

Towards a Human Rights Based Water Governance

Challenges for the post 2015
Thematic Consultations on Water



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“Perhaps as a result of the Millennium Development Goal process, reaching targets has been the major preoccupation of many countries, both developing and developed. Inevitably at times this focus on quantity has been at the expense of quality, and on immediate impact rather than lasting change. Reconciling the desire for quick, readily quantifiable results with substantive, long-term progress has been one of the most salient difficulties with targeting resources for meeting the MDGs. Implementing the rights to water and sanitation suggest that it is the means, as well as the end, that define a rights-compliant approach to delivering services, the key principles being participation, access to information, transparency, non-discrimination and accountability. The current MDGs also do not take into account the enormously important human rights question for which portions of the population should be prioritised. In recent discussions, water and sanitation experts agreed that applying the principle of non-discrimination, and ensuring that the most vulnerable and marginalised individuals and groups are prioritised, should be reflected in new goals and targets.”

Catarina de Albuquerque,
UN Special Rapporteur on the rights to water and sanitation

1. INTRODUCTION

This article outlines the emergence of a Human Rights Based Approach (HRBA) to water governance in the post-2015 framework. In recent decades it has been increasingly recognized that water governance should be approached in this manner. This is a recent phenomenon: only twenty years ago, at the 1992 Dublin Conference on Water and Sustainable, the influential ‘Dublin Declaration’ declared that *water has an economic value in all its competing uses and should be recognized as an economic good*. While water is clearly essential to economic production, this statement created controversy because it did not accord sufficient weight to either environmental or humanitarian emergencies and because it symbolised a dominant paradigm that viewed water as a commodity. Importantly, it is precisely in the past twenty years that the human right to water has been recognised and that the trade offs between the economic and social functions of water have been significantly clarified. In addition, the constitutional protection of the human right to a healthy environment has advanced significantly, providing content to the meaning of sustainable development.

Water is a resource that is essential to life itself, to all forms of economic production, to many forms of social interaction and to many cultural activities. Because water is so fundamental, a wide variety of institutions are involved in its governance, and this immediately creates challenges in the sphere of complementarity and coherence. Just within the UN system, for instance, 28 organizations and agencies have mandates in which a responsibility for water governance is integral to their work. At the national level, similar challenges exist.

Fortunately, the human rights system offers a broadly (almost universally) endorsed

normative and legal framework that sets minimum standards for governance and defines the rights and obligations of different categories of institutions. Because water has been recognized as a human right, the human rights system offers opportunities to streamline global (and national) water governance and provide coherence both in the sphere of environmental sustainability and in terms of human development. In addition, since 1997 and in the context of the UN programme for reforms, human rights have been mainstreamed into the activities and programmes of many UN organisations and agencies. In 2003 the UN produced a statement of Common Understanding on a Human Rights Based Approach to Development Cooperation, and in 2009 the United Nations Development Group, consisting of 19 organisations and entities, established the Human Rights Mainstreaming Mechanism (UNDG-HRMM). Human rights therefore increasingly provide a common point of departure within the UN system as regards human development issues, and especially water governance.

At the national level, the spread of democracy and the rule of law worldwide offers unprecedented opportunities to improve public responsiveness, access to information, and citizen participation and accountability in the planning, implementation and evaluation of water and sanitation related programmes and projects. Where the world only had 66 democracies in 1987, there are now approximately 123. This historic development provides huge opportunities for water governance in the post 2015 framework. And at a deeper and perhaps more complex level, the rights and obligations related to environmental conservation are emerging as a subject matter for legal practitioners. Sustainability – often framed in terms of the rights of future generations – is now in the *avant garde* of legal development. Thus for instance more than 100 countries currently have constitutions that contain references to the right to a healthy environment, leading one author to speak of ‘an environmental rights revolution’ . Nor is this merely a paper revolution : court rulings on the human right to a healthy environment are imposing a paradigm shift on sustainability issues all over the world : for instance a court ruling forced a clean up of the world’s dirtiest river, the Matanza-Riachuelo basin in Buenos Aires, Argentina ; a court ruling revoked the license of Coca-Cola to abstract groundwater in Maharashtra, India, because it was interfering with the right of villagers to access water; a court ruling on the Tana Delta in Kenya clarified the need for participatory land use planning to secure the long term enjoyment of the right to a healthy environment. In short, these subjects place human rights at the heart of the post-2015 debate.

The post-2015 debate is marked by two main initiatives. Firstly, one of the main outcomes of the UN Conference on Environment and Development ‘Rio+20’ Conference in June 2012 was the decision to prepare a set of Sustainable Development Goals that are “coherent with and integrated into the United Nations development agenda beyond 2015”. Secondly, on a somewhat parallel track, the Millennium Development Goals are being revised and a new set of goals is being prepared for the sixty-eighth session of the General Assembly in September 2013. Impressive efforts are currently being deployed at all levels to define these goals for the post-2015 development agenda. While there was initially some concern that these two proposals would set in motion separate or parallel processes, many nations have since emphasized the need for coherence in the definition of the “post-2015 sustainable development agenda”. Concretely, the current process is advancing towards integration of Sustainable Development Goals (SDG) within the framework of the post-2015 MDG process. Whatever

the outcome of these discussions, however, it is likely that human rights will increasingly become an anchor for issues related to both development and sustainability.

