General Comment No. 15 on the Right to Water (2002)

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The establishment of an international human rights regime with its legally binding treaties is a remarkable, yet unforeseeable development in the history of the United Nations. Although the Universal Declaration of Human Rights was adopted in 1948, it would take another twenty years for a legally binding human rights treaty the International Convention on the Elimination on all Forms of Discrimination entering into force in 1969. Today, nine international human rights treaties exist, and member states' compliance with the obligations of each respective treaty is monitored by independent experts in the treaty bodies. The content of these norms is further determined through General Comments or General Recommendations; an often-overlooked instrument of the treaty bodies. These authoritative treaty interpretations address all state parties equally and aim at assisting them in preparing their reports. At first sight, this instrument is a useful solution to the problems arising out of the indeterminacy of human rights norms. However, the legitimacy of the General Comment as a legal tool for interpretation is contested, and the process of drafting them lacks formal guidelines and transparent rules of procedure. Opinions from scholars and practitioners differ sharply: some say that by using it, the treaty bodies exceed their authority as a quasi-judiciary body; others praise it for its role in the development of international human rights law and politics. By looking in detail at the General Comment No. 15 on the right to water, which was adopted by the Committee on Economic, Social, and Cultural Rights in 2002, this commentary argues that it is indeed a powerful tool for the development of human rights.

Genesis

For many, the human right to water is now considered indispensable, for what use is the basic human right to life without access to water? Nevertheless, the right to water was not included in the International Covenant on Economic, Social and Cultural Rights (ICESCR) or any other human rights treaty, whereas the right to food and the right to health was.[1] Although the omission of water in the human rights treaties was severely criticized by many human rights organizations, the General Comment No. 15 on the right to water in 2002 still came as a surprise to every stakeholder. General Comments[2] are usually authoritative interpretations of norms that are included in the treaties instead of having to create new ones. Hence, the General Comment No. 15 broke new grounds for human rights law by being the first legal framework for a human right to water.

The human right to water is not included as such in any of the human rights treaties, whereas the right to food is remains puzzling for human rights scholars and practitioners alike. Rather unconvincingly, one position puts it down to a lack of foresight that water could become a scarce resource through drought or pollution. However, prior to 2002, many events in the field of development and environment had already confirmed an international acceptance of the need for clean drinking water for everyone. In 1977, the same year the ICESCR entered into force, the UN Water Conference produced the Mar del

Plata Declaration, stating that “all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality to their basic needs.”[3] This can be seen as the starting point for the legalization of an international norm on the human right to water. The agenda-setting was made possible through the work of non-governmental organizations (NGOs). Their perspective mainly focused on development-related aspects of water at the time of the Water Conference in 1977. While the developed world took clean water as a matter of course, more than one billion people in the global south lacked access to this resource. This was regarded as “one of the most fundamental failures of 20th century development.“[4] Development cooperation NGOs demonstrated how their work in health, agriculture and nutrition was hindered or even at risk of becoming void by a lack of access to water. Due to their grassroots experience, they possessed “world-cultural authority,”[5] which facilitated calls for state action on the international level. Other international conferences followed, like the UN Conference on Environment and Development in Rio in 1992 and Habitat II in Istanbul in 1996, at which different actors agreed on the centrality of access to drinking water, and also extended the scope of a potential right to water to include water for sanitation.

These multilateral events and meetings facilitated the establishment of transnational networks in the 1980s and 90s, made up of actors from civil society, advocating for water issues in the field of development and environment. However, even 25 years after Mar del Plata, the human right to water was still not acknowledged by any organ of the UN. The reasons for the standstill of the norm’s development are complex, but a key factor is the shift of the development paradigm during the 1980s and 90s: “water for all” was no longer regarded a public obligation only. Supported by a bilateral development cooperation and the programs and policies of the World Bank and the International Monetary Fund, the shift became visible in the Dublin Principles, which were agreed following an expert meeting on the conflicts of water and development in 1992. Here, water is acknowledged as having an economic value and is recommended to be recognized as an economic good. This emphasis on the economic rather than the human dimension of water spurred the debates at the international level, and NGOs from different fields joined forces to advocate for a human right to water.

The main actors involved in this network were NGOs working in the field of humanitarian aid and in developing countries, but the network was also supported by organizations like WHO and FAO. Their activism