



Human Rights Advocates

P.O. Box 5675, Berkeley, CA 94705 USA

The Human Right to Water- An Imperative

Contact Information:

**Leslie Bennett, Frank C. Newman Intern
Representing Human Rights Advocates through
University of San Francisco School of Law's
International Human Rights Clinic
Tel: 415-422-6961
Leslie.bennett7@gmail.com**

**Connie de la Vega, Professor of Law
University of San Francisco
delavega@usfca.edu**

Human Rights Advocates (HRA) presents this report to address the imperative of recognizing the right to water as an explicit, stand alone human right. HRA's concern lies in the lamentable fact that this right has been relegated to an implicit need rather than an explicit right. The purpose of this paper is to highlight the legal basis for the recognition of water as a human right, the need for a rights-based approach to water insecurity and its attendant protections and supervision, and finally issues associated with the implementation of this right.

Part I- Introduction to the Right to Water

In a recent introduction to the November 2008 International Conference on the Right to Water and Sanitation in Theory and in Practice, held in Oslo, the momentum behind the recognition of a human right to water was reaffirmed.

In 2006, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted Guidelines on the Realization of the Right to Drinking Water and Sanitation. The same year, UNDP's Human Development Report's first recommendation was that all governments 'make water a human right - and mean it'. Some governments and national courts have begun to recognise and apply the right to water. In 2007, the UN High Commissioner for Human Rights stated that it is now time to consider access to both water and sanitation as a human right.¹

Specifically, last year, in the opening of the 7th Session of the UN Human Rights Council on 3 March 2008, Minister of Foreign Affairs, Maxime Verhagen, announced the Netherlands is to recognise water as a human right.² He stressed that the recognition of the right is essential, not as an absolute solution to the problem but as a powerful incentive to increase access to water for the poor. The recognition of the right to water, as COHRE as so potently states, will increase the political profile of water and sanitation as well as pressure those responsible for water to be held

¹ Oxford Centre for Water Research, "Background to the International Conference on the Right to Water and Sanitation In Theory and in Practice", available at <http://ocwr.ouce.ox.ac.uk/international-righttowater-conference/background.php>

² The Right to Water, "The Netherlands Formally Recognise the Human Right to Water", available at <http://www.righttowater.org.uk/code/homepage.asp>

accountable at all levels of governance.³ The European Court of Human Rights and the Inter-American Court of Human Rights along with national courts have supported an implementation of the right to water as a human right in recent holdings.⁴ It is therefore an opportune time to recognize a human right to water as a platform for the forward momentum towards combating the global water crisis and moving further towards the Millennium Development Goals, specifically Goal 7, Environmental Stability, Target 10 – Halving the proportion of people without sustainable access to safe drinking-water and basic sanitation by 2015, and facing the challenge of overcoming the crisis in water and sanitation. The UNDP in its 2006 Human Development Report eloquently reported that, “Success in addressing that challenge [the crisis in water and sanitation] through a concerted national and international response would act as a catalyst for progress in public health, education and poverty reduction and as a source of economic dynamism.”⁵

Safe water and sanitation are core dual pillars for human development. The lack of adequate water and sanitation claim millions of lives, compromise dignity and diminish prospects for economic growth. Water insecurity consigns billions of people to lives of poverty and disease, keeps women and children from education, and creates one of the most daunting crises of the 21st Century.⁶ Against a backdrop of national security threats, armed conflicts, and a growing illicit trade of drugs and arms, the imperative human security threats linked to a denial of a right to water can get lost. “The 1.8 million child deaths each year related to unclean water

³ COHRE, “Clean Water for the Poor, Making the Human Right to Water a Reality”, 2005 available at <http://www.cohre.org/store/attachments/clean-water-for-the-poor.pdf>

⁴ William James Smith Jr., “Major Contributions Supporting a Human Right to Water”, Center for Energy and Environmental Policy at the University of Delaware (2001) available at <http://www.waterobservatory.org/library.cfm?RefID=33655>