2. THE RIGHT TO WATER AND SANITATION IN THE POST 2015 DEVELOPMENT AGENDA

In the thirteen years since the Millennium Declaration, the global perspective on water and sanitation has shifted fundamentally in that both water and sanitation have come to be officially recognised as human rights under international law. This commenced with a legal opinion: in November 2002, the Committee in charge with monitoring and interpreting the International Covenant on Economic, Social and Cultural Rights (ICESCR) dedicates its General Comment no. 15 to the right to water. In an assessment of existing human rights law, General Comment no. 15 declared that access to water was an integral part of the right to life. It declared that “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 disease and to provide for consumption, cooking, personal and domestic hygienic requirements”

This authoritative interpretation of the ICESCR set in motion a global debate on a human rights approach to water and sanitation, resulting in more than 30 countries adapting their legislation to incorporate water as a human right. General Comment no. 15 also provides international standards for what constitutes ‘sufficient, safe, acceptable, physically accessible and affordable’ water as well as providing guidance on procedural issues framing the governance of water and sanitation. However, the authority of the legal opinion expressed through General Comment N°15 on the content of the right to water was provided with fundamental support through the recognition of this right both by the General Assembly and Human Rights Council. On the 28th of July 2010, 122 countries formally recognised water and sanitation as human rights through a resolution of the United Nations’ General Assembly (A/64/292). On the 24th of September 2010, the Human Rights Council adopted a resolution (A/HRC/RES/18) recognising that the right to water and sanitation are part of the right to an adequate standard of living. In short, in the post 2015 era, a fundamentally different approach is required to water and sanitation that takes into account the obligations of states and the rights and duties of non-state actors under human rights law.

Currently, human rights methodology is even beginning to playing a role in the revision of the Millennium Development Goals (MDGs). We cannot review here in detail the various MDGs or evaluate their outcomes, but most observers confirm that the MDGs did have a positive effect on global access to drinking water and sanitation. There is a general consensus that the MDGs have contributed to an overall improvement to human development and the reduction of poverty. Although they are not formal (legally binding) commitments, the Millennium Development Goals’ simple wording, clear priorities and measurable targets succeeded in raising public awareness and focusing efforts of the world community on fundamental issues. However, it is equally clear that the MDGs left room for improvement. Critiques of the MDGs are significant

(including the lack of explicit targets on environmental sustainability and the targeting of the poor(est) in interventions). Therefore, the current discussion about the post-2015 development agenda is a great opportunity to overcome their weaknesses and perhaps, more ambitiously, to introduce new governance mechanisms for sustainable development.

MDG no.7, target C on water and sanitation was to halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation. It is critiqued for being narrowly formulated, unrelated to human rights, and having weak links to environmental sustainability. Progress on this goal was measured through the WHO/UNICEF Joint Monitoring Program for Water Supply and Sanitation (JMP). In its capacity as co-host of the post-2015 consultations, the JMP created four working group in January 2012: Water, Sanitation, Hygiene and Equity/Non-Discrimination. These working groups proposed 4 WASH targets¹, with an interesting innovation: the integration of human rights language on universal access, non-discrimination and progressive realisation into the MDG framework. In a paper for the thematic consultation on addressing inequalities, the UN Special Rapporteur on the Human Right to Water and Sanitation states that:

- A key role in the realization of rights is to be played through data collection and monitoring mechanisms such as the Joint Monitoring Programme (JMP) and the Global Analysis and Assessment of Sanitation and Drinking Water (GLAAS), which are beginning to incorporate rights-based indicators into their monitoring framework. Such indicators need to include the affordability of services and should enable disaggregation that can help identify inequalities in access to services that are structured along geographical, religious, and ethnic lines and include information in access to services in slums²;
- There would be great value in ensuring a stand alone goal on equality to ensure that the elimination of inequalities are addressed under the substantive targets³;

In addition to these specific points on the post 2015 agenda, the Special Rapporteur has in earlier work emphasised other aspects of a rights based approach that are crucial to ensuring access to water, sanitation and hygiene in future. Many of these points are related to the thematic area of financing, spending, tariffs and costs⁴:

