_2009_report.pdf)>.

<sup>12</sup> 'HRC Resolution 16/2: The Human Right to Safe Drinking Water and Sanitation' UN Document A/HRC/RES/16/2 (8 April 2011).

<sup>13</sup> 'Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque' UN Document A/HRC/15/55/Corr.1 (23 November 2010).

<sup>14</sup> Financing for the Realization of the Rights to Water and Sanitation (2011) and the other handbooks in the series are available at: <<https://unhabitat.org/books/realizing-the-human-rights-to-water-and-sanitation-finance/>>.

Wastewater management in the realization of the rights to water and sanitation;<sup>15</sup> and Sustainability and non-retrogression in the realization of the rights to water and sanitation.<sup>16</sup> Her next charge was to further develop a Compendium of Best Practices, which was perhaps her largest achievement. Perhaps, the most important contribution of the office has been Catarina de Albuquerque's *Handbook*, as 'the culmination to her six year of work as the mandate holder' and Heller's thematic evaluations, both of which we will review.<sup>17</sup>

The mandate of Catarina de Albuquerque as the first 'Independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation' was extended and renamed as 'Special Rapporteur on the human right to safe drinking water and sanitation' after the resolutions in 2010. Through her reports to the Human Rights Council and the UN General Assembly, she continued clarifying the scope and content of the human right to water and sanitation. Léo Heller was appointed in 2014 to be the second Special Rapporteur on the human rights to safe drinking water and sanitation, with his title also slightly modified. He was mandated to work on identifying challenges and obstacles to the full realization of the rights, as well as protection gaps, good practices and enabling factors. His reports have included: Service regulation and human rights to water and sanitation,<sup>18</sup> gender equality,<sup>19</sup> development cooperation,<sup>20</sup> different levels and types of services,<sup>21</sup> and affordability.<sup>22</sup> The second incumbent's first two reports received the most attention on affordability of water and sanitation service,<sup>23</sup> and on the analysis of the different types of water and sanitation services from the perspective of the human right to safe drinking water and sanitation; and then on service regulation and its role in the progressive realization of the human rights to water and sanitation.<sup>24</sup>

The approach taken by both mandate holders reflects the nature of these two ESCRs. We can see that their records show contributions toward the following goals:

- a) universal access to affordable, adequate water and sanitation services, including managing, recycling and treating wastewater, especially fecal sludge management, and controlling pollution;
- b) full participation in and consistency with the Sustainable Development Targets, especially numbers 6, 10 and 17;
- c) national planning for protecting these two human rights;
- d) participatory processes for all producers and consumers in decision-making;
- e) making public defecation unnecessary;
- f) non-discrimination against gender, race, ethnicity and religion; accountability, transparency for outside reviews, reasonable pricing and protection against arbitrary cutoffs for the poor who cannot afford the charges;
- g) reduction in excessive inequalities;
- h) safely managed services and drinking water safety; and
- i) human rights-based policy making and implementation for these two rights, while also integrating these two human rights holistically in monitoring other rights that affect their protection, such as the rights to participation.

<sup>15</sup> <<http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/WasteWaterManagement.aspx>>.

<sup>16</sup> See: <<http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Sustainabilityretrogressionrealisationofwaterandsanitation.aspx>>.

<sup>17</sup> <<http://www.righttowater.info/handbook/>> They consist of: Booklet 1: Introduction; Booklet 2: Frameworks (Legislative, regulatory and policy frameworks); Booklet 3: Financing (Financing, budgeting and budget-tracking); Booklet 4: Services (Planning processes, service providers, service levels and settlements); Booklet 5: Monitoring; Booklet 6: Justice (Access to justice) Booklet 7: Principles (Non-discrimination, equality, information, participation, sustainability); Booklet 8: Checklists; Booklet 9: Sources (Glossary, Bibliography, Index). The full text is found as, 2014 Addendum: *Handbook for realizing the Human Right to Safe Drinking Water and Sanitation* UN Document A/HRC/27/55/Add.3 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/070/41/pdf/G1407041.pdf?OpenElement>> lists the checklists on pp. 6–17.

<sup>18</sup> <[http://www.ohchr.org/Documents/Issues/Water/ServiceRegulation/LeafletServiceRegulation\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Water/ServiceRegulation/LeafletServiceRegulation_EN.pdf)>.

<sup>19</sup> UN Document A/HRC/22/49 <<http://www.refworld.org/pdfid/57cd86c84.pdf>> as well as a summary: <<http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/GenderEquality.aspx>>.

<sup>20</sup> <<http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/DevelopmentCooperation.aspx>>.

<sup>21</sup> <<http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Differentlevelsandtypesofservices.aspx>>.

<sup>22</sup> <<http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Affordability.aspx>>.

<sup>23</sup> 'Report of the Special Rapporteur on the human right to safe drinking water and sanitation' UN Document A/HRC/30/39 (5 August 2015).

<sup>24</sup> 'Report of the Special Rapporteur on the human rights to safe drinking water and sanitation' UN Document A/HRC/36/45 (19 July 2017).



In terms of their methods, the two incumbents have also chosen to provide specific, detailed advice on how the law can be protected in difficult circumstances like pandemics, the impoverished and migrants in vulnerable situations, access to in public spaces and for the displaced and informal settlements, even though its country visit reports and follow-up reports about two years later have been meticulous, fair, and specific in its evaluations. They have yet to make a concerted effort on the greatest existential threat to these two rights, climate change, which requires more concerted action with other mandate holders. (While Special Procedures have yet to coordinate formally with treaty bodies, it is high time for the Human Rights Council to relax that restriction and facilitate maximum coordination.)

