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## The human right to water and sanitation: is the obligation deliverable?

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The concept of the human right to water can be traced to the Mar del Plata water conference that took place in Argentina in 1977. A quarter of a century later, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) gave a major boost to the concept by recognizing it in a separate comment. This was further strengthened by two resolutions by the United Nations General Assembly and the Human Rights Council – both adding the right to sanitation. This article discusses the evolution of the right and the challenges facing its implementation, and addresses the question of whether this obligation is indeed deliverable.

**Keywords:** General Comment 15; Human Rights Council; Mar del Plata Water Conference; Rio Summit; United Nations General Assembly

### Introduction

Water is an essential and indispensable element for life. It is a finite resource without an alternative, and upon which there is total dependence for survival. Social and economic development is closely tied to water, and poverty is prevalent mostly in areas that face water shortage. Water-related diseases, caused by unsafe drinking water and the absence of proper sanitation facilities, are among the leading causes of death in the developing world.

The arithmetic of water and sanitation in the world today indicates a very gloomy picture. Close to 1 billion people lack access to improved water resources; 2.6 billion people are without provision for sanitation; and 1.5 million children under five die annually of water-borne diseases. By 2050 one-fourth of the world population is expected to live in countries with chronic water shortage, mostly in the Middle East, Africa, and parts of India and China (United Nations, 2010).

Population growth presents the major challenge to water resources and sanitation around the globe today. The world population grew from 1.6 billion to 6.1 billion during the last century, and has already surpassed 7.2 billion inhabitants by the end of the year 2013. The figure is expected to reach 9 billion people by 2050, competing over the same finite amount of water. Hydrological variability, environmental degradation and climate change are other challenges to water resources, compounded by spatial and temporal variations in water availability. Consequently, the variations in availability and uses are stark. The renewable internal freshwater resources per capita for South Asia is less than 2000 m<sup>3</sup>; the Middle East is less than 1000 m<sup>3</sup>; and it is less than 5000 m<sup>3</sup> cubic meters for Sub-Saharan Africa. On the other hand, the per capita for Latin America and the Caribbean is close to 25,000 m<sup>3</sup>; and for Europe and Central Asia it is above 12,000 m<sup>3</sup> (World Bank, 2013).

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This situation has generated extensive debate on how to deal with the challenges of variations and variability, the competing demands of the different uses and users of water resources, and how to guarantee access of the poor and vulnerable segments of the population to adequate amount of water and provision for sanitation. This latter element gradually evolved into the concept of the human right to water.

The debate on the human right to water started during the international conferences on both environment and water in the 1970s, and became more comprehensive and focused in the 1990s by including a reference to sanitation. By the beginning of this century, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) gave a major boost to the right, and to the debate, by recognizing a human right to water and sanitation through its General Comment No. 15. About a decade later the United Nations General Assembly (UNGA) and the Human Rights Council (the Council) both joined the legal debate and contributed significantly to the emergence and strengthening of the international law basis of the right to water and sanitation. Thus, through this incremental approach an international legal regime for the human right to water and sanitation has gradually emerged, as will be discussed in this article. The emergence and evolution of that regime built heavily on, and in turn strengthened, the global legal regime for human rights.

### **The human right to water and sanitation: genesis of the debate**

The debate on the human right to water started as early as the 1970s. The 1972 Stockholm United Nations Conference on the Human Environment identified water as one of the natural resources that needed to be safeguarded ‘for the benefit of the present and future generations through careful management or planning’. It would, however, take five more years before the debate would move from management and planning to the right to water.

In 1977 the United Nations held the Mar del Plata Water Conference in Argentina. That was the first time a global conference devoted fully to water resources was held. The Action Plan included a number of recommendations and resolutions covering a wide spectrum of issues. One resolution stated specifically that ‘All people whatever their stage of development and their social and economic conditions have the right to have access to drinking water of quantities and of a quality equal to their basic needs’ (United Nations, 1977). This resolution unquestionably represented a milestone, given that it relied on, or was guided by, no precedents. Indeed this is the first instrument to be issued by an international meeting that included an explicit reference to the right to water. The fact that it did not address the issue of sanitation should in no way be seen as a shortcoming, considering the time, in the historical framework, in the resolution was adopted.