1 Consolidated proposal for post-2015 targets and indicators discussed in The Hague (December 2012): “Target 1: By 2025 no one practices open defecation, and inequalities in the practice of open defecation have been progressively eliminated. Target 2: By 2030 everyone uses a basic drinking-water supply and handwashing facilities when at home, all schools and health centres provide all users with basic drinking-water supply and adequate sanitation, handwashing facilities and menstrual hygiene facilities, and inequalities in access to each of these services have been progressively eliminated. Target 3: By 2040, everyone uses adequate sanitation when at home, the proportion of the population not using an intermediate drinking-water supply service at home has been reduced by half, the excreta from at least half of schools, health centres and households with adequate sanitation are safely managed, and inequalities in access to each of these services have been progressively reduced. Target 4: All drinking-water supply, sanitation and hygiene services are delivered in a progressively affordable, accountable, and financially and environmentally sustainable manner”. See WHO/UNICEF (2013): Joint Monitoring Programme the Hague Consultation

2 De Albuquerque, C (2012) : The Future is Now. Eliminating inequalities in sanitation, water and hygiene. Paper for the Thematic Consultation on “Addressing Inequalities” the heart of the post 2015 agenda and the future we want for all. Geneva : OHCHR.

3 Ibid.

4 De Albuquerque, C. (2012): On the Right Track. Good Practices in Realising the Rights to Water and Sanitation. Geneva: OHCHR

- States should aim to spend a minimum of one percent of GDP on water and sanitation;
- External (foreign) funding should be driven by the programming and budgets delivered by states;
- To ensure sustainability, spending needs to be spread more broadly over data gathering and dissemination of information, legal and policy development, capacity building, public participation in planning, and monitoring and evaluation relative to spending on technology and 'hardware' (see also text box on page 3 above);
- Tariff and subsidy policies need not ensure that water and sanitation services are free, but they should ensure that services are affordable. As a general rule spending on water services should not exceed 3% of the household income of the poorest groups in society.

Other points are related to the more general oversight and regulatory roles of the state, including:

- The elaboration of national plans and strategies for the realization of the right to water and sanitation;
- The provision of mechanisms for accountability such as consultations, systems of access to information, complaints procedures and equal access to competent and effective judicial bodies such as ombudspersons, courts and tribunals;
- The obligation to regulate water use (i.e. water resources management) in such a way as to prioritise basic human requirements before allocating water to other uses⁵.

3. HUMAN RIGHTS AND WATER IN THE ANTHROPOCENE

Depending on which culture one is looking at, freshwater has been a public good, an open access resource or a common property resource governed under customary law for thousands of years. Thus Roman law defined water as *res omnium publicum* defining water as a public good for the case of perennial rivers. Being public in nature, most uses of water were also defined as *res communis omnium usus* similarly to air, the seas and wildlife, i.e. open to free usage. This applied to perennial rivers that were navigable: streams arising on private property and non-perennial rivers could in principle be privately controlled. At low levels of consumption, there was little need to strictly determine rights to water other than for navigation. However, where water was scarce, competition for access to the resource was typically intense, and a variety of water al-

⁵ Special Rapporteur on the right to water and sanitation (2012): Human rights and WASH, water resources and wastewater. Paper for Thematic Consultation on Water in the post -2015 development agenda / Cross-cutting discussion on human rights and inequalities

location and licensing systems have emerged in response, such as the riparian and prior allocation systems.

Currently, at the beginning of the 21st century, water is becoming increasingly scarce, and the question as to what constitutes a just allocation and distribution of water in the public interest is presenting itself with increasing urgency. The clarification of the minimum obligations of states in order to comply with existing human rights commitments is therefore a key component of development, peace, justice and sustainability.

How can a blue planet experience water scarcity? Although 70% of our planet is covered by water, it is important to know that 97.5 percent of the world's water resources are located in the seas and oceans and unfit for human consumption and most productive uses. Of the remaining 2.5%, which is freshwater, about 70 percent is locked into the great glaciers of the world, although this 'stock' of freshwater is declining due to climate change. The remaining 30% of the world's freshwater is contained in surface and groundwater reserves. Thus, surface water sources and groundwater sources hold merely 0.75% percent of the total water quantity. However, again, the greatest part of the world's freshwater (nearly 99 percent) of this water is groundwater, of which a large proportion is constituted by soil moisture or is inaccessible for mankind. Groundwater is a crucial resource, especially for the world's poor, but the question how much can be sustainably withdrawn in any one locality remain challenging to answer. While surface water resources are governed by international law and quite extensively by national law, both international and national laws still face the challenge of adequately regulating groundwater resources in the public interest.

3.1 Increasing pressure on water resources

With increasing effectiveness, mankind has harnessed water resources. The first known irrigation systems were developed by the early Sumerians in Mesopotamia some 7,500 years ago. This began a process of replacement of *natural water systems* by man made *water use systems*. In the last century, water use systems have extended across the globe, and global water withdrawals have increased from 580km³ in 1900 to 5,190km³ in 2000⁶. Agriculture accounts for 70% of this consumption: the global land area under irrigation increased from 100 million ha in 1900 to 277 million ha now⁷. Groundwater based irrigation accounts for 45% of world irrigation, mostly in arid areas, resulting in 'hydrological debt' or unsustainable groundwater abstraction levels: global groundwater depletion has increased from 126 km³ to 283 km³ between 1960 and 2010. In several countries such as the United States or China, due to the intensity of non-renewable groundwater use it is expected that these resources will be completely depleted by 2030 on the North China Plain and by 2025 in the United States. Surface water is also being used at levels that undermine both sustainability and human rights: in a study of 424 major river basins, Hoekstra and Mekonnen found that environmental flow requirements were violated in 223 basins, implying that 2.67 billion people face severe