⁵ UNDP Human Development Report: Summary, “*Beyond Scarcity: Power, Poverty and the Global Water Crisis*”, 2006 UN Development Programme at p.9, available at http://hdr.undp.org/en/media/HDR2006_English_Summary.pdf

⁶ *Id.*, at p.5

and poor sanitation dwarf the casualties associated with violent conflict. No act of terrorism generates economic devastation on the scale of the crisis in water and sanitation. Yet the issue barely registers on the international agenda.”⁷ Perhaps this lack of attention to the water crisis results from the reality that water insecurity bears heaviest on poor people in poor countries; those without a strong voice in shaping national and international policy on human rights. There is more than enough water in the world for domestic purposes, for agriculture and for industry.⁸ However, scarcity is not caused by lack of water but artificially through political processes and institutions that disadvantage the poor.⁹

As the former UN Secretary General has put it, “Access to safe water is a fundamental human need and, therefore, a basic human right.” Upholding the human right to water is an end in itself and a means for giving substance to the wider rights in the Universal Declaration of Human Rights and other legally binding instruments—including the right to life, to education, to health and to adequate housing.¹⁰

The substantial momentum of the recognition of water and sanitation as a human right needs to continue. The UN High Commissioner for Human Rights believes that, “it is now time to consider access to safe drinking water and sanitation as a human right, defined as the right to equal and non discriminatory access to a sufficient amount of safe drinking water for personal and domestic uses—drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene—to sustain life and health.”¹¹ The Commissioner’s report was informed by considerable submissions by governments, intergovernmental organizations, national human right institutions and civil society. The evidence is paramount that the recognition of the right to water and sanitation as a human right is essential. Recognition of

⁷ *Id.* at 12.

⁸ *Id.* at 11.

⁹ *Id.* at 11.

¹⁰ *Id.* at 12.

¹¹ Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments. A/HRC/6/3 16 August 2007 Para. 66

human rights obligations in relation to the accessibility of safe water and sanitation is not enough. Accessibility is but one of the components which make up the umbrella of normative content of the right to water. This accessibility, both physical and economic, is joined by availability, quality, adequacy and non-discrimination in the application of the right to water to round out the comprehensive right. The right should not be stated in terms of mere accessibility but more broadly as the right to water.

Part II-The Necessity of a Rights-Based Mechanism

In its concern over the resolution adopted in March, 2008 by the Council, COHRE stated that the resolution could have been stronger if it had adopted language which explicitly stated a right to water and sanitation rather than limiting its obligations in terms of a vague accessibility to safe water and sanitation.¹² Some have dismissed the exclusion of rights-based rhetoric as more an issue of political reference than a legal matter because access to safe water and sanitation carries with it inherent legal obligations. However, this argument strongly underestimates the value in the recognition of the human right to water. The resolution, in its absolute omission of any rights-based language, made more than a political deletion, it instead seriously undermined the legal efficacy, sustainable implementation and the applicability of a rights-based approach to water and sanitation.

Although the right to water has yet to be clearly recognized, it is a necessity for the right to life and other fundamental human rights such as: the right to food, the right to adequate standard of living, the right to housing, the right to education as the lack of proper supply of water mandates children often walk long distances several times a day to retrieve water for their families instead of attending school, the right to health and the right to self determination in that

¹² Right to Water, “*UN Human Rights Council Moves Forward on the Right to Water and Sanitation*,” available at http://www.righttowater.org.uk/pdfs/Information_note_on_HRC_2008.pdf

every person has the right to manage their own resources.¹³ As such, the establishment of a right to water in international human rights law would protect the established human rights for which it is a necessity. Without full protection and provision of adequate water, the human rights which rely on this premise will be jeopardized.

