



# The Human Right to Water

*What is Behind the Concept?*

*by Michael Windfuhr*



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## Introduction

Over the last two years, the right to water has received considerable attention both within the United Nations human rights system as well as within the work of non-governmental organisations. On the whole, the debate surrounding the content of and state obligations from the right to water is still in its early stages, nevertheless important progress has been made. This article traces the development of this debate in four steps. Part one briefly introduces water as an issue in international law. Part two introduces the current interpretation of the right to water as a human right, according to a General Comment on the right to water, adopted by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in November 2002<sup>1</sup>. In part three FIAN-International's human rights work on this issue is presented. FIAN concentrates on the right to food. In our practical human rights work there have been different uses and cases on the right to water. I would like to conclude with some thoughts on the challenges and chances of the increased use of the right to water as a human right. These thoughts are an invitation to deepen and extend work on the right to water using a rights based approach.

## References to Water in International Law

In international law water is referred to in different places. At the same time, we have to take into consideration that the quality of the legal status of international law texts varies and that different aspects of the water issue are dealt with. First of all, it is important to differentiate between "action plans" and "declarations" at the United Nations level and International Treaties Law. Action plans and declarations contain declarations of intent by states or a community of states designed to direct and shape policy. They are often referred to as "soft law" and differ from international treaties that are signed and ratified by states. Signing an international treaty implies the obligation to transform it into national law. They become binding obligations for citizens and are termed "hard-law". International treaties are the central legal sources in international law.

International law recognises other forms of legal sources such as Customary International Law. The continued recognition of legal norms and their observance in the day to day running of governmental activities can give such a status to international norms. Human rights are seen by many international law experts as part of customary international law, whereas others deduce human rights' legal quality from central human rights treaties. Independent of this dispute over international law, which we can neither deepen nor want to answer at this point, the frequent reference to a right in many international texts – of differing quality – indicates the significance of the issue and that states recognise the need for further regulation. In some cases international declarations have even more impact on the development of law than treaties. The Universal Declaration of Human Rights, 1948, is an example of a declaration that proved to be highly influential, especially with regard to the structure and formulation of a number of constitutions. This demonstrates that the significance of "soft law" in international law should not be underestimated. International Treaty Law, on the other hand, must be transferred as binding treaty law into national law and implemented by states. Water is mentioned in both. It is referred to in different texts at the international level but also in international treaty law. A brief introduction to both areas follows.

Water is referred to in programmes of action resulting from different international conferences: the issue is taken up in Agenda 21 - the programme of action adopted at the Earth Summit in Rio in 1992 – and recently

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<sup>1</sup> The Committee on Economic, Social and Cultural Rights periodically publishes documents known as General Comments to provide guidelines on the interpretation of specific rights of the International Covenant on Economic, Social and Cultural Rights. General Comment No.15 on the right to water refers to the Committee's corresponding general comments on the right to food (No.12) and health (No.14).

in the programme of action adopted at the World Summit on Sustainable Development in Johannesburg in 2002 – which, like the Millennium Development Goals<sup>2</sup>, aims to halve the proportion of people who do not have access to water by the year 2015. The right to water is part of international law as part of the International Covenant on Economic, Social and Cultural Human Rights (ICESCR), which, together with the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights constitutes the basis of the human rights protection system<sup>3</sup>. Although the ICESCR does not explicitly mention the right to water, it is, however, protected by Articles 11 and 12, according to the Committee on Economic, Social and Cultural Rights (CESCR). Article 11 concerns the right to an adequate standard of living and article 12 concerns the right to health. The second section explains how the right to water is derived and interpreted by the CESCR.

Furthermore, the debate surrounding the right to water and its recognition is influenced by the general debate on economic, social and cultural rights. Gradually, international law experts' traditional prejudices towards the legal character of economic, social and cultural rights (esc rights) are being surmounted. There are many law students who are still being instructed accordingly during their studies. Prejudices towards esc rights are gradually being overturned thanks to the work of the committee on esc rights and the practical work of human rights organisations which have documented numerous cases of esc rights violations over the years; it is becoming evident that all five groups of human rights – civil, political, economic, social and cultural human rights are comparable with regard to their legal character.

Within the UN human rights system, the right to water is a relatively new issue. Whilst the right to an adequate standard of living is contained in the UDHR, the specific formulation only refers to food, clothing, and housing – although it is formulated in such a way to indicate that the list is not exhaustive and that other aspects are not excluded on principle. Article 11 of the ICESCR is formulated in a similar way. For this reason it is necessary to explain why the issue of water or the right to water is not explicitly mentioned in older texts, whereas it is highlighted nowadays. Three trends can be identified that have contributed to bringing the right to water onto the agenda of the UN human rights system.