6 McNeill, J.R (2000). An environmental history of the twentieth century. London: Penguin Press.

7 Sandra Postel in Gleick (1993): Water in Crisis. A guide to the world's water resources. Oxford: Oxford University Press

water scarcity during at least one month of the year⁸. Although some 2 billion people have obtained access to safe water since 1990, and although there are still some 780 million people without access to safe water, clearly current large scale human interventions in water resources currently undermine the continuity of access to water for basic human requirements and therefore infringe on the human right to water. The population of the world currently numbers 7 billion. Some 783 million individuals do not have access to clean drinking water and every 20 second a child dies as a result of inadequate sanitation. 50 percent of all infectious diseases are caused by contaminated waters. As a result of these waterborne contagions, annually approximately 300 million people become ill and about 5 million people die every year.⁹ Thus, water plays a crucial role in our lives.

The geographical concentration of water demand has also increased rapidly: during the second half of the 20th century world population grew by 150% but the world urban population by 300%. Many cities depend on groundwater for clean water but are also leaching pollutants into the groundwater. Most urban areas lose 25-35% to leakage & pollute heavily through inadequate sanitation and overloaded purification systems. Cities are increasingly claiming water resources of the hinterland. World industrial water use is expected to increase from 752 km³ in 1995 to 1,170 km³ in 2025. Industrialisation creates heavy pollution loads: some 300-500 million tonnes of heavy metals, solvents, toxic sludge etc are dumped untreated into waters every year¹⁰. As a result, the biodiversity of freshwater ecosystems has been degraded more than any other ecosystem. In addition, vegetation removal, urbanisation, river channeling, floodplain alteration, land use changes and climate change are destabilising river basins. In the last twenty years the number of flood related disasters for instance has increased by 230 %¹¹.

It may be evident from the above that sustainability is essential for the long term enjoyment of the human rights to water, sanitation and health, as it is essential to ensure that future generations can enjoy the same rights. However, the following three excerpts from key international statements on water indicate that these rights are insufficiently protected:

ONE: "Scarcity and misuse of fresh water pose a serious and growing threat to sustainable development and protection of the environment. Human health and welfare, food security, industrial development and the ecosystems on which they depend, are all at risk, unless water and land resources are managed more effectively in the present decade and beyond than they have been in the past"¹².

8 Hoekstra, A. and Mekonnen, M. (2012): The Water Footprint of Humanity. PNAS: February 28, 2012, vol. 109 no. 9
9 See e. g. World Business Council for Sustainable Development (WBCSD) and United Nations Environment Programme (UNEP): *Industry, Fresh Water and Sustainable Development*. Geneva: WBCSD and UNEP, 1998.; Gleick, Peter H.: *The World's Water 2000-2001: The Biennial Report on Freshwater Resources*. Washington, DC: Island Press, 2000.
10 See http://www.unwater.org/statistics_pollu.html
11 UNEP (2012): Global Environmental Outlook (GEO) 5, chapter 4: Water. Nairobi: UNEP
12 Dublin (1992): International Conference on Water and the Environment: Dublin Statement on Water and the Environment,

TWO: “The widespread scarcity, gradual destruction and aggravated pollution of freshwater resources in many world regions, along with the progressive encroachment of incompatible activities, demand integrated water resources planning and management. In developing and using water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of ecosystems”¹³.

THREE: “the continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty. Water is required for a range of different purposes, besides personal and domestic uses. Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease”¹⁴.

Together, these statements indicate that in the current era, we are reaching planetary boundaries with regard to our claim on freshwater resources. This era has recently been referred to as the ‘anthropocene’, i.e. the most recent in a long list of geological epochs dating back to the early Cambrian, 3800 million years ago. Each epoch has its own unique climate, ecosystems and flora and fauna. We are currently in the anthropocene because the earth’s surface, climate and biodiversity are being fundamentally affected by mankind. We are transforming and degrading the world’s soils and have degraded more than 40% of the world’s agricultural land, we have increased carbon dioxide levels from 280 parts per million (ppm) in the preindustrial era to 400 parts per million in 2013, and we have contributed to the largest mass extinction of species in 65 million years¹⁵.