Second, both rapporteurs have visited about two dozen countries.<sup>25</sup> Léo Heller has averaged two country visits per year. The countries visited and reported upon do not reveal any explicit condemnations for corruption, or gross inefficiency. However, all of them have criticisms that are perhaps understood as such in the host countries. Brazil was so offended that it wrote a systematic report in rebuttal. In his visit to El Salvador, Heller identified that most of the country lacked access to improved sanitation, while its capital and much of the country received its water from groundwater, not reservoirs. Rural populations rarely had access to toilets and were often internally displaced and/or migrants to cities living in slums. A researcher in the Oswaldo Cruz Foundation in Brazil, Heller noted that the country's water crisis was largely the result of ignoring vulnerable populations, as well as failing to incorporate a human right to water and sanitation in either legislation or constitutional texts.<sup>26</sup> Malaysia's response clarified the details of governance in the country's autonomous areas: disagreed with the Special Rapporteur's characterization of prisoners' access to private use of toilets, and emphasized that the country had sufficient resources to undertake various rural investments needed to increase the supply of water.<sup>27</sup>

An important reform undertaken by Léo Heller has been his follow-up assessments of five countries to his final reports, Portugal, Mexico, Botswana, Tajikistan, and El Salvador. He relied on questionnaires sent to the states, information from NGOs, the internet and other communications, but without a follow-up visit.<sup>28</sup> The grading scale applied to each of the recommendations in the country visit reports are: 1) good progress, 2) progress ongoing, 3) limited progress, 4) progress not started, 5) unable to assess due to lack of information, or 6) retrogression. In his report on El Salvador, the Special Rapporteur made nineteen different judgments, each using this six-point grading scale.<sup>29</sup> He found, for example, 'good progress' on the National Plan for Water and Sanitation, on implementing the monitoring systems of drinking water, and on the Updated Climate Change Plan, but lower grades for the remaining 16 recommendations. He found 'progress not started,' for example, on establishing programs to lessen the financial burden for those without access to collective systems by setting up social protections. Governments are naturally and predictably defensive. After a SRWS country visit, the government of Malaysia responded 'Major upgrades, repairs, or replacements will be undertaken by the Ministry of Health, which is again *largely dependent on the availability of funds*.'<sup>30</sup> For this mandate, additional interlocutors in the UN system would include a bureaucracy of many offices, UN Water,<sup>31</sup> a coordinating body of over thirty UN agencies, the AQUASTAT bureau within the UN Food and Agricultural Organization's global water statistical information system and specific UN agencies involved in peace missions; the UN Development Programme which funds water and sanitation projects; and the UN Secretariat offices on peacekeeping and The Peacebuilding Commission.

Third, both mandate holders focused on legal norms and violations. The source of customary international law is an argument that the SRWS must make explicitly and repeatedly. The two strongest legal claims that the two human rights, to safe drinking water and to sanitation, are binding under customary international

<sup>25</sup> For a list and the visit reports, see: <<http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/CountryVisits.aspx>>.

<sup>26</sup> 'Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation on his mission to El Salvador' UN Document A/HRC/33/49/Add.1 (3 August 2016). See press release: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19986>>.

<sup>27</sup> See also 'Suhakam's Written Statement to the Human Rights Council on the Report of the Special Rapporteur on the Visit to Malaysia' UN Document A/HRC/42/NI/1 (4 September 2019) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/263/16/PDF/G1926316.pdf?OpenElement>>.

<sup>28</sup> See Follow-up analysis of official country visits <<https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/FollowUpAnalysisOfficialCountryVisits.aspx>>.

<sup>29</sup> 'Follow-up on the Visit of the Special Rapporteur to El Salvador' UN Document A/HRC/42/47/Add.4 (30 August 2019)p 3.

<sup>30</sup> Emphasis added. UN Document A/HRC/42/47/Add.8 Paragraph 11, (29 August 2019) 'Population in Rural Areas', in response to paragraph 34 of the Special Rapporteur's 2017 Final Report.

<sup>31</sup> Over 30 UN organizations carry out water and sanitation programmes, reflecting the fact that water issues run through all of the UN's main focus areas. UN-Water's role is to coordinate so that the UN family 'delivers as one' in response to water related challenges. <<https://www.unwater.org/about-unwater/>>.

law, have come from assertions about what has been accepted by states from a General Comment of a supranational treaty body, No. 15 of the Committee on Economic, Social and Cultural Rights, and from an inter-governmental body, General Assembly Resolution 64/292 of 2010. The Special Rapporteur has written,

The human rights to safe drinking water and sanitation are explicitly recognized by the UN General Assembly (resolution 64/292) and the Human Rights Council (resolution 15/9), which derive from the right to an adequate standard of living, protected under, Article 11 of International Covenant on Economic, Social and Cultural Rights (ICESCR). The UN General Assembly (resolution 70/169) and the Human Rights Council (resolution 33/10) recognized that water and sanitation are two distinct but interrelated human rights.

In particular,

the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living.<sup>32</sup>

In addition, both Cuba and Peru have adopted a constitutional amendment to guarantee safe drinking water,<sup>33</sup> recognizing it as a universally required human right.

By contrast, in the US, the issue of human rights to safe drinking water and to sanitation are largely unnoticed by the general public. For example, '350,000 people lack access to potable water in the San Joaquin Valley (of California) alone.'<sup>34</sup> Even the scandal over the poisoning of the citizens of Flint, Michigan remains at the time of writing, largely unresolved, without payment of reparations to the victims. In the United States, an oil pipeline underneath the Lake Oahe, less than a mile away from the Standing Rock Sioux Tribe's reservation and directly upstream from their drinking water intake started its construction. No consultation of the Tribe occurred. Few states have mainstreamed these two human rights. The State of New York, has attempted to amend its state constitution.<sup>35</sup> US water rights violations include polluting groundwater from fracking; lead poisoning of the City of Flint after it was in the receivership of the State of Michigan; to the disconnection of drinking water in a third of the homes of Detroit, Michigan, the latter overlapping with the 2020 Coronavirus Pandemic. Special procedures are charged with receiving 'communications' alleging violations and to issue urgent actions by the government to explain and rectify rights compliance. On many of these issues, the SRWS was quiet, on others intimately involved in innovative and intensely productive ways.

As with treaty-based bodies, special procedures like the SRWS, firstly, are important sources of 'soft law development,' mostly non-legally binding, but desirable norms required for implementation of human rights. However, identifying hard law requirements that are legally binding, either immediately under customary international law and/or focused on treaty law codification for clarification or progressive development. This would mean enunciating principles, themselves not legally binding as such, as pronouncements of a special procedure are not legally binding because they said so.<sup>36</sup> However, a special rapporteur does summarize laws that already are clearly or arguably legally binding under customary international law.