- (1) Water is becoming an increasingly scarce resource and access to water is becoming a cause of conflict – especially with regard to distribution and usage. As a result, water has become an important issue in different international fora.
- (2) The instigation and implementation of large infrastructure projects caused serious conflicts in many countries in recent years. Dam constructions, river course alterations and other hydraulic engineering projects hold considerable conflict potential – so much so that the World Bank and several international organisations established a World Commission on Dams.
- (3) The increasing privatisation of water supply systems both in the north and in the south has enormously promoted the issue in recent years. Supporters of privatisation proclaim that working in co-operation with the private sector is the only opportunity to raise enough investments in developing countries in order to improve or reconstruct water supplies. Critics fear price increases go hand in hand with privatisation as well as a deterioration in accessibility to this scarce resource, especially for poor groups in society.

In recent years, the right to water has been taken up by the human rights system. In 2001 the Commission on Human Rights requested that the both the Special Rapporteur for the right to housing (Miloon Kothari) and for the right to food (Jean Ziegler) consider the right to water in their next annual reports. These reports are now available providing us with important background information on the understanding of the right to

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<sup>2</sup> The MDGs were adopted at the turn of the century by the United Nations General Assembly and reiterate the obligation of the international community to prioritise development.

<sup>3</sup> The three texts together are also called "International Bill of Human Rights"

water. Furthermore, in 2002 the Commission appointed a special rapporteur on the right to water (El Hadji Guissé), whose final report should be available at the end of 2004. In November 2002 the committee on esc rights adopted a General Comment (No. 15) on the right to water that provides an authorised interpretation on which the following debate is oriented. The most important elements of General Comment No. 15 are outlined below<sup>4</sup>.

## The Right to Water as a Human Right

The committee on esc rights derives the right to water from the right to food and the right to health equally. The normative content of the right is described by several elements: the right to water primarily encompasses the right to access of every person to a system of water and protection against interference through disconnection of water supplies. Available water should not be contaminated. Every person has the right to a functioning water system. Water systems and facilities should be organised and managed to ensure that access to water is guaranteed to be continuous. According to the committee on esc rights, access to water refers to water that each person needs for personal and domestic use. Originally, the general comment was supposed to refer to the "right to drinking water". During the committee's consultations and discussions it became clear that the category "drinking water" is too narrow and that the right to water must encompass personal use and domestic use in its entirety since health and sanitary aspects could be excluded otherwise. At the same time, the use of water for irrigation is excluded from the definition. The issue of access to irrigation in order to produce sufficient food is evaluated by the committee on esc rights under the right to food.

The committee on esc rights defines in more detail what can be understood by "access to water". Based on comparable definitions found in the general comments on the right to food and the right to health, the committee adheres to the policy that access primarily refers to the physical accessibility of water. Water must be available and of adequate quality. It is insufficient to consider only the physical availability of water in a community. To realise the right to water it is crucial that each person actually has access to water facilities; that is to say that each person has the economic means to obtain water. Access may not be limited by discriminating practises, for example if minority groups or women are prevented from using water that is physically available. Accessibility is also defined as the right to sufficient information, since this is the only way to ensure that each person has information about his or her rights as well as information concerning water issues.

## States' Obligations

The normative content of the right to water in General Comment No.15 includes almost 20 paragraphs in which the committee on esc rights clearly describes states obligations for the implementation of the right to water. Paragraphs 17-29 deal with national obligations. Within the scope of states'obligations, practices the state must refrain from that could interfere with the enjoyment of this right are described as is the obligation to each person living under its jurisdiction to undertake certain practices. If these obligations are violated, each person can, in principle, demand the implementation of these obligations. Six paragraphs follow which describe states' international obligations with regard to the right to water. By dividing states' obligations into national and international obligations the committee continues to use the same structure found in General Comment No.12 on the right to food, which was adopted in 1999. States' international obligations refer to each states' activities within international organisations and potential impacts of states' policy measures on an international level – the impacts on people in other countries. Many international law experts limit states'