Although the human right to a healthy environment is still an evolving field, it is clear from the above that, in the words of the UN Independent Expert on the human rights obligations relating to the enjoyment of a safe, clean and healthy environment, “environmental degradation can and does adversely affect the enjoyment of a broad range of human rights, including rights to life, health, food and water”¹⁶. Current interventions in water resources carry grave risks for human health and often infringe on the human right to water. It would therefore seem evident that:

- States have the responsibility to take measures to protect citizens from exposure to toxic substances released into water bodies by agriculture, industries, mines and household wastes (including excreta and pathogens);
- States have the responsibility to take measures to protect citizens from floods;
- States have the duty to inform citizens of the risks to the health of present and future generations caused by the degradation, pollution and destabilisation of water resources;
- The implementation of Integrated Water Resources Management, agreed on in Rio in 1992 and the WSSD in 2002 would seem to be an urgent priority to ensure the

13 United Nations Conference on Environment and Development (UNCED, 1992), Agenda 21, chapter 18

14 Committee on Economic, Social and Cultural Rights (2002): Substantive issues arising in the implementation of the international covenant on economic, social and cultural rights. General Comment no. 15: the right to water.

15 For more on this see the proceedings of the Planet Under Pressure conference, London, March 2012

16 OHCHR (2012) : Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox. Geneva : 22nd session of the Human Rights Council

realisation of the human rights to water and sanitation.

It is important to note in this regard that the Independent Expert has argued that there is a 'virtuous circle' between procedural and substantive rights in respect of environmental governance in that free and effective participation of all concerned citizens in environmental decision making, on the basis of appropriate access to information, results in better environmental protection and, as a consequence, greater protection of the human rights that may be threatened by environmental degradation.

4. THE POST 2015 CONSULTATIONS ON WATER AND SUSTAINABILITY

The global consultations on the post 2015 goals for development and sustainability are structured around 11 thematic areas, of which water is one¹⁷. It is widely recognized, though, that water has a particular importance and that if it is appropriately governed, it can contribute substantially to the realization of all the other post 2015 goals. Perhaps not surprisingly, the consultation on Water that commenced in November 2012 has elicited a response larger than the response on all other ten topics put together¹⁸.

A key event from the point of view of water was a meeting convened on the post-2015 agenda consultation on water that was held in Geneva in the 27th and 28th of February 2013 and hosted by the Swiss government. This meeting aimed to produce an initial and brief discussion document, highlighting possible targets and indicators for a future water goal. At this stage three 'streams' were already identified within the topic of water, i.e.: Water, sanitation and hygiene; Water resources management; Wastewater management and water quality. The global consultations on water subsequently reached a critical phase in March, during World Water Day, when the Government of the Netherlands hosted both the World Water Day celebrations and the High Level Panel on the post-2015 Development Agenda. This event formally marked the submission of the main messages from the 'World We Want' thematic consultations on water to the UN High Level Panel. It resulted in a synthesis report that contains a group of 'emerging recommendations' for each of the above 'streams' within the thematic consultation on water. Although the debate is still continuing and the emerging recommendations are not set in stone, it would be nothing short of historic if goals on water resources management and wastewater management were indeed to be added to the post 2015 goals. This broadening of the subject matter of a water related goal would serve to substantially increase the emphasis on sustainability through management of water at the level of the resource and through consideration of issues related to water pollution.

How will these messages be integrated and translated into the post-2015 develop-

17 The eleven topics are : Conflict and Fragility, Education, Energy, Environmental Sustainability, Food Security, Governance, Growth and Employment, Health, Inequalities, Population Dynamics, and last but not least, Water.

18 See the Post 2015 Water Thematic Consultation Synthesis Report

ment agenda? In any case, the broadening of MDGs to wider thematic discussions and the large participatory processes are already a sign of the impacts of Rio+20 conference on the definition of the post-2015 development agenda. It remains to be seen to what extent the sustainable agenda (SDGs) will be integrated into the development agenda (MDGs). Of course there is a lot at stake in the process leading up to the discussion at the General Assembly in the autumn of 2013, as this could imply no less than a paradigm shift. The results from the thematic consultations and the first proposed goals over WASH, water resources, and wastewater management and water quality offer a good start to think the wider post-2015 sustainable development agenda. It is great news for the wider sustainable development agenda that the water discussions are so well organized and advanced: the way the human right to water and sanitation has been explicitly related to the 'Big water' issues is welcomed¹⁹.

5. HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT

In the run-up to the Rio + 20 Summit, the Special Procedures mandate-holders of the Human Rights Council to States submitted an open letter on the links between human rights and sustainable development to states negotiating the Rio + 20 outcome document. They jointly called on states to incorporate universally agreed international human rights norms and standards in the Outcome Document of the Rio+20 Summit with strong accountability mechanisms to ensure its implementation. Their main argumentation was procedural in nature, raising the question how decision makers could be held accountable to the commitments made :

“A real risk exists that commitments made in Rio will remain empty promises without effective monitoring and accountability. We offer proposals as to how a double accountability mechanism can be established. At the international level, we support the proposal to establish a Sustainable Development Council to monitor progress towards the achievement of the Sustainable Development Goals (SDGs) to be agreed by 2015. We recommend building a mechanism based on the Universal Periodic Review of the Human Rights Council inaugurated in 2007 to provide a peer review of the human rights records of all 193 Member States of the United Nations every four years. At the national level, we recommend establishing participatory accountability mechanisms through which people’s voice can be reflected and independent monitoring can be conducted”²⁰.