Second, they pass judgement on legal violations, ethical injustices and emergency situations requiring condemnation and/or humanitarian intervention. The SRWS condemned the lead poisoning of Flint,

<sup>32</sup> Léo Heller, 'Consultation on private sector participation and the human rights to safe drinking water and sanitation' (13 September 2019) Palais des Nations, Geneva.

<sup>33</sup> Article 7-A.- 'The state recognizes the right of every person to progressive and universal access to potable water. The state guarantees this right, prioritizing human consumption over all other uses. The state manages the sustainable management of water, which it recognizes as an essential resource, which constitutes a public good and national patrimony. Its domain is inalienable by decree or in time.' (Author's translation) <[https://www.minjus.gob.pe/wp-content/uploads/2019/05/Constitucion-Politica-del-Peru-marzo-2019\\_WEB.pdf](https://www.minjus.gob.pe/wp-content/uploads/2019/05/Constitucion-Politica-del-Peru-marzo-2019_WEB.pdf)>.

<sup>34</sup> UC Davis Center for Regional Change, 'The Struggle for Water Justice in California's San Joaquin Valley: A Focus on Disadvantaged Unincorporated Communities' 2018 <[https://regionalchange.ucdavis.edu/sites/g/files/dgvnsk986/files/inline-files/The%20Struggle%20for%20Water%20Justice%20FULL%20REPORT\\_0.pdf](https://regionalchange.ucdavis.edu/sites/g/files/dgvnsk986/files/inline-files/The%20Struggle%20for%20Water%20Justice%20FULL%20REPORT_0.pdf)>.

<sup>35</sup> See, 'Amendment to state Constitution guaranteeing clean air and water is proposed' (Albany, NY: *Legislative Gazette*, 16 April 2019) <<https://legislativegazette.com/amendment-to-state-constitution-guaranteeing-clean-air-and-water-is-proposed/>>.

<sup>36</sup> As noted in Article 38 of the statute of the Permanent Court of International Justice, learned opinions by scholarly sources of law are indicators of what could be part of international law. 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.' (emphasis added) <[http://www.kentlaw.edu/faculty/bbrown/classes/HumanRightsSP10/CourseDocs/11CJ%20Art\\_38.pdf](http://www.kentlaw.edu/faculty/bbrown/classes/HumanRightsSP10/CourseDocs/11CJ%20Art_38.pdf)>.

Michigan's drinking water by the State of Michigan, which had held that largely African-American city in receivership, after the State changed Flint's water source.

Third, especially in the context of human rights that affect everyone, such as the emergence of climate change as a human rights issue in the past two decades, and most recently in the COVID19 pandemic,<sup>37</sup> which emerged as this essay was completed, the SRWS has an obligation to interact with many of the other special procedures, as well as human rights treaty bodies, the Office of the High Commissioner for Human Rights, NGOs, and the governments concerned to take coordinated action to address both specific injustices as well as more general threats. Toward these three ends, the SRWS should complete the following tasks:

- a) clarifying what implementation requirements in the production and cleaning of water are legally binding;
- b) clarifying soft law that, while not legally binding, are still necessary to achieve the legally binding norms and therefore represent 'best-practices;'
- c) developing a data collection and reporting obligation from all states and obtaining, since this is a universal mandate, to respect these two human rights;
- d) greater collaboration with other, related special procedures and treaty and UN Charter-based human rights bodies to implement an early warning system for clean water and sanitation crises, such as for droughts, epidemics, or diversion of scarce drinking water to industrial uses; and
- e) analysis and recommendations on hard and soft law obligations needed for pandemics, such as COVID19, as well as epidemics where access to clean water, not only for drinking but also for cleaning hands.

The first SRWS mandate holder, Catarina de Albuquerque, asserted that the human rights to safe drinking water and sanitation are derived from several articles of the two main human rights Covenants and customary international law.<sup>38</sup> 'Access to water and sanitation is required for the realization of other human rights, including the right to adequate housing, the right to the highest attainable standard of health, and the right to life.'<sup>39</sup> Both the General Assembly and the Human Rights Council affirmed these rights 'by consensus' in 2013, suggesting evidence of customary international law.<sup>40</sup> The mandate holder should also identify laws, practices and projects which do not follow explicit dictates from international human rights law, but which are implicit norms needed for their implementation and protection.

Special Procedures are effectively required to juggle a number of balls concurrently, including deepening the legal specificity of human rights, including clean water and sanitation, which many states have approved without much thought or real sense of legal obligation. Even more complicated is that these two human rights are hybrids between absolutely binding rights to life and economic and social rights, which are fungible under the amorphous rubric of 'best efforts' with 'available resources.'<sup>41</sup>

With so many potential tasks and tradeoffs in time, expertise, resources, and needs, the SRCWS has faced inevitable choices and tradeoffs, some unique to this office applied to a unique array of choices, but some of which are generic to playing a role of public critic with governments whose countries are supposed to either visit in person; the reality that the UN intergovernmental bodies are divided between a more or less pro-human rights transnational advocacy network of UN bodies, states and NGOs and a more security oriented network that opposes mainstreaming human rights concerns, which are considered violations of national sovereignty. Each individual mandate holder has defined the job somewhat differently, depending not only on what is the pressing issue of the time, but also personal interests and abilities. A lawyer is more likely to focus on developing and clarifying human rights norms relevant to the particular mandate. Activists might focus holding forums, workshops and other meetings with civil society stakeholders, whether online or in person. Policy analysts and engineers might prefer country-visits and follow-up reports in order to work on

<sup>37</sup> For a summary of Special Procedures activity on the pandemic, see: 'COVID-19 and Special Procedures' <<https://ohchr.org/EN/HRBodies/SP/Pages/COVID-19-and-Special-Procedures.aspx>>.