It would take 15 more years before the right to sanitation would be addressed. That took place at the International Conference on Water and the Environment which was held in Dublin, Ireland, in January 1992. Principle 4 of the Dublin Statement on Water and Sustainable Development proclaimed that ‘water has an economic value in all its competing uses and should be recognized as an economic good’. Yet, this principle clarified further that ‘It is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price’.<sup>1</sup> Thus the Dublin Statement complemented what the Mar del Plata Action Plan started, and the right to water and sanitation became associated and interrelated rights.

The Dublin Conference was held as a preparatory meeting for the United Nations Conference on Environment and Development that took place in Rio de Janeiro, Brazil, in June 1992 (the ‘Rio Summit’). Agenda 21 of the Rio Summit ‘Programme of Action for Sustainable Development’ included a separate chapter (Chapter 18) on freshwater

resources. The overall objective laid down for freshwater resources is ‘to satisfy the freshwater needs of all countries for their sustainable development’. On the issue of the needs and rights to water, Chapter 18 stated that

Water resources have to be protected, taking into account the functioning of aquatic ecosystems and the perennality of the resources, in order to satisfy and reconcile needs for water in human activities. In developing and using water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of the ecosystems.

Moreover, the chapter endorsed the resolution of the Mar del Plata Water Conference that all peoples have the right to have access to drinking water, and called this ‘the commonly agreed premise’ (United Nations, 1992).

Five years later, in May 1997, the UNGA adopted, by a large majority exceeding 100 of its members, the Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourses Convention). The Convention underscores what it terms ‘vital human needs’. Article 10 deals with ‘Relationship between Different Kinds of Uses’ and states that in the absence of an agreement to the contrary, no use of an international watercourse enjoys priority over other uses. Paragraph 2 of Article 10 of the Convention states that ‘In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to Articles 5 to 7 of the Convention, with special regard being given to the requirement of vital human needs’. Articles 5 and 6 deal with equitable and reasonable utilization; while Article 7 addresses the obligation against causing significant harm (Salman, 1997). In clarifying the provisions of Article 10, a Statement of Understanding was issued and adopted by the UNGA stating that: ‘In determining “vital human needs”, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.’

The UN Watercourses Convention should be distinguished from the previous instruments discussed in this article. Whereas those instruments are mere soft law resolutions with no binding effect, the Convention is an international treaty with a binding effect. The Convention has entered into force on 17 August 2014 (Salman, 2014).

Three years after the Convention was adopted, the UNGA held, in 2000, the Millennium Summit. The Summit issued the United Nations Millennium Declaration on 8 September 2000. The Declaration was adopted unanimously by the UNGA, and was signed by the 147 head of states who attended the Millennium Summit. The Declaration addressed eight Millennium Development Goals to be achieved by the year 2015. These goals include reducing by half the proportion of people without sustainable access to safe drinking water. The United Nations Summit on Sustainable Development that was held in Johannesburg, South Africa, in September 2002 added a similar goal with regards to basic sanitation, and corrected this unfortunate oversight by the Millennium Development Goals. This is similar to the Dublin Conference of 1992 complementing the Mar del Plata Action Plan on the issue of sanitation.<sup>2</sup>

These developments provided a major boost to the emerging concept of the human right to water and sanitation, and paved the way for the UN Committee on Economic, Social and Cultural Rights to issue in 2002 General Comment No. 15 recognizing a human right to water. The Committee has been established to oversee implementation of the rights enshrined under the International Covenant on Economic, Social and Cultural Rights (ICESCR), as will be discussed below. The issuance of General Comments on the rights under the ICESCR has been one major tasks and achievement of the Committee.

### **General Comment No. 15, and the UNGA and the Council Resolutions on the right to water and sanitation**

If it was General Comment No. 15 that has given prominence to the Committee on Economic, Social and Cultural Rights, it is the Committee, no doubt, that has actually unleashed the notion of the human right to water. The crux of General Comment No. 15 is paragraph 2, which states:

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related diseases and to provide for consumption, cooking, personal and domestic hygienic requirements.

Eight years after the Committee issued General Comment No. 15, the UNGA adopted Resolution 64/292 on July 2010. The Resolution declared ‘the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights’. It was adopted by a vote of 122 members, with 41 abstaining, and with no negative vote (United Nations, 2010).