The key proposals in this letter included the strengthening of the institutional framework for sustainable development, arguing in support of the scientific community that the urgency of the world’s current environmental problems required a ‘constitutional

19 Water Thematic Consultation Report, April 2013, p17, 18. available at <http://www.worldwewant2015.org/node/341163>;

20 Office of the United Nations High Commissioner for Human Rights (2012) : If Rio + 20 is to deliver, accountability must be at its heart. Geneva : OHCHR ;

moment' similar to that which led to the establishment of the Bretton Woods institutions. The letter argued that the stark increases in natural disasters, food and water security problems and biodiversity loss provide evidence that humanity may be crossing planetary boundaries and approaching dangerous tipping points, and that an effective environmental governance system needs to be instituted as a matter of urgency. In this light the letter supported the idea to establish a Sustainable Development Council to oversee the implementation of the Sustainable Development Goals (SDGs) and recommended a mechanism built on the Universal Periodic Review system of the Human Rights Council to provide periodic peer review every four years. Because the actual implementation of the UNCED commitments from 1992 on biodiversity, desertification, land degradation and climate change is limited, and because biodiversity loss, climate change and land degradation hold the threat of irreversibly damaging societies, destabilising economies and multiplying natural disasters, developing legal mechanisms to hold governments to their environmental commitments and clarify the roles of non-state actors is no luxury.

In a similar vein, Rio + 20 was unique in that for the first time ever, national Supreme Court Judges were assembled to review environmental commitments from a legal perspective. Organised by UNEP, the World Congress on Justice, Governance and Law for Environmental Sustainability was held in Brazil, from 17-20 June 2012, with the aim to contribute to the support of Chief Justices, Attorneys General, Auditors General and other legal experts to the achievement of sustainable development and to provide inputs to the United Nations Conference on Sustainable Development Rio +20. In a joint Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability the group asserted that²¹ :

- Without adherence to the rule of law, without open, just and dependable legal orders the outcomes of Rio+20 will remain unimplemented ;
- An independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law ;
- Environmental law is essential for the protection of natural resources and ecosystems and reflects our best hope for the future of our planet ;
- Environmental litigation often transcends national jurisdictions, therefore more effective national and international dispute settlement systems are needed for resolving conflicts.

International environmental law and human rights are becoming ever more interconnected. Human rights, especially their procedural aspects, that is the right to access to information, participation and remedy, have increasingly found their way into environmental law (e.g. UNCED Principle 10²²). These principles were further codified in

21 UNEP (2012) : Joint Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability. World Congress on Justice, Governance and Law for Environmental Sustainability, Brazil, 17-20 June 2012.

22 United Nations Conference on Environment and Development (1992): Rio Statement, principle 10: Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national

the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). The Committee on Economic, Social and Cultural Rights in General Comment 15 on the 'human right to water' also defines state obligations relating to these rights:

“The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.” (GC 15 §48)

Interestingly, a recent pending case before the Compliance Committee of the UNECE Aarhus Convention raises the question of the nature of private water services providers' obligations relating to disclosure of environmental information. The delimitation between what is strictly related to drinking water services and what concerns water resources management may indeed become tricky in some situations. In this regard, access to information, participation and access to justice as recognized in international environmental law may directly contribute to the realization of the human right to water.

6. HUMAN RIGHTS AND WATER RESOURCES MANAGEMENT

Environmental sustainability is an integral part of the human right to water. The human right to safe drinking water of current generations has a direct implication for water resources and sanitation management: the protection of water resources as *sources* of drinking water²³. One of the legal bases for the human right to water is the human right to health (article 12 of the International Covenant on Economic, Social and Cultural rights). Departing from the right to health, the Committee on economic, social and cultural rights in its General comments 15 points to the need for states to take steps to prevent threats to health from a range of malpractices in the water field.

And although the human right to water and sanitation focuses largely on domestic water supply and sanitation issues, it has far reaching implications in the realm of water resources management. General Comment no. 15 is replete with references to 'upstream' requirements that need to be fulfilled in order to give effect to the RTWS. Some examples are given here.

level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

23 WaterLex Declaration on International Water Law Commitments derived from Human Rights Obligations, 2012. Available at: <http://waterlex.org/waterlex/fr/news/archives-des-news/212-waterlawdeclaration>

For instance, in its introductory paragraph, General Comment no. 15 declares that water is a limited natural resource and that “the continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty”²⁴. Clearly this opening links, at the outset, poverty to the current state of water resources, and provides a preamble to the clarifications that follow ;

Next, paragraph 6 places the right to water in the context of the multiple uses of water, emphasising other uses of water that are central to the realisation of ICESCR rights such as the need to produce food (right to food), the need to ensure environmental hygiene (right to health), the importance of water in securing a livelihood through work (right to gain a living through work), and the right to engage in certain cultural practices (right to take part in cultural practices). Importantly, it states that despite these multiple uses, priority of allocation should be given to the fulfilment of the right to water for personal and domestic purposes. Also, it states that priority should be given to the allocation of water needed to prevent starvation and disease. Here, there is a direct impact on water resources management in that a hierarchy of allocation is clarified that limits or places conditions on the scope for water licensing in any given area. Similarly, paragraph 7 states that a people should not be deprived of its means of subsistence and therefore states should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples. This note on balancing competing needs for water offers normative authority on Chapter 18 of Agenda 21, the agenda for sustainable water resources management adopted at the United Nations Conference on Environment and Development in Rio in 1992.