In addition, without a formal recognition of the right to water, the current regime leaves individuals suffering from deprivation of enough clean water to link their cause of action to other substantive rights (i.e. right to life, right to health, etc.). This, in turn, “leaves courts and commissions on the shaky ground of creatively extending rights.”¹⁴ A formal recognition of the human right to water in a global human rights instrument would not only remedy this situation but would create other substantial avenues of redress for violations of said right. For example, an explicit substantive human right to water would allow an injured party redress at the national level. Aggrieved individuals would further have an international forum through human rights institutions to address their complaints in the event of a failure at the national level. State reporting procedures, inter-State complaints, individual petitions or complaints, and UN investigation and resolution procedures would provide the panoply of protections for the individual or party suffering from a lack of adequate water.

Furthermore, the right to water would not only speak to government accountability but would provide a tool to assist governments to establish practical policies and implementation strategies. A recent conference in Oslo coordinated by the UNDP Water Governance Programme, the University of Oslo, and the University of Oxford, high level participants focused on how to bring a human right to water from theory into practice using a human rights based

¹³ John Scanlon, Angela Cassar and Noemi Nemes, Water as a Human Right?, IUCN Environmental Policy and Law Paper No. 51, International Union for Conservation of Nature and Natural Resources, 2004. Available at http://www.iucn.org/about/work/programmes/water/wp_resources/wp_resources_thematic/?1156/Water-as-a-human-right-

¹⁴ J. Eaton, “The Nigerian Tragedy”, *Boston University International Law Journal*, vol. 15:261, (1997) at 297.

approach. The focus was on how the human right to water and sanitation can be translated into practice specifically focused on four major elements of the policy cycle and areas of intervention: Policy and Enabling Environment, Institutional Development, Planning and Implementation, and Financing- Investments and Service Delivery.¹⁵ The Conference was followed by the creation of working groups and a platform advocating for the use of a human rights based approach to water and sanitation. This is a laudable example of how a human right to water can be used to effectuate implementation which will lead to an on-the-ground sustainable change as well as shift the momentum from academic to practical.

Defining water as a human right is essential to the realization of development. The definition of a rights-based mechanism for achieving this realization is

a conceptual framework for the process of human development that is normatively based on international human right standards and operationally directed towards promoting and protecting human rights. A rights based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development. The norms and standards are those contained in the wealth of international treaties and declarations... A rights-based approach to development includes: express linkage to rights, accountability, empowerment, participation, non-discrimination and attention to vulnerable groups.¹⁶

As applied to a right to water, a rights-based approach places the individual in a place of power and at the center of development instead of relegating them to passive recipients of aid. A rights-based approach identifies actors as duty-bearers, thereby necessitating the adoption of concrete measures to respect, protect and fulfill the right to water and sanitation and ensuring that the beneficiaries of the rights are parties to decision-making which affects them and guaranteed

¹⁵ Inga Winkler, “A Human Rights-Based Approach to Water Supply and Sanitation: Background Paper for the Workshop”, *UNDP Oslo Governance Centre*, November 28, 2008, available at <http://right2watsan.ning.com/>

¹⁶ OCHCR, “What is a Rights-Based Approach to Development?”, available at <http://www.unhcr.ch/development/approaches-04.html>

transparency in the decision-making processes.¹⁷ The notions of accountability, non-discrimination and empowerment provide for more sustainable solutions focused on what is required, and not what is externally deemed necessary. Ensuring the right to water and sanitation as an explicit human right feeds into this rights based mechanism for development and transforms safe water for personal use into a legal entitlement, rather than just a basic need or a commodity.¹⁸ The recognition of this comprehensive right informs a high level of accountability both in national and international judicial bodies and through the UN human rights system in its evaluative techniques and monitoring mechanisms if according water obligations, both positive and negative, are not met by the States parties.

Part III-Legal Basis for Recognition of a Right to Water and Sanitation

In March 2008, the Human Rights Council accepted by consensus a resolution recalling and emphasizing various international human rights treaties, declarations, programmes, General Comments, resolutions, and other legal basis for human rights obligations in relation to access to water and sanitation.¹⁹ These legal bases form the foundation for explicitly recognizing a human right to water and sanitation.