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<sup>4</sup> Since General Comment No.15 is almost 20 sides long, only the main features can be presented here. The complete version, in German, is available under [http://www.menschen-recht-wasser.de/downloads/4\\_2\\_un\\_comment.pdf](http://www.menschen-recht-wasser.de/downloads/4_2_un_comment.pdf)

obligations to the national level since human rights regulate the relationship (the rights) of the individual before the state. For many years, non-governmental organisations and an increasing number of international law experts have called for the need to consider the international impacts of state policy measures. An analysis of the frameworks for state policy making in times of globalisation clearly demonstrates that there is good reason to include as part of the human rights protection system far-reaching impacts of state policy on citizens in other states since such impacts are increasingly being observed. European agricultural policy, for example, has far-reaching impacts on the right to food of farmers in Africa if agrarian export subventions considerably influence the price of food on local African markets. An African government can not influence these policies because the conditions set by the World Bank, the International Monetary Fund as well as by WTO regulations prohibit it from taking measures to limit trade. This example alone makes it clear that in times of globalisation other states and international organisations create important conditions for the possibilities to implement economic, social and cultural rights and that these responsibilities must be contained in the respective general comments. In General Comment No.15 on the right to water, the committee on esc rights differentiates between the international obligations of each state (paragraphs 30-35) and the obligations of other actors, such as international organisations (paragraphs 60 and 61); a distinction which can only be approved as it clearly states which actor takes on which responsibility.

#### National Obligations (paragraphs 17-29)

When characterising states' national obligations, the committee on esc rights uses the established difference between three levels of obligation: respect, protect and fulfil.

- (1) Respect obliges states to refrain from engaging in any practice or activity that denies access to adequate water – not "interfering directly or indirectly with the enjoyment of the right to water". This obligation includes the protection of water in crisis situations.
- (2) The obligation to protect the right to water requires states to prevent third parties, such as individuals, groups or corporations, from interfering in any way with enjoyment of the right to water. Protection includes adopting effective legislative and other measures to protect disadvantaged groups in society and to avoid discrimination. According to the committee, such a control also includes the obligation to adopt effective legislative and management measures in the case of privatisation of water systems.
- (3) To fulfil the right to water is the third category. The state is required to take positive measures to assist all individuals and communities without access to water to enjoy the right to water. The state should ensure that water is available for each person at a payable rate. This is the level of obligation that leads international law experts to interpret esc rights as mere political objectives since financial means and other resources must be available for implementation. It is important to note that money is also needed to implement civil and political rights. For example: to implement the right of every individual to have access to a fair trial, then the system of judicature would have to be constructed and financial assistance for trial costs would have to be made available. This example demonstrates that the implementation of all human rights categories includes measures for all three levels of obligation (respect, protect and fulfil). The fulfil category does not demand the impossible from states because it is not expected that the state provides all citizens with water, food, housing, health, and work immediately. Rather, the state should draw up policy measures in such a way so that the "maximum of its available resources" (article 2 CESCR) are used, which is possible. Measures which put people in a position to secure their own supply belong to this category. Only when these are not sufficient is the state obliged to provide access to, in this case, water. The committee divides the obligation to fulfil into three different areas. Facilitation, requiring the state to take positive measures to assist individuals and communities to gain access to water supplies themselves. Promotion, requiring the state to ensure that there is adequate education on

the hygienic use of water. Failing this, provision, requiring the state to provide water directly when individuals or groups are unable to do so. As in the previous general comments on food and health, the obligation to provide direct supply is limited to the maximum of resources available. The state must prove, however, that the maximum of resources available have actually been exhausted, and in doing so is not discriminating and has already identified who is in need so that the individuals and groups that are especially disadvantaged are supplied.

The general comment outlines states' national obligations in much more detail. Because space is limited not all clauses can be presented here, only the basic structure of the general comment.

#### International Obligations (paragraphs 30-35)

General Comment No.15 contains precise clauses on states' international obligations with regard to the realisation of the right to water. The committee included the international obligations category in its previous comments. The most detailed and precise was General Comment No.12 on the right to food. The corresponding clauses in comment No.15 build upon and expand the differentiations from comment No.12. In this way, General Comment No.15 sets new standards for outlining and interpreting international obligations.

International Obligations include (1) regulations on development co-operation that can be divided into two areas: 'Positive' obligations and 'negative' obligations in development co-operation. Development co-operation should first of all ensure that it does not contribute to violations of the right to water in other countries (negative). It can assist countries in their efforts to implement the right and to fulfil its obligations. The comment stipulates that (2) in international relations no embargoes shall be imposed affecting water. (3) Each state is required to adequately control private companies and persons that invest in other countries in order to ensure their activities do not contribute to a violation of the right to water. Furthermore, states should always be aware of their human rights obligations (4) when drawing up international agreements and should not enter into any agreement which contradicts human rights agreements. For further commitments in international organisations (IOs) states should ensure (5) that these IOs, within the scope of their own programmes and projects, are not partially responsible for violations of the right to water. According to the committee, this is especially the case for participation in the World Bank and the International Monetary Fund.