Furthermore, departing from the right to health, paragraph 8 points to the need for states to take steps to prevent threats to health from unsafe or toxic water conditions. These include the need for states to protect water resources from being polluted by harmful substances and pathogens, as well as the monitoring and control of areas where waterborne diseases could be spread.

Paragraphs 10 and 11 refer to the right to sustained access, by pointing to the right to be free from arbitrary disconnections or contamination as well as the right to the **sustainable** realisation of the right to water for present and future generations.

Paragraph 12 defines the adequacy of water in terms of availability, quality and accessibility as mentioned in section 3 above. These criteria place strict demands on water resources management, requiring supply to be continuous, free from pollutants and accessible for all. They also require full information accessibility by communities on issues related to water supply. At this point procedural rights become an important issue, as interventions in watercourses that affect communities can be analysed from the point of view of the access to information and the degree of participation of communities in water projects affecting them or their access to water. Where in the past NGO’s campaigned for the legal recognition of notions such as Free Prior Informed Consent and encountered difficulties in getting these concepts accepted by those investing in large scale water infrastructure such as dams were difficult, General Comment no. 15 contains similar provisions such as paragraph 56 that states that

24 See CESCR (2002): General Comment no. 15, Op. Cit.

“Before any action that interferes with an individual’s right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies”²⁵.

Clearly, given the number of countries that have ratified ICESCR, this provides great opportunities for the improvement of the governance of water infrastructure by opening the door to participatory and accountable decision making in a sector often troubled by corruption, opaque decision making, unsustainable investments and inadequate compensation for loss of property and livelihoods²⁶.

Paragraph 13, for its part, establishes a clear baseline for the equitable distribution of water. It does so in the first instance by emphasising the fact that the right to water should be enjoyed without discrimination on the grounds of race, colour, sex, age, language, religion, etc. This aspect of the RTWS places a responsibility on investors in water infrastructure to avoid falling into the trap of reaching for the low hanging fruit by investing in areas where payment for services carries a reasonable guarantee, and to proactively seek means to reach out to the vulnerable and the marginalised. Non-discrimination, by definition, then, requires a pro-poor focus.

In the second instance, paragraph 13 points to the need to protect the access of vulnerable communities to water even in times of severe resource constraints. This falls under the obligation of states to **protect** the right to water, i.e. that the state should act to prevent third parties from interfering with the enjoyment of the right to water. This requires practical measures at catchment level to ensure a continued flow of water for basic needs purposes. An example of this kind of measure was piloted in South African legislation, which provides for a ‘basic needs reserve’ that needs to be maintained in a catchment over and above water abstraction licenses for economic purposes such as irrigation and mining. Paragraph 14 continues this argument by stating that

“States parties should ensure that the allocation of water resources, and investments in water, facilitate access to water for all members of society [...] investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population”²⁷

The obligation to protect the right to water extends to the duty to proactively restrain third parties from interfering in the enjoyment of the right to water. In terms of paragraph 23, the obligation to protect includes “adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying access to adequate water, and polluting and inequitably extracting from water resources”²⁸.

25 Ibid.

26 See for instance Transparency International (2008): *Corruption in the Water Sector*. Cambridge: Cambridge University Press.

27 See CESCR (2002): General Comment no. 15, Op. Cit., art. 14.

28 Ibid., art. 23

Apart from the obligation to protect the right to water, states also have the duty to **respect** and **fulfil** it. Under the obligation to fulfil, paragraph 28 is replete with criteria that are designed to ensure the sustainable management of water resources:

“States parties should adopt comprehensive and integrated strategies to ensure that there is sufficient and safe water for present and future generations. Such strategies and programmes may include: (a) reducing depletion of water resources through unsustainable extraction, diversion and damming; (b) reducing and eliminating contamination of watersheds and water related ecosystems by substances such as radiation, harmful chemicals and human excreta; (c) monitoring water reserves; (d) ensuring that proposed developments do not interfere with access to adequate water; (e) assessing the impacts of actions that may impinge upon water availability and natural ecosystems and watersheds such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity; (f) increasing the efficient use of water by end users; (g) reducing water wastage in its distribution; (h) response mechanisms for emergency situations; (i) and establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes”²⁹.