Two of the six major international human rights treaties, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) recognize the right to water and sanitation. Article 14(2)(h) of the CEDAW treaty requires States parties to ensure for rural women, “the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply,...”. Further, the CRC requires States parties to ensure that all segments of society are educated,

¹⁷ Id.

¹⁸ Lindsay Knight, “ The Right to Water”, World Health Organization (WHO), 2003 p.9-10, available at http://www.who.int/water_sanitation_health/rtwrev.pdf

¹⁹ Resolution, “Human Rights and access to safe drinking water and sanitation”, A/HRC/7/ L.16, 20 March 2008. Available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_L_16.doc pp.1-3.

informed, and supported in the utilization of basic needs such as hygiene and environmental sanitation. The CRC, in Art. 27(1) recognizes the right of every child to an adequate standard of living which has been interpreted by the Committee on the Rights of the Child, to include access to clean drinking water and latrines.²⁰

In addition, the recently adopted Convention on the Rights of Persons with Disabilities requires State parties to recognize in Article 28, “the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability and resolve to take appropriate steps to safeguard and promote the realization of this right, including measures to ensure equal access by persons with disabilities to clean water.”²¹ The Geneva Conventions and Protocols also explicitly protect a right to drinking water in times of armed conflict. The scope of this protection, however is narrowed by its focus only on drinking water.

22

The two legally binding human rights covenants of 1966 and perhaps the two strongest vehicles for the safeguard of human rights, the International Covenant on Civil and Political Rights (ICCPR)²³, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)²⁴ implicitly recognize a right to water. The ICCPR affirms the “right to life” and emphasizes in General Comment No. 6 (1982) that this right to life is not narrowed to the civil and political sense but should be seen expansively to include adopting measures which would increase life expectancy such as measures to eliminate malnutrition and epidemics.²⁵ Surely the right to water fits into this model as life cannot be sustained without clean water. As

²⁰ *Infra* n.26 at p.2

²¹ *Infra* n.26 at p.2

²² *Supra* n.13 at p. 4

²³ International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, G.A. Res. 2200A (XXI), UN Doc A/6316 (1966)

²⁴ International Covenant on Economic, Social and Cultural rights, adopted 16 December 1966, entered into force 3 January 1976, G.A. Res. 2200A (XXI) UN Doc. A/6316 (1966)

²⁵ Human Rights Committee, General Comment No. 6 adopted at the Sixteenth session (1982) on Art. 6 of ICCPR

aforementioned, 1.8 million children alone die of diseases related to lack of clean water and sanitation. The right to water, in securing at least adequate amounts of clean drinking water would therefore increase life expectancy and is directly supported by the definition of the right to life afforded in the ICCPR. The International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified by 157 states, recognizes the right of everyone to an adequate standard of living ...including adequate food, clothing and housing and to the continuous improvement of living conditions”. In Article 11(1), as interpreted in General Comment 15, an adequate standard of living includes the right to water as part of the list of necessities for the protected right of everyone to an adequate standard of living.²⁶ The General Comment recognizes, “The human right to water is indispensable for leading a life in human dignity. It is prerequisite for the realization of other human rights.”²⁷

Complementing the major international treaties, several international declarations dating back to 1977’s Mar del Plata Declaration of the UN Water Conference recognize the right to water. The Programme Action of the 1994 Cairo Conference on Population and Development, endorsed by 177 states recognized the right to an adequate standard of living to include the right to water and sanitation, and the Habitat Agenda of 1996 echoes the same sentiment. In December, 2007, 37 countries at the 1st Asia-Pacific water Summit recognized “the people’s right to safe drinking water and basic sanitation as a basic human right.”²⁸ In the same year, the

²⁶ Ashfaq Khalfan and Thorsten Kiefer, “The Human Right to Water and Sanitation: Legal Basis, Practical Rationale and Definition,” Centre on Housing Rights and Evictions (COHRE), 26 March 2008, p.1, available at http://www.cohre.org/store/attachments/RWP-LegalbasisforRTWS_30.03.08_FINAL.pdf

²⁷ United Nations Economic and Social Council, Committee on Economic Social and Cultural Rights, General Comment No. 15 (2002). *The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* Twenty-ninth session, Geneva, 11-29 November 2002. E/C. 12/2002/11.