#### Further decisive clauses

The general comment contains further clauses of which six shall be presented briefly

1. One main focus of the comment is the regulation of non-discrimination of individuals or groups in their access to water (paragraphs 13-16). The comment hereby takes into account that, especially with problems of accessibility to scarce or increasingly scarce resources, the principle of non-discrimination must be play a decisive role.
2. The text includes a paragraph that was already developed in previous general comments by the committee on esc rights. In paragraph 37 the committee formulates core obligations of State Parties to ensure access to the minimum essential amount of water for all persons at all times. This minimum may not be achieved by progressive realisation of obligations but must take immediate effect.
3. Paragraphs 39-44 describe typical forms of violation of the right to water thereby helping us to further understand states' obligations. Violations of the right to water can be caused by incorrect state policy measures - if, for example, existing regulations protecting access are removed or standards are reduced ("acts of commission"). Violations can also occur if the state neglects to develop adequate legal regulations ("acts of omission").

4. Paragraph 24 deals with the impacts of water privatisation. The committee requires states to establish an effective regulatory system where water services are privatised.
5. The comment requires states to develop their own national water strategy to improve the realisation of the right to water. Within the framework of such strategies the necessary legal and administrative measures should be undertaken and adequate legal revision of state behaviour to all persons should be guaranteed. The development of strategies and programmes are described in detail. The committee sees an important role for such strategies and programmes for the realisation of the right to water.
6. In paragraphs 60 and 61 the committee focuses on the obligations and responsibilities of actors other than states. Here, international organisations are addressed, especially those that can contribute to the realisation of the right to water in a double sense. Firstly because they use measures or permit measures which violate the right to water, and secondly because they directly support states to fulfil their obligations. It is important to note here that in General Comment No.15 the committee on esc rights clearly differentiates between the role of states in the international arena (international obligations) and the obligations that international organisations themselves have.

#### Experiences in the Work of FIAN

FIAN is a human rights organisation working on the right to food. The right to water is derived partly from the right to food and partly from the right to health and is therefore also at the core of FIAN's mandate. In recent years FIAN has already worked on violations where water or the destruction of access to good quality water has played a decisive role. Up to now, FIAN has discussed these cases as the right to food because there is hardly any recognition of the right to water. In the future it will be easier for FIAN to explicitly address violations of the right to water.

The cases FIAN has worked on up to now which concerned the right to water can be divided into three categories. The first group categorises situations in which access or accessibility rights of population groups were destroyed or interrupted. For example, the loss of access rights of nomad groups to traditional water places. There is a whole host of cases in which accessibility rights are violated due to overuse of scarce water resources by other users. Some accessibility conflicts arise when available water reserves or sources are privatised. This form of direct privatisation of water resources is not the same as the privatisation of water supply systems because in the case of the later, distribution service is privatised. This group also includes cases taken up by FIAN concerning the loss of accessibility to irrigation water or the destruction of irrigation systems. Here, the destruction or interruption of water supplies for personal and domestic use was also identified. The second group covers cases in which the right to water was destroyed permanently as a result of water sources pollution. This was the case in Ecuador's lowlands where oil production caused widespread river and source contamination. There are also cases of cyanide accidents in gold mining which destroy water and food supplies for whole villages long-term. Cases involving the contamination of water sources due to intensive chemical application in agriculture – in flower or banana plantations, for example – also belong to this group.. A third group of cases included those in which dramatic changes in water supply occur for individuals or whole communities as a result of development projects or large scale interventions in the natural environment such as displacements to make way for dam constructions or for whole river diversions and river-flow changes for mining projects.

In future FIAN will attempt to address violations of the right to water more directly and highlight the fact that they often go hand in hand with violations of the right to food, as is the case with forced displacements. FIAN will try to systematically incorporate this issue into its future lobby work. When preparing parallel reports for the committee on esc rights or when lobbying to influence the development of guidelines for the

realisation of the right to food, which are currently being developed by the FAO, the issue of water can and shall become a central element.

### Challenges and Opportunities

The human rights approach can be seen as a helpful and important complement to other approaches to discussing water problems. In the general debate about the usage of this scarce resource or about privatising water resources and water supply systems, this approach can deliver helpful criteria for assessing cases. It will make it easier in discussions with the WTO, World Bank or International Monetary Fund to question privatisation concepts and to lobby for adequate regulation of water supplies which includes effective state control as well as a high level of commitment by the state to ensure water supply.

The human rights approach presents, above all, an opportunity to improve the situation of victims in concrete cases. Given the shortage of water, there will be an increase in difficult and complex conflicts about water access rights which will affect marginalised groups in particular. Expanding case-related human rights work, therefore, presents one of the main challenges.