Clearly, a human rights approach offers not only minimum standards with regard to water and sanitation services but also provides a range of norms for sustainable water resources management

7. HUMAN RIGHTS, WATER ALLOCATION, AND WATER EFFICIENCY

A human rights-based governance of water is not limited to the human right to drinking water and sanitation, but also in securing access to water resources for other human rights, such as the right to food. In addition, human rights-based water governance implies that human rights are both an end and a means for water governance: the human right to water for instance is in place to ensure access to water for drinking, hygiene and cooking. However, the access to water for drinking, hygiene and cooking is also a means to the realisation of other rights, such as the right to health, the right to food, etc. Thus on the right to food, in interpreting the ‘right to water’ in the overall context of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Committee specifies States’ obligation relating to access to water resources derived from the International Covenant states that:

“The committee notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food (see 1999 General Comment n°12). Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology” (GC 15§7).

29 Ibid, art. 28.

The Committee further explains:

“Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not ‘be deprived of its means of subsistence’, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihood of indigenous peoples.”(GC 15 §7)

Clearly, therefore, decisions need to be taken at the level of water resources management to guarantee an interrelated set of human rights such as the right to sufficient and safe water, the right to sanitation, and the right to food. In the allocation of water over various competing uses, allocations for the realisation of such human rights take priority over other categories of water use by virtue of the priority accorded to human rights law over other forms of law. Furthermore, since these rights apply not only to present generations but also to future generations, the water utilisation of present generations may not compromise the rights of future generations to enjoy the right to water, the right to food, etc. This introduces the issues of environmental sustainability into water resources management and brings the renewability of freshwater into the heart of human rights law. Ensuring water allocations for ecosystems maintenance is not just a necessity from the point of view of environmental conservation, it is a cornerstone of intergenerational equity and is therefore essential from the point of view of human rights law. It follows from the above that the point of departure for water resources management, before giving consideration to other allocations of water, should be to ensure access to water and sanitation, to ensure subsistence food production, and to maintain the renewability of the resource by ensuring that catchment areas continue to perform their key hydrological functions.

Does this stand in the way of economic growth? Do human rights impose an inflexible system upon water resources management in such a way as to undermine the efficiency of market processes? Historically, various forms of water allocation systems have been adopted at the national level. These include prior appropriation systems, which accord rights of water use in the order in which claims were historically made to water courts, riparian systems, which accorded water abstraction rights to water users owning land adjacent to a water source, market systems which enable the transferability of water abstraction permits through their sale, and public water allocation mechanisms whereby the state issues water abstraction licenses. Over time, as water demands have become greater, the exclusive rights of prior appropriation and riparian rights holders has been modified to allocate water to new claimants such as growing cities and towns. In this process the role of the state has grown, but it has historically been state planned water allocation in the interests of balanced economic growth, allowing for the growth of emerging economic sectors such as industry, mining, and services. However this economic growth did not incorporate the true social and environmental costs into the price of water, and it became possible for instance for polluting industries to pass on the costs of water purification to downstream recipients. In a green economy, these costs are either internalised into the production process, or the waste stream is treated as a source of revenue from biogas, phosphorous extraction, compost, etc. And in many cases this green economy is vibrant and highly competitive. For instance, the market for organic produce is growing as fast as the Chinese economy. Equity and efficiency in water uses are also heavily influenced by other - not-water specific- policies: food prices, agricultural and industrial subsidies or

trade and investment policies. While aiming at water efficiency, policy-makers should not overlook the following aspects: first, water efficiency does not necessarily mean water sustainability. Second, one needs to pose the question: what is the ultimate goal of water efficiency?

8. CONCLUSION

In this article we reviewed the post 2015 debate on the Millennium Development Goals and Sustainable Development Goals from a human rights perspective. In doing so we focused specifically on a human rights approach to water governance in order to establish to what extent human rights have a role to play in water governance after 2015.

We conclude that the human rights framework offers ample guidance for a more coherent and accountable water governance at all levels. At both the international and national levels, the role of human rights is rapidly expanding – in the UN system, in international cooperation, in the globalisation of democracy. This is linked to environmental protection for instance through the embedding of the human right to healthy environment in more than 100 constitutions. During the period in which the Millennium Development Goals were being implemented, a revolution took place in the way in which water and sanitation are approached through the recognition of water and sanitation as human rights. Therefore the post 2015 framework cannot approach water and sanitation in the same way as before : human rights need to take centre stage.

In the current post 2015 debate, the thematic area of water has undergone significant expansion to include water resources management and wastewater treatment sustainable water management, providing a further anchor for sustainability in the water governance field. From the point of view of human rights and sustainable development, we witness for the first time a strong contribution from the legal field to sustainability, emphasising the role of law in ensuring accountability for the environmental commitments made by governments and supporting new forms of institutional development that can solidify progress on sustainability. We see that although the human right to water and sanitation aims predominantly at the domestic sphere, General Comment 15 has far reaching consequences for water resources management. And in the broader realm of water rights for production, there appears to be no reason to expect that human rights guarantees will have a negative effect on water efficiency.



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