<sup>38</sup> Booklet 1, Sections 7 on 'Legal Foundations' 24. <<http://www.righttowater.info/wp-content/uploads/BOOK-1-INTRO-22FEB.pdf>> 'Recognition of water and sanitation as human rights' was reaffirmed by the UN General Assembly in July 2010, UN GA Resolution: the human right to water and sanitation, 2010 (A/Res/64/292) and the Human Rights Council in September 2010 (HRC Resolution: human rights and access to safe drinking water and sanitation, 2010 (A/HRC/Res/15/9).

<sup>39</sup> Booklet 1, Sections 7 on 'Legal Foundations' 24. <<http://www.righttowater.info/wp-content/uploads/BOOK-1-INTRO-22FEB.pdf>>.

<sup>40</sup> UNGA Resolution: the human right to safe drinking water and sanitation, 2013 (A/Res/68/157), and HRC, Resolution: the human right to safe drinking water and sanitation, 2013 (A/HRC/Res/24/18).

<sup>41</sup> Henry F. Carey, 'Economic, Social and Cultural Rights' in Henry F. Carey and Robert J. Beck (eds), *International Studies Association Compendium on International Law* (Oxford: Blackwell, 2010)1261–1283.

concrete challenges with governments inclined to have an outsider make evaluations that might be embarrassing to the host country. Beyond legal clarification, this mandate holder faces tactical choices whether to criticize, engage, and/or collaborate with states, interest groups, and consumers.

#### 4. Recent developments

On November 19, 2019, the SRWS gave a press conference on the occasion of the 'World Toilet Day on the Dignity, Safety and Human Rights for Sanitation Workers,' a relatively low-profile event on a major concern in the multi-faceted effort to diminish the largest killer in the world, poor sanitation. Léo Heller, the current Mandate holder, declared a profound truth on the UN most significant current policy initiative, the Sustainable Development Goals for up to the year 2030. They are similar to safe water and sanitation in that they target another putative human right with complex inter-relationships with other human rights, though not found in any formal treaty.

During my mandate, I have observed with concern discrimination against some of the most vulnerable sanitation workers, the manual scavengers, who clean latrines and sewers and handle human excreta by hand. Despite attempts to put an end to manual scavenging through legislation, there are still women and men cleaning public and private toilets, collecting excrement in latrines and open drains who, as a result, suffer from deplorable housing and living conditions... Governments need to take urgent measures in order to protect the human rights of sanitation workers. Achieving Sustainable Development Goal no. 6 requires substantially increasing the working force in the sanitation sector, which will make it necessary to offer dignified and safe conditions in order to attract and retain enough sanitation workers. Governments have also committed to Sustainable Development Goal no. 8, which requires decent conditions for all.<sup>42</sup>

Calling attention to an inequity in labor that actually harms most people if public resources were properly spent on higher levels of sanitation is just a recent example of how the SRWS can use his or her 'bully pulpit' to try to goad governments to take their responsibilities seriously and by 'not doing business as usual.' It also underscores the complex interdependence of human rights performance, as the issue of inequality harming the human rights of everyone, especially the poor minorities including indigenous, racial, and ethnic groups, the aged and the confined including detained migrants, detained youth, the confined aged and the imprisoned. Since these vulnerable groups tend to be the least political active, including voting, they are the most at risk of being ignored, even in a democracy where open government and awareness of huge threats is generally least likely to be suppressed compared with closed societies and/or authoritarian regimes.

Another innovation has been the holding of public consultations,<sup>43</sup> as well as bilateral discussions using internet communications, seeking input from NGO stakeholders on what goals, methods, and standards should be adopted to promote these human rights. These include such questions that he was preparing to present to the 45<sup>th</sup> Session of the Human Rights Council in 2020,

1. How can the concepts of 'progressive realization', 'maximum available resources' and 'minimum core obligations' be translated in the context of the human rights to water and sanitation?
2. What elements and specificities of the human rights to water and sanitation should be considered in the application of the three concepts mentioned above?
3. To which extent do human rights monitoring bodies (and others, such as the Joint Monitoring Program) assess the implementation of States' obligations relating to the three concepts mentioned above? How can those bodies further address those concepts?
4. How should compliance with the obligation of progressive realization be evaluated? Is the standard of reasonableness (and related standards such as adequacy, appropriateness, and proportionality) sufficient to determine whether the steps taken by a State comply with its obligations? How to translate those standards in the water sector? and
5. Is there any other perspective that should be discussed in relation to these three concepts mentioned above in the context of the human rights to water and sanitation?<sup>44</sup>

<sup>42</sup> 'World Toilet Day Statement of the Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation' November 18, 2019 <<https://www.unwater.org/world-toilet-day-statement-of-the-special-rapporteur-on-the-human-rights-to-safe-drinking-water-and-sanitation/>>.

<sup>43</sup> For example, the Special Rapporteur met for two hours with NGOs on 22 October 2019 in a public consultation in New York, co-sponsored by Franciscans International, at the venue of the Baha'i International Community, 866 United Nations Plaza #120.

<sup>44</sup> <<https://www.ohchr.org/Documents/Issues/Water/Progressive%20Realisation%20Flyer.pdf>>.



The core ideas that Heller emphasized in 2020, in his final year as SRWS subsumed three core themes, human rights of the most vulnerable and core minimum capacities of states, as well as his specific response to the Coronavirus Pandemic. First, he summarized the decade of experience of this special procedure since 2010, the year of the General Assembly Resolution that resolved that safe drinking water and sanitation were legally binding under customary international law. Heller sought to specify and explain how to achieve human rights protection of safe drinking water and sanitation. The core of his argument is that progress should be identified in three dimensions; 'human rights as a driver, human rights as a policy tool, and human rights as a people-centric approach.'<sup>45</sup> Human rights as a driver focuses on both overall development policy and on specific megaprojects. Human rights in policies focuses on different levels and types of services, affordability, service regulation, and accountability. The people-centric approach of human rights focuses especially on gender mainstreaming, forcibly displaced persons and spheres of life outside of the home, such as displaced and homeless individuals or essential workers requiring clean water to prevent exposure to the Coronavirus Pandemic, cholera epidemics, or their equivalent.