This resolution was followed two months later by a more elaborate and comprehensive resolution issued by the Human Rights Council (the Council) in September 2010.<sup>3</sup> The Council Resolution affirmed that ‘the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity’ (Human Rights Council, 2010).

Thus the work that was started by the Mar del Plata Water Conference in 1977 was picked up and elaborated 25 years later by the Committee on Economic, Social and Cultural Rights in 2002. Building on these precedents, the human right to water and sanitation got a major boost, eight years later in 2010, by both the UNGA and the Human Rights Council, confirming the human right to water and sanitation under international law.

### **Analytical foundations for recognition of the right to water and sanitation**

The Committee, the UNGA and the Council relied, in varying degrees, on three analytical foundations for recognition of the human right to water.

The first foundation is derivation and inference. The Committee, the UNGA and the Council relied upon the derivation of a right to water from Article 11 of the ICESCR. The Article confirms recognition by the States Parties to the ICESCR of ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’.

The Committee placed particular reliance on the phrase ‘including adequate food, clothing and housing’. The process of implying rights is undertaken by relying on a well-established method of statutory interpretation in the realm of rights. The Committee set forth its methodology by stating in paragraph 3 that ‘The use of the word “including” indicates that this catalogue of rights was not intended to be exhaustive. [...] The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since water is one of the most fundamental conditions for survival’.

The Committee and the Council went further and inferred this right also from Article 12 of the ICESCR where the states parties recognized the right of everyone to the

enjoyment of the highest attainable standard of physical and mental health, concluding that the right to water and sanitation is inextricably related to this right (McCaffrey, 1992). They also tied the right to the other rights enshrined in the Universal Declaration of Human Rights (UDHR), ‘foremost amongst them the right to life and human dignity’.

The Second foundation is centrality and necessity of water to other ICESCR rights. The Comment and Resolutions noted the centrality of water to states parties obligations under Article 1 (2) of the ICESCR, stating that a people shall not be ‘deprived of its means of subsistence’, which requires adequate access to water for basic needs. The right to the highest attainable standard of health (Article 12.1) provided yet another anchor, because water is central to environmental hygiene (Gleick, 1998). Similarly, the necessity of water to the right to adequate food, as well as to housing (Article 11.1), was also cited. Beyond the substantive content of the ICESCR provisions, the Committee reaffirmed the ineluctable place of water in the rights to life, liberty and human dignity contained in the UDHR.

This analytic model offers significant reinforcement to the concept of a human right to water, because without water many of the rights contained in the core international human rights instruments would be meaningless and left devoid of any practical effect. The Committee noted this when it stated in Paragraph 3 that ‘the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival’.

The third foundation used by the Committee, the UNGA and the Council is prior recognition of the right to water by other instruments. The Committee and the UNGA based a significant part of their argument on the right to water on the existence of such right under other international conventions, as well as soft law instruments, and regional initiatives and agreements. In particular, the Committee cited Article 14 (2) of the International Convention on the Elimination of All Forms of Discrimination Against Women (1976), which provides that states parties shall guarantee to women the right to ‘enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply’. They also cited Article 24 (2) of the Convention on the Rights of the Child, which stipulates that the states parties shall combat disease and malnutrition ‘through the provision of adequate nutritious foods and clean drinking water’. Other treaties that refer to the right to water that were cited include the Geneva Convention Relative to the Treatment of Prisoners of War, and the Geneva Convention Relative to the Treatment of Civilian Persons in time of War, both of 1949, as well as Additional Protocol I thereto, and Additional Protocol II, both of 1977. The UN Watercourses Convention 1997, and the Convention on Rights of Person with Disabilities, 2005 were also cited as including explicit references to the right to water.

The Committee, the UNGA and the Council also referred to a number of prior declarations and resolutions, such as the Mar del Plata Action Plan of 1977; which, as discussed above, stated that all people have the right to have access to water in quantities and of quality equal to their basic needs. They also cited the Dublin Statement of 1992, and Agenda 21 of the Rio Earth Summit, 1992, which stated the vital need to recognize the basic right of all human beings to have access to clean water and sanitation at an affordable price. Other instruments cited included the Millennium Declaration 2000; the Action Plan for the Johannesburg Summit on Sustainable Development 2002; and a number of UNGA resolutions including those on the International Decade for Action (Salman, 2005), the Right to Development, and International Year of Freshwater. In addition, the Comment and the resolutions referred to a number of regional commitments, initiatives and instruments on the right to water such as the Abuja, New Delhi, Sharm El-

Sheikh, and Beppu initiatives, as well as the Protocol on Water and Health of the United Nations Economic Commission for Europe (UN/ECE).