²⁸ *Supra* n. 25 at p.3.

2007 Report of the UN High Commissioner for Human Rights concluded that “it is now time to consider access to safe drinking water and sanitation as a human right.”²⁹

Regional legal instruments also affirm a basis for recognizing the human right to water. The European Council of Environmental Law (ECEL) Resolution on the right to water considers in Art. 1 that “each person has the right to water in sufficient quantity and quality for his life and health.”³⁰ The European Commission of the United Nations for Europe (ECE) Protocol on Water and Health states that “parties shall, in particular, take all appropriate measures for the purpose of ensuring (a) adequate supplies of wholesome drinking water...; (b) adequate sanitation...”.³¹ It specifically mentions three central facets to a human right to water stating that, “equitable access to water, adequate in terms of both quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion.”³² This statement infuses notions of equity and non-discrimination to the substantive provisions of quality and quantity of water. Furthermore, the African Charter on Human and People’s Rights and the African Charter on the Rights and Welfare of the Child protect a right to a satisfactory environment and health amenable to personal development. This includes an assurance to the provision of adequate nutrition and safe drinking water.³³ Finally, Art.11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural rights provides that “everyone shall have the right to live in a healthy environment and to have access to basic public services.”³⁴ The reference to basic public services implies the provision of water and sanitation.

²⁹ *Supra* n. 11

³⁰ ECEL Resolution, adopted 28, April 2000, published in *Environmental Policy and Law*, 30/5 (2000).

³¹ Art. 4(1) of the ECE Protocol, adopted on 17 June 1999 at the Third Ministerial Conference on Environment and Health.

³² *Id.* at Art. 5(1).

³³ *Supra* n.13 at p.8.

³⁴ *Supra* n.13 at p.8

Finally national legislation, constitutions and judicial decisions can provide further bolstering of the bases for a human right to water. Belgium and the United Kingdom, have, through their Secretaries for Development, recognized a human right to water and as such have led the movement amongst developed countries to follow suit.³⁵ National constitutions of Gambia, Ethiopia, Uganda, Bolivia, Ecuador and South Africa have also explicitly created a right to water for their citizens.³⁶ Furthermore, South Africa has enshrined an explicit right of access to sufficient water in its Bill of Rights. As a leader in this realm, South Africa has set a commendable judicial precedent in May, 2008 in a ruling by the Johannesburg High Court that found that a prepaid water scheme in South Africa's largest township, Soweto, was unconstitutional.³⁷

Critics to the recognition of this right offer threadbare and empty opposition. Most recently, critics have parlayed fears that the recognition of a right to water may allow countries whose water resources are low to draw from countries in which water reserves are more plentiful. However, other human rights obligations, such as the right to food, or shelter, have not required States parties to deplete their own resources in providing assistance to other States. Furthermore, critics of the recognition of the right to water must justify the acceptance of other economic, social and cultural rights such as the right to health, food, housing, while opposing a right to water which is just as vital to any person's dignity and survival. Finally, to deny the recognition of the right to water is to deny government accountability for ensuring the access of a basic necessity of human life. The treatment of water and sanitation as a human right empowers

³⁵ Right to Water.org.uk "*Latest News and more about...*" homepage available at <http://www.righttowater.org.uk/code/homepage.asp>

³⁶ "Law on the Right to Water: National Legislation on the Right to Water", available at http://www.righttowater.org.uk/code/Legislation_2.asp