Second was Heller's idea of a core minimum capacity of all states, focusing on the sustainable development goals pertinent to these two human rights. This idea is not inconsistent with the idea in the ICESCRs of 'progressive realization with available resources' that states often recite as a mantra in response to criticism from the Special Rapporteur. It also resembles practices of other human rights bodies. For example, the Human Rights Committee acknowledges that derogable rights, even if properly and legally suspended according to principles of necessity, proportionality and discrimination, does not cover the non-derogable elements of derogable rights, such as due process, which can be suspended in an emergency, but never suspending *amparo*, *habeus corpus*, or similar concepts requiring detention to be justified legally. Because safe drinking water and sanitation are connected with the right to life, governments must assure that all citizens have enough clean water and protection from fecal poisoning to protect the lives of their citizen—no matter how poor the country. Sovereignty claims and emergency declarations to suspend these two human rights to safe drinking water and sanitation. The challenge for the Special Rapporteur will be how to define how much is enough national competence to protect life to protect citizens' access to safe drinking water.

Third, Heller specified how the two human rights to progressive realization of safe drinking water and sanitation should be realized through two criteria: a) using the maximum of its available resources and b) fulfilling the minimum core obligations.<sup>46</sup> He developed two important conceptual standards. The first is vertical realization: availability, accessibility, and quality through the 'ladders' used by the World Health Organization and UNICEF.<sup>47</sup> These ladders are based on progressing according to the technical standards for water, sanitation, as well as hygiene (handwashing). The second is horizontal realization, which is focused on the equality of access to these three realms. More eclectic and wide-ranging, the strategy centers on six approaches identifying and protecting those left behind; the cultural and political context that requires adaptation; ensuring that water and sanitation service uphold privacy; and assuring respect for dignity and informed consent and active participation; with access to information on choices available; and with reliable supervision and accountability. The maximum resources means that states need to generate information on their implementation standards. The minimum core is based on General Comment no. 15, referred above from the Economic, Social and Cultural Rights Committee as the 'minimum essential amount' of clean and safe water that citizens need to survive, if not thrive safely and reliably at an affordable price with reasonable access, without discrimination. Operationalizing these criteria and implementation tasks going forward is clearly an agenda for future Special Rapporteurs, as well as for the relevant states subject to the treaty body's review of state party reports.

Finally and exceptionally, 2020 brought into focus the Coronavirus Pandemic. During initial weeks of the COVID19 pandemic, the politically charged atmosphere offers the opportunity to take important action (for good or bad). The Special procedures issued five joint public statements during the first three months of the crisis, the only topic of any public statements from special procedures during those first three weeks.<sup>48</sup>

<sup>45</sup> 'Progress towards the Realization of the Human Rights to Water and Sanitation (2010–2020)' UN Document A/HRC/45/11 (6 August 2020).

<sup>46</sup> 'Progressive Realization of the Human Rights to Water and Sanitation' UN Document A/HRC/45/10 (8 July 2020) <<https://undocs.org/A/HRC/45/10>>.

<sup>47</sup> See Joint Monitoring Program, WHO and UNICEF, 'Monitoring' <<https://washdata.org/monitoring>>.

<sup>48</sup> 'COVID-19: States should not abuse emergency measures to suppress human rights – UN experts' 19 March 2020 <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>>.

'COVID-19 will not be stopped without providing safe water to people living in vulnerability – UN experts' 23 March 2020 <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25738&LangID=E>>.

It remains to be seen if human rights will prevail with supranational institutions like, the special procedures will be able to overcome the onslaught of criticism against inter-governmental bodies, ironically who are handicapped often by not doing any more than their UN Member States permit them to do. The SRWS also issued three short videos focusing first on hand washing; the second on access to sanitation as a measure to prevent disease including COVID-19; and the third on water and gender.<sup>49</sup> However, these public information videos begs a few questions that the unexpected emergency poses. First, water utility companies or agencies should never turn off water delivery for reasons of the consumers' inability to pay, when water is needed for handwashing. Second, is there a human rights case against or in favor of pursuing herd immunity as a public policy strategy? Third, is there public knowledge about water systems transmitting the COVID virus, either generally, or in terms of specific uses of water that is not generally hygienic. Fourth, what human rights claims are absolute in public policy concerning the primary choice whether to pursue 'herd immunity' with catastrophic short-run losses in life or 'social distancing,' in order to protect the health care system. When to reopen an economy after social distancing? Fifth, in the countries that have not mandated social distancing, which are generally the poorer ones, public health is imperiled from congestion of people in slums.

Governments promulgated many COVID19 emergency declarations.<sup>50</sup> The SRWS should focus on whether water has been prioritized in these new executive powers, both as a negative human rights to halt any harm to water rights, but also as a positive right to ensure that governments take steps to make sure safe drinking water is made available to those who are vulnerable, especially as social distancing measures are implemented. So, all special procedures contribute to legalization: hard legally-binding law, soft law, both non-legally binding norms and incipient hard law on that are intended to become binding if states acquiesce in norms that are repeated and brought into consciousness by transnational advocacy networks. The failure of world leaders to wear masks and wash their hands routinely could have been issued as a general policy matter. As of mid-September 2020, the SRWS had not publicly discussed, at least on the official UN websites any of these leadership and policy issues. However, one can imagine that SRWS Léo Heller could have criticized his own country's president, Jair Bolsonaro, who singularly defied conventional wisdom, repeatedly and publicly minimizing the threat of the virus and refusing to practice norms of handwashing, face-mask wearing, whether or not the virus is spread primarily by breathing.<sup>51</sup>

## 5. General evaluation and recommendations

What have and should the SRWS prioritize to use the necessarily limited resources of any one person and those who could assist that office from other UN agencies and other bodies, as well as NGOs? First, the Special Rapporteur could facilitate and coordinate the construction of 'right to clean water and sanitation' data bases. Researchers, government officials, and stakeholders could collaborate without initially knowing each other. And further that they can optionally meet and have conversations with people from all around the world that happen to be or have been on the same webpage. This could include network mapping to facilitate cooperation among inter-governmental units, from the UN to regional IGOs, to national capitals, to regional and local governments, as well as private sector, both for-profit and not-for profit organizations, not only in practice, but also in theory, to optimize productivity. The mapping could also identify missing links which could be filled through recruiting new consulting and review relationships. Such multi-level governance connections, from International Organizations and their sub-units to the various stakeholders involved. Together, they could not only better share information, but also provide peer-to-peer counseling or direct evaluations, monitoring production and quality of water and practices that might cause toxicity or epidemics.