Reference was also made to an increasing number of domestic law provisions in a number of countries around the globe recognizing a right to water. Indeed, some countries like South Africa have even included in their constitutions provisions on the human right to water.

Thus, General Comment No. 15 and the UNGA and Council Resolutions recognize the human right to water and sanitation through: (1) derivation and inferences from Articles 11 and 12 of the ICESCR; (2) an analysis of the centrality and necessity of water to other rights under the ICESCR, as well as (3) basing the argument to the right to water on the prior existence of such right under various other international and domestic legal instruments. Through these three analytical foundations, the Committee, the UNGA and the Council have provided solid legal basis for recognizing the human right to water and sanitation.

### **The normative content of the right to water and sanitation**

The question that would immediately follow from recognition of the human right to water and sanitation is the normative content of this right. According to General Comment No. 15, the right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. Moreover, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

The elements of the right to water must be adequate for human dignity, life and health. The Comment warns that adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.

The General Comment then lists a number of factors regarding adequacy of water, namely availability, quality and accessibility. With regard to availability, the water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. The quantity of water available for each person should correspond to the WHO Guidelines.<sup>4</sup>

With regard to quality, the water required for each personal or domestic use must be safe, therefore free from microorganisms, chemical substances and radiological hazards that constitute a threat to a person's health. With regard to accessibility, water and water facilities and services have to be accessible to everyone without discrimination, within the jurisdiction of the state party. Accessibility is defined in terms of four overlapping elements:

- Physical accessibility: water, and adequate water facilities and services, must be within safe physical reach for all sections of the population.
- Economic accessibility: water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water

must be affordable, and must not compromise or threaten the realization of other ICESCR rights.

- Non-discrimination: water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.
- Information accessibility which includes the right to seek, receive and impart information concerning water issues.

Thus the normative content of the right to water includes a wide array of requirements ranging from availability, affordability, adequacy and accessibility, in both a physical and an economic sense. This normative content leads to the question about the states parties' core obligations with regards to the right to water and sanitation, discussed below.

### **The states parties' core obligations**

While the ICESCR provides for progressive realization of the economic, social and cultural rights, and acknowledges the constraints due to the limits of available resources, it also imposes on states parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to water, such as the guarantee that the right will be exercised without discrimination of any kind, and the obligation to take steps towards the full realization of Article 11, Paragraph 1, and Article 12 of the ICESCR. Such steps, as per Paragraph 17 of the General Comment, must be deliberate, concrete and targeted towards the full realization of the right to water. States parties have a constant and continuing duty under the ICESCR to move as expeditiously and effectively as possible towards the full realization of the right to water.

Realization of the right should be feasible and practicable, since all states parties exercise control over a broad range of resources, including water, technology, financial resources and international assistance, as with all other rights in the ICESCR. The right to water, like any human right, imposes three types of obligations on states parties: obligation to respect, obligation to protect, and obligation to fulfil.

The obligation to respect requires that states parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, *inter alia*, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water.

The obligation to protect requires states parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities, as well as agents acting under their authority. The obligation includes, *inter alia*, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.

The obligation to fulfil can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires the state party to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the state party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States parties are also obliged to fulfil (provide) the right when individuals or

a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.

To ensure that water is affordable, states parties must adopt the necessary measures that may include, *inter alia*: (1) use of a range of appropriate low-cost techniques and technologies; (2) appropriate pricing policies such as free or low-cost water; and (3) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including the socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

General Comment No. 15 and the Human Right Council resolution require that states parties recognize the essential role of international cooperation and assistance, and take joint and separate action to achieve the full realization of the right to water. To comply with their international obligations in relation to the right to water, states parties have to respect the enjoyment of the right in other countries. International cooperation requires states parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the state party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.

Depending on the availability of resources, states should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and necessary aid when required. In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to the ICESCR rights, including the provision of adequate water. International assistance should be provided in a manner that is consistent with the ICESCR and other human rights standards, and should also be sustainable and culturally appropriate.