³⁷ Human Rights Tribune, "*Court Ruling on Water in South Africa*", available at http://humanrights-geneva.info/spip.php?page=print_article&id_article=3081

disadvantaged and marginalized groups in the struggle towards development, which is a clear mandate in the UN's accepted Millennium Development Goals. "The human right to water and sanitation can be used to promote accountability in decision-making, focus on the needs of the most vulnerable and marginalized groups and help increase participation in decision-making by traditionally excluded communities."³⁸

Part IV-Service Implementation of the Right to Water

Under a rights-based approach, the duty-bearers must attend to their obligations to respect, protect and fulfill the right to water and sanitation. The facet of protection requires the States Parties to prevent third parties, such as corporations, from interfering in any way with the enjoyment of the right to water.³⁹ The threat of privatization without the interjection of government accountability can present vicious and violent problems as exemplified by the example of Cochabamba, Bolivia resulting in its "Water Wars."

In early 2000, in Cochabamba, Bolivia, thousands took to the streets in a revolt against the privatization of its water system into the hands of a subsidiary of a U.S. based corporation, Bechtel, named Aguas del Tunari. Aguas del Tunari signed a contract with Bolivian officials giving the corporation control of Cochabamba's water company for forty years with a guaranteed return of 16% per year to be financed by Cochabamba's people. Aguas del Tunari quickly translated this return into obscene rate hikes of upwards of 51% for all users and 43% to the poorest users. These rate hikes and exorbitant connectivity fees essentially eradicated access to water for the people of Cochabamba, making water unaffordable and therefore untenable. The

³⁸ Ashfaq Khalfan and Thorsten Kiefer, "Why Canada must Recognise the Human Right to Water and Sanitation", Centre on Housing Rights and Evictions (COHRE), 26 March 2008, available at <http://www.cohre.org/store/attachments/RWP-WhyCanadamustrecogniserighttowaterandsanitation2026-205.pdf>

³⁹ Lindsay Knight, "The Right to Water", World Health Organization (WHO), 2003 p.7, available at http://www.who.int/water_sanitation_health/rtwrev.pdf

resulting public uprising brought the city to a halt and ultimately forced Bechtel's exit and the reincorporation of the water company into the municipality's control.⁴⁰

However, privatization does not have to be the deathnell of an effective service implementation of water in the advancement of the provision of water and sanitation as a basic human right. Private/public partnerships can be struck between third parties and governments for the creation and realization of water plans and service implementation. An example of the successful coalition of government accountability and privatized service of a water system is the East Bay Municipal Utility District (EBMUD) which serves over 1.2 million customers in the Eastern San Francisco Bay Area region. EBMUD is a publicly owned utility, formed under the Municipal Utility District Act, passed by the California Legislature in 1921.⁴¹ The Act facilitates a working relationship between the federal government, the local state government, and EBMUD in ensuring equal access and the highest water quality to all served within EBMUD's jurisdiction.⁴²

Part V. Recommendations

In summation, Human Rights Advocates recommends the following actions:

- a. Commends the Council on its appointment of an Independent Expert on Water and urges a continuation of the examination of the merits of recognizing a right to water as a fundamental human right.
- b. Urges the Independent Expert on Water to consider the need for a rights-based approach to the recognition of the right to water and sanitation.
- c. Recommends that the Council reinforce an explicit human right to water for personal and domestic usage.

⁴⁰ Jim Shultz, Dignity and Defiance: Stories from Bolivia's Challenge to Globalization, 10-42 (2008 Jim Shultz and Melissa Crane Draper).

⁴¹East Bay Municipal Utility District. *All about EBMUD*. available at http://www.ebmud.com/about_ebmud/publications/all_about_ebmud/current_allaboutebmud.pdf

⁴² Id.

- d. Urges States as duty-bearers in a rights-based approach to coordinate public/private partnerships so as to protect the right to water.