<sup>49</sup> 'No exceptions with COVID-19: "Everyone has the right to life-saving interventions" – UN experts say' 26 March 2020 <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=E>>.

'Unacceptable' – UN expert urges better protection of older persons facing the highest risk of the COVID-19 pandemic 27 March 2020 <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25748&LangID=E>>.

"Leave no one behind" – Don't forget your commitments in your response to the COVID-19 crises, UN expert urges States' 9 April 2020 <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25786&LangID=E>>.

<sup>49</sup> Video on handwashing <<https://youtu.be/eDS7DZuuonY>>.

Video on access to sanitation <<https://youtu.be/S13uMaid5Vs>>.

Video is on water and gender <<https://youtu.be/-rDcJ01ko3A>>.

<sup>50</sup> At the time of writing, 71 countries had promulgated emergency declarations, 11 affecting free speech and 78 countries on assembly. For a worldwide summary of emergency measures undertaken, see 'COVID-19 Civic Freedom Tracker' <<https://www.icnl.org/covid19tracker/>>.

<sup>51</sup> Tom Phillips, 'Brazil: Bolsonaro's defiance of distancing criticized by health minister' (*The Guardian*, 13 April 2020) <<https://www.theguardian.com/world/2020/apr/13/brazil-bolsonaro-coronavirus-covid-19-social-distancing>>.

Second, country visits by the SRWS have been systematic and consistent with the guidelines for other special procedures. But, they are necessarily dependent on information from third parties and the internet. Sometimes, the sourcing of the information on the follow-up reports is not provided. Of greater urgency remains the unspecified hard law obligations of states, both specific general requirements and prohibitions, as well as the legally binding aspects of rights which are derogable, if proclaimed as necessary under an emergency, with measures that are proportionate and discriminatory against gratuitous harm. The office has provided superb accountability and implementation guidelines needed, but this groundwork should be developed into clear statements as to which of them are part of customary international law. Transformative change is not yet in the offing, but the different normative orders are emerging with the effort for the progressive realization of an expanding set of norms affecting the definition and implementation of conditions needed for safe drinking water and sanitation. Heller has innovated with his progress reports on country reports, which set a model for all states, and by his specification of the dozen expanding norms that have clarified what was unseen previously. It might be desirable to emulate what John Knox, the former Special Rapporteur on Human Rights and the Environment contributed, which was a set of Framework principles that represented legally binding customary international law.<sup>52</sup> This would help move the SRWS into a second phase where stakeholders will attempt to achieve social recognition for these norms, given that states have not actively contested these norms in the abstract, in their various interactions with and reactions to his reports. Such a set of framework should confront in explicit terms the core requirements of all states, no matter how few resources may inhibit their competency.

The country visit and follow-up reports of de Albuquerque and Heller state explicitly what of their recommendations have been followed and which require further progress. Sometimes, these improvements accrue from foreign financed or assisted development of water infrastructure, often funding private contractors, domestic NGOs or the result of the work of humanitarian relief NGOs, also foreign-funded.<sup>53</sup> However, many states have not generally recognized that they have a legal duty to assume this responsibility, even if the majority of their legal systems are monist with respect to the incorporation into domestic of international law. They do not regard these conferences or the proclamations of special procedures as legally binding. Even where their state representatives are positive about legal compliance with these norms, their domestic legal system are constrained by political dissent and vagaries. Moreover, states have generally not enacted legislation in accordance with the language found in either General Comment Number 15 or the Handbooks and other official reports of the Special Rapporteur. However, some progress has been indicated in the country-visit reports of the Special Rapporteur. The problem is that most countries are never visited by this special procedure and these two human rights to safe drinking water and to sanitation are not systematically reviewed by either other Charter-based processes like the Universal Periodic Review or the Committee on ESCRS review of state party reports. Thus, there is a huge information and knowledge gap in this issue area.

Third, some state parties and non-state parties maintain that human rights treaties do not apply extra-territorially and/or that in armed conflict, human rights law is irrelevant. So, the US, which is a non-IESCR state party what rejects both extra-territoriality and the applicability of IHRL to armed conflicts, its military, which is used frequently and with great destructive power, is would only get supervised intensively for violations of the right to water by the Special Rapporteur, beyond anything that might come up during its periodic, Universal Periodic Review. Of course, the US ignores the criticisms of this Special Rapporteur, just as it ignored criticisms of the Human Rights Committee and the Committee against Torture for its cruelty and torture practices, among various critiques by treaty ad Charter Bodies. Clearly, the Special Rapporteur needs to stress, as she did in her US visit, that as with all human rights obligations, extra-territorial obligations are the same as those inside countries, and include not only direct violations but also those financed by surrogates and client governments. Countries that finance foreign armies that attack, or who themselves attack reservoirs, as the US did in the 1999 War against Serbia, also need to be held account (and reject any claims that human rights law is irrelevant during armed conflict because of the falsely claimed *lex specialis* of only international humanitarian law, which also forbids attacks on critical infrastructure needed for humans to survive.

<sup>52</sup> 'Framework Principles on Human Rights and the Environment: the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.' (2018) <<https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>>.

<sup>53</sup> Sharmila L. Murthy, 'The Human Right(s) to Water and Sanitation: History, Meaning and Controversy over Privatization' 31 (1) Berkeley International Law Journal 89–149; Jennifer Naegle, 'What is Wrong with Full-Fledged Water Privatization?' (2004) Journal of Law and Social Challenges 99–130.