The economically developed states parties have a special responsibility and interest to assist the poorer developing states in this regard. States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.

Accordingly, the Comment and the Resolutions set forth some basic core obligations on the states parties, notwithstanding the fact that States parties are only required to progressively realize the ICESCR rights. They impose three types of obligations: to respect, protect and fulfil the right to water, and they direct the steering of international aid and cooperation in that direction as well. However, as discussed in the section below, a number of challenges stand on the way of the delivery of this obligation by the states parties.

### **Challenges and opportunities to the human right to water and sanitation**

It is generally agreed that realization of economic, social and cultural rights is costly, unlike realization of the civil and political rights, and that such costs pose a major challenge to the realization of the human right to water.

Clarifying these main differences between the rights enumerated under the International Covenant on Civil and Political Rights (ICCPR), and those under the International Covenant on Economic, Social and Cultural Rights (ICESCR), Alston and Quinn (1987, p. 159) opined:

Economic, social and cultural rights require active intervention on the part of governments and cannot be realized without such intervention. [...] Closely linked to this is a distinction between resource-intensive and cost-free rights. Thus, it is said that civil and political rights can be realized without significant costs being incurred, whereas the enjoyment of economic, social and cultural rights requires a major commitment of resources.

However, as indicated above, this positive action by the states and the commitment of resources is quite dependent on each of these states' financial situation, and planning priorities. Indeed the ICESCR itself has qualified realization of its obligations by the availability of resources and the progressive achievement of these rights. Article 2 (1) of the ICESCR states that

Each State Party [...] undertakes to take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Consequently, states have used Article 2 (1) as a way for easing the pressures of the national and international civil society organizations and the global institutions on the state governments to do more so as to meet their obligations under the ICESCR. Most states keep complaining about their limited, sometimes meagre, financial resources, even when their allocation and priorities are directed towards less important and urgent projects and programs than water service delivery. Unfortunately, no international entity has the right to challenge the planning priorities of any state. Thus, the limitations of 'the maximum available resources' and 'the progressive realization' have surfaced as two major challenges to the fulfilment of the obligation of the states of the human right to water, and indeed the entire catalogue of rights under the ICESCR. This is notwithstanding the emphasis by General Comment No. 15 that the states parties have a constant and continuing duty under the ICESCR to move as expeditiously and effectively as possible towards the full realization of the right to water.

Another challenge to the delivery of the States' obligation of the right to water relates to the absence of legislation in most countries to reflect the country's international obligations and to institutionalize and elaborate that right. The absence of water legislation in general, or the inadequacy of such legislation when it exists, has resulted, *inter alia*, in poor water management practices, leading to inefficient use and outright waste. This situation, in turn, has contributed to inadequate water service delivery, as well as shortages, and in many cases higher water tariffs. These challenges are compounded when the water legislation does not explicitly refer to the right to water.

Moreover, even when the water legislation has included provisions on the right to water, other challenges have surfaced in connection with the details, as well as the interpretation and implementation, of these provisions. One example for such challenges is the South African case of *Manquele v. Durban Transitional Metropolitan Council* which dealt with the human right to water. South Africa has included provisions on the human right to water in both: its constitution of 1996 (as amended in 2003), and its Water Services Act of 1997. Under the Act, South Africa is required to provide a certain amount

of water free of charge to people who are below a certain income level, for which the water utility bills the metropolitan authorities who are required to pay for that amount. In the *Manquele* case, the applicant failed to pay for water in excess of the free six kilolitres per month provided by the Durban Transitional Metropolitan Council (DTMC). The DTMC, invoking its bylaws, gave the applicant written notice and allowed for representations to be made before disconnecting her water supply. The applicant argued that said bylaws were inconsistent with the Water Services Act because the disconnection resulted in her being denied access to basic water services while she was unable to pay for the extra services.

The Court ruled that under Section 4(3) of the Water Services Act, ‘basic water supply’ is ‘the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality [...]’, and that the term ‘prescribed’ indicates that regulations made under the Act must give further content to the term ‘basic water supply.’ Because no such regulations exist, the court indicated that the issue would concern policy matters which are outside the purview of the court. Furthermore, the court indicated that it was satisfied that the procedures for disconnection under the bylaws were not inconsistent with the Water Services Act (Manquele, 2001). Thus the facts of the case and the interpretation of the provisions of the Water Services Act by the court posed major challenges to the intent of the constitutional and legislative provisions on the human right to water.