Fourth, the Special Rapporteur should develop and lobby for a treaty that would protect the human rights to water and sanitation. This could be done in stages, including questionnaires to and meetings with UN member states and stakeholders. The treaty would require as immediately binding hard law, long-term planning for long-term prevention of loss of water and preservation of sources of water. Planning to prevent losses resulting from development that could hurt the most vulnerable, who live near these sources of water would also be legally required. It is difficult to resolve these tradeoffs and dilemmas, but institutionalizing policies of planning is one what to try to achieve political consensus that has been difficult to achieve. For large infrastructural projects financed by foreign governments and/or multinational corporations, government officials and businesses should make their accounting transparent to minimize corruption. The issue was hardly mentioned by the Special Rapporteurs, even though it is certain that this predicament of embezzlement and kickbacks pervades water and sanitation, infrastructure project. Rules on who would police corruption is also long overdue. Additional development of mandatory norm compliance, among the guidelines and best practices already developed, should be identified as part of the treaty-development or at least in thematic reports.

Fifth, the SRWS has been less visible and arguably less critical of UN member-states than many 'if not most' other UN Special Procedures. Heller has issued public criticisms for Flint, Michigan and in Chile, where he asked the government to explain its intensive cultivation of avocados in the central coastal region of Valparaiso, as well as the Alto Maipo Hydroelectric Project which jeopardizes the drinking water of the capital, Santiago.<sup>54</sup> However, both Albuquerque and Heller's urgent actions have focused more on South America than any other region. Given that the right to safe drinking water is absolute and an estimated two-thirds of the world's population experience severe water scarcity for at least one month per year,<sup>55</sup> the SRWS ought to criticize governments that fail to plan for these water scarcities. About half of these four billion people are in China and India, with the California region of the US in third place. All three of these states have more than adequate resources to guarantee safe drinking water during droughts. While Cape Town, South Africa in 2016 and Melbourne, Australia escaped existential threats to their water supplies by cutting consumption, many other major cities are at great risk and ought to be monitored.<sup>56</sup> However, these proclamations appear to be the exceptions that prove the rule of quiescence.

Sixth, the SRWS has many specific dilemmas in choosing confrontational or cooperative approaches, but it seems clear that more confrontation is in order because too much deference or non-attention to many scandalous practices, particularly regarding the most vulnerable. While it is praiseworthy to develop all these new soft law norms concerning the vulnerable, it is time to name names regularly and use the office to help mobilize shame on those that they name. The SRWS should interact more with other special procedures on inter-sectional issues, from climate change, to violations of civil and political rights, where public contestation may be their only avenues to protect rights to drinking water and sanitation and to protest insufficient, unsafe, or unaffordable water supplies and waste disposal harming water. Protests against threats from toxic waste and mining require democratic access as well. The vulnerable poor in informal settlements, migrants, and indigenous rights need to get their counterpart Special Procedures to include the SRWS involved in joints studies and statements. NGOs and other UN agencies should be used more extensively for research and coordination. Greater attention is needed on contaminated river water and lakes used for drinking; the unauthorized abuses of logging and plantations that divert or pollute drinking water; and the improved development and enforcement of environmental protection laws designed to limit commercial production that the quality of water sources.

Seventh, two other practices should be more fully utilized. First, would be the establishment of social media reporting on outbreaks of water contamination, especially once an epidemic of a water-borne, contagious disease like cholera, has been identified. They are simply faster and more reliable in remote areas than waiting for a lab specimen brought into a laboratory. Lives are at stake in water-born illnesses and the SRWS could advance the practices of agencies like the World Health Organization and its regional affiliates, as well as the US-based CDC, in relying on social media reporting. While public health is more invested in the WHO and its various regional partners, proper sanitation at the micro-level arguably ought to be included in the Special Rapporteur's ambit. Unlike for the COVID19 epidemic, where there are so many asymptomatic cases,

<sup>54</sup> Reuters, 'U.N. Water Rights Expert Questions Chile's Avocado and Energy Priorities' (20 August 2020), <<https://www.usnews.com/news/world/articles/2020-08-20/un-water-rights-expert-questions-chiles-avocado-and-energy-priorities>>.

<sup>55</sup> 'Don't let a drought go to Waste' (25 April and 2 May 2016) The Christian Science Monitor Weekly 34.

<sup>56</sup> Among those cities at risk have included Los Angeles, USA, Jaipur, India, Dar es Salaam, Tanzania, Dalian, China, San Diego, USA, Karachi, Pakistan, Harbin, China, Phoenix, USA, Porto Alegre, Brazil and Monterrey, Mexico. Ryan Lenora Brown, 'Squeezing More Out of Taps' (7 May 2018) Christian Science Monitor Weekly 24–30.



those with water-borne diseases, 'like cholera' are easily identified by the casual observer. Remote rural areas and overpopulated slums both lack proper sanitation and lack modern sanitation infrastructure. Certainly, human settlements in slums can efficiently use more investments in sanitation.

Finally, various NGOs and government agencies provide macro water quality indices of regions and countries.<sup>57</sup> These indices ought to be part of the SRWS's reporting regime. Instead of a dozen country visits every few years with follow-up reports based on third-party and internet-based information, macro data is available to compare country compliance with the human rights norms in terms of macro quality and quantity. The norm of clean drinking water and sanitation represent a spectrum of compliance. While there are clear 'violations' of the right to life and to a clean environment, there is ample space for evaluating UN member states on two types of scales, an objective international rating of water quality and quantity and a more subjective rating of how well a country is performing given its standard of living.

## 6. Conclusions

The two Special Rapporteurs have followed a pattern of impacts similar to most special procedures. Human rights violations and norms have been publicized and are discussed to a much greater extent overall, as well as attempting to mainstream the human rights of water and sanitation protection in a variety of contexts, especially where the United Nations itself is involved, such as peacekeeping and peacebuilding, human rights reviews, and disaster relief. There is some evidence of modest improvements in the right to water, though it would be difficult to prove that this resulted from human rights advocacy and monitoring. The publicity to the norms as legal obligations has framed the issue in supportive fora, but are ignored or rejected in neoliberal or statist arenas. As an ESCR, the Special Rapporteur's advocacy is not taken seriously by states like the US, which do not accept that right. Nevertheless, the United States did host a visit from de Albuquerque in 2011,<sup>58</sup> where she focused on excluded groups, as well as its development assistance overseas—one of the few times that the extraterritorial implications of US human rights policy was ever conducted—a position also completely rejected by US legal doctrine as an understanding stipulated at US Senate ratification. In addition, her successor, Leo Heller, declared in one of his most important public statements, a critique of US officials for allowing residents of Flint, Michigan, USA, a majority African-American city, to be poisoned when its water sources were changed to save money. 'The fact that Flint residents have not had regular access to safe drinking water and sanitation since April 2014 is a potential violation of their human rights...Serious problems reported on water quality, particularly high concentrations of lead, are also concerning human rights issues.' He was joined by two other special procedures. Leilani Farha, UN Special Rapporteur on adequate housing, cautioned that 'the impact on housing and living conditions for an already vulnerable group is clear and devastating.' 'Decisions would never have been made in the high-handed and cavalier manner that occurred in Flint if the affected population group was well-off or overwhelmingly white,' said Philip Alston, UN Special Rapporteur on extreme poverty and human rights.<sup>59</sup>

However, another example was a blemish on the record of both SRWS incumbents through inaction. The terrible cholera epidemic in Haiti from 2010 to 2019, which followed the January 2010 earthquake, had a catastrophic impact because of the country's poor sanitation generally, though the origin came from improper sanitation by the MINUSTHA peacekeeping units from Nepal. Why did Haiti have the lowest sanitation until after the 2010 calamity? That is a difficult problem owing to the country's extreme poverty and massive corruption. However, because of the devastation in the country, international assistance arrived from the Pan American Health Organization, the Center for Disease Control (CDC) of the US Government, and many bilateral aid programs. Yet, it took eight years for Secretary General Ban Ki-Moon to apologize for the UN Stabilization Mission's causing that epidemic and nine years to end the cholera epidemic. The SRWS played no role on Haiti not holding the UN accountable and not lobbying for higher levels of proper sanitation, such as lobbying for the country's first sewage plant. Not only was this a disgraceful blemish on the record of both mandate holders of this special procedure, but it represented a lost opportunity to establish

<sup>57</sup> Exemplars include: 'Global Open Data Index' <<https://index.okfn.org/dataset/water/>>.

UN Environment Programme, 'Global Drinking Water Quality Index Development and Sensitivity Analysis Report' <[https://www.un.org/waterforlifedecade/pdf/global\\_drinking\\_water\\_quality\\_index.pdf](https://www.un.org/waterforlifedecade/pdf/global_drinking_water_quality_index.pdf)>.

UN Environment Programme, 'Global Drinking Water Quality Index Development and Sensitivity Analysis Report' <<https://www.unenvironment.org/resources/report/global-drinking-water-quality-index-development-and-sensitivity-analysis-report-0>> and <<http://wedocs.unep.org/handle/20.500.11822/9439>> and <<http://wedocs.unep.org/handle/20.500.11822/9439?show=full>>.

<sup>58</sup> 'Report of the Special Rapporteur on the human rights to safe drinking water and sanitation' UN Document A/HRC/18/33/Add.4 (2 August 2011).

<sup>59</sup> UN Press Release, 'Flint Michigan crisis "not just about water," UN rights experts say ahead of President Obama's visit' <<http://www.un.org/apps/news/story.asp?NewsID=53839#.Wm50hkfZIU>>.

the principle of accountability of intergovernmental organizations, like the UN, as well as to help Haiti gain clean water and sanitation practices and technologies.

The SRWS has not to date specified what legal aspects of the Right to Safe Water and Sanitation have been accepted by states as customary international law, even if the latter is controversial and requires legal expertise, for which a water specialist in this position might lack; or if s/he had the legal expertise, then would like the public health knowledge. The hard law might be more procedural: given immediate and proximate threats to the right to life, there are legally-binding obligation to address water safety following contamination or pollution and adequacy in drought. This obligation could extend not only to the state party with the territorial crisis, but also to wealthy countries to provide resources to compensate for their past contributions to climate change in the vulnerable states. Of course, country politics will remain legally sovereign and resistant. If a Special Rapporteur is to evaluate causes to make corrections, the risk of offending the state being assessed can be mitigated through a process for having a continuing discussion is needed, even if a national legislature or executive will ultimately decide whether to follow these evolving norms.

To summarize, the Special Rapporteur has brought attention to issues that have limited visibility to the general public, except in the case of large scandals, such as Flint, Michigan. More needs to be done to condemn serious violations. Norms are being created that were never specified as recently as 2017 when Mr. Heller was able to innovate with his progress reports on country reports, which set a model for all states, and by his specification of the dozen expanding norms, that have clarified what was unseen previously. Constituting these norms are only the first phase of this emerging global order. The Special Rapporteur is moving into a second phase where stakeholders will attempt to achieve social recognition for these norms, given that states have not actively contested these norms in the abstract, in their various interactions with and reactions to his reports. Their main complaints have been that they simply lack the resources to achieve the higher quality of sanitation and safe drinking water standards. The lack of active contestation does mean that states are acquiescing into the new norms rather than actively supporting them.

There still is not much media salience, but this special procedure has created many normative opportunity structures at the many junctures where he has initiated thematic norms in special reports that follow public consultations at a pace of about two major initiatives every year. These processes have engaged many stakeholders to the table, where people, despite their differences, are speaking to the issue—even if states and stakeholders are often speaking past each other in separate bubbles. Their normative positions and background knowledge remain largely isolated and unaddressed, leaving the conflicts to be politically calm, but also quite unresolved. While the Special Rapporteur has not attempted to negotiate with opposing sides, states and stakeholders, s/he has made her positions clear on behalf of human rights norms, both core obligations and legally non-binding but persuasive arguments to realize the implementation of these human rights. So, we are short of transformative change, but also advancing soft law norms in a progressive, if isolated argument for change. States that do agree to be consulted are still inclined to object to some of the regulations, but the large majority of states are on the sidelines or in opposition to claims of universal applicability of both the core obligations and the soft law mandates for positive adoption of the dozen-odd principles that are ideal conditions for the protection of these two human rights to safe drinking water and sanitation.

## Competing Interests

The author has no competing interests to declare.

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