Moreover, the states’ limited resources, and hence needs for additional financial resources for their projects and programs, have opened the door for non-state providers, namely the private sector, in the water service delivery. This has raised some basic and difficult questions such as whether water should be a commodity for profit, since the basic obligation of the management of the private sector entity is to its shareholders, and for the maximization of the returns on their investments. Another consequential question is how to guarantee the rights of the poor and vulnerable groups of the society to a share in water resources when the private sector is managing the water resources. Opponents of private sector participation in water service delivery have argued vehemently that such participation and the concept of the human right to water are not in concert, and that there are no guarantees privatization will actually yield the desired performance improvements because of the monopolistic nature of water resources service delivery (Rees, 1998).

Indeed, the debate has become heated after the revolt that followed the Cochabamba privatization of water service delivery by the Bolivian government in 2001. Privatization of the water services there resulted in a complete control of the water resources in the city surroundings by the private sector entity. It also resulted in a considerable increase in the cost of water to the users whereby some bills had doubled, and ordinary workers had water bills that amounted to a quarter of their monthly income. The situation was further complicated by the fact that the increase in the water tariffs was not preceded by any improvements in the water service delivery. That situation led to the revolt, which eventually led to the cancellation of the contract with the private sector entity, and a complex and lengthy litigation before an international tribunal. Not surprisingly, the participants in that revolt claimed, and armed themselves, *inter alia*, with the concept of the human right to water, and presented privatization as a major challenge to the concept (Finnegan, 2002).

Some opponents of privatization raise the issue of users’ participation in the management of water resources as one effective way for achieving the results of privatization and attaining the right to water (Salman, 1997). Indeed those opponents have argued that users’ participation can be a viable alternative, through public utilities or water users’ associations, to the private sector participation. Water for them should not be a commodity

for profit.<sup>5</sup> It is argued, along those lines, that the issues surrounding the use and protection of water resources are complex, and responsibilities for such issues cannot be placed solely on the states or the private sector. Individuals should bear an equal, if not a larger, portion of such responsibilities. Consequently, rather than placing emphasis on the recognition of a human right to water and the obligation of the state to deliver such an obligation, it is suggested that a better approach would be to address the right to manage, or participate in the management of, the water resources.

Building on this concept and approach, Jan Lundqvist argued that 'the critical point to ensure that fundamental human rights to water and sanitation are met will therefore be to ensure that actors other than the government will be allowed and supported to engage themselves in water management' (Lundqvist, 2000, p. 199).

Indeed, this approach has been underscored by the 1992 Dublin Statement on Water and Sustainable Development. As mentioned above, the second of the Dublin Principles emphasizes that water development and management should be based on a participatory approach involving users, planners, and policymakers. This participatory approach further strengthens the empowerment of the users, vesting them with both rights and corresponding duties with respect to water management and use. Needless to say, in order for participation to be meaningful and effective, a reasonable measure and space for free expression and assembly must be permitted. Unfortunately, the absence of such a measure and space characterizes many countries and poses major challenges to the meaningful participation of users in water management.

The South African and Bolivian cases raise one other major question in connection with the right to water. That question relates to affordability, and whether it should mean free water, or subsidized water, and how tariffs should be set, and subsidies targeted. Many of the economists and international financial institutions have argued that subsidies do not usually reach the intended groups; but rather end in benefitting the rich. However, there have been cases where such subsidies have indeed reached their intended targets. One example is the above discussed South African experience of providing a certain amount of water to certain groups of the society who live below a certain income level, and the cost of that amount of water would be paid for by the metropolitan authority. Another example is the water stamps system through which the Chilean government provides as financial assistance to the families of the poor sector of the society as defined by the Chilean law to pay their water bills (World Water Council, 2000). In Armenia, the Water Code provides for financial assistance in the form of subsidies to needy users, or tax benefits to suppliers to cover the cost of the water to the poor.

Moreover, the role of international financial institutions in the water sector and their policies regarding full cost recovery of services also raise questions related to affordability, and pose some challenges to the promotion and implementation of the human right to water and sanitation.

Thus, the challenges to the realization of the human right to water and sanitation are considerable. They range from the states meagre financial resources and their competing priorities, to the absence of legislation on the right to water and sanitation in many countries. Such challenges also include the role of the private sector in the water service delivery, and the pressures of the international financial institutions for full cost recovery for state-provided services.

However, despite these challenges and constraints, there are positive signs reflected in the gradual but steady, decrease in the number of people who lack access to improved water resources and sanitation in the developing world. With the on-going and continued emphasis on the right to water by academic and civil society organizations as well as some

international institutions, governments around the world are bound to continue their efforts, however meagre their resources and complex their priorities, towards more recognition and work for attaining the human right to water and sanitation for all. This trend is being facilitated by many factors, including participation of users in the water service delivery, as well as some innovative approaches to affordability.

### **Conclusions**

General Comment No. 15 on the right to water issued by the Committee on Economic, Social and Cultural Rights in 2002 has no doubt heralded the emergence of the human right to water as an international legal obligation on all states. The UNGA and the Human Rights Council resolutions built on Comment No. 15, and elaborated, eight years later, the right to water and sanitation, and strengthened its legal basis and content. And based on the analysis of the Comment and the two resolutions, as well as the other various international and national instruments discussed in this article, it can be concluded that there exists today a human right to water and sanitation under international law. This conclusion is buttressed by the large number of soft law instruments, evolving customary international law, some global treaties, and an increasing number of domestic law provisions.

The three entities: the Committee, the UNGA and the Council have recognized the human right to water and sanitation through three analytical foundations. These foundations are derivation and inferences from Articles 11 and 12 of the ICESCR, an analysis of the centrality and necessity of water to other rights under the ICESCR, as well as through basing their argument to the right to water on the prior recognition of such right under various other international legal instruments. Through these three analytical foundations, the Comment and the two resolutions signal clearly that there exists today a human right to water and sanitation under international law, and further strengthen the argument on the rapid evolution of the development–human rights–water nexus.

However, implementation of the right to water and sanitation faces multiple challenges, raising questions as to whether states can indeed fully deliver this obligation. Such challenges include the states' limited financial resources on the one hand and their competing projects and programs on the other, and the absence in most countries of legislation reflecting the states' obligations under the ICESCR, and expounding the human right to water. As we have discussed, even when legislation recognizing the right to water exists, it could face major challenges of implementation, as well as interpretation by the court system itself. The issue of privatization of water service delivery and its likely effects on the poor and vulnerable groups is another challenge facing fulfilment of the obligation by the states that opted for participation of the private sector in water service delivery.

Despite the multiple challenges facing implementation of the human right to water and sanitation, and delivery of the states' obligation, there is a slow but steady decrease in the number of people without adequate access to water and sanitation. This steady decrease can and should be attributed to the worldwide recognition of the human right to water and sanitation, and the active role played by national and international civil society organizations and institutions. The pressure has been clearly building on states to do their utmost to fulfil this obligation, and the gradual and incremental achievements will, in turn, keep strengthening and cementing the concept of the human right to water and sanitation.

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## Notes

1. The other three principles are: (1) Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment; (2) Water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels; and (3) Women play a central part in the provision, management and safeguarding of water (Salman & Bradlow, 2006, pp. 169–174).
2. Reference should also be made the resolutions issued by each of the World Water Forums that are organized by the World Water Council every three years. These resolutions have been addressing, in one way or another, the right to water. For example, the Ministerial Declaration of the second World Water Forum held at The Hague in March 2000 recommended 'action to recognize the basic human needs to have access to clean water and sanitation'. For the text of each of these resolutions, see World Water Council, World Water Forums, at: <http://www.worldwatercouncil.org/index.php?id=1/>.
3. The Human Rights Council was established by the UNGA in March 2006. It consists of 47 UN members elected by the UNGA. It replaced the United Nations Commission on Human Rights. For more details on the Council and its resolutions, see: <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx/>.
4. The World Health Organization (WHO) estimates the use by a household through a single tap within the confines of the household living areas as typically about 50 litres per day, and considers this as access to an intermediate level of service, ensuring good hygiene. In the case of supply of water through multiple taps within the house, the average use per person, per day, is estimated as 100–200 litres (WHO, 2002).
5. Indeed, the Preamble to the European Union Water Framework Directive underscores this principle by stating that 'Water is not a commercial product like any other, but, rather, a heritage which must be protected, defended and treated as such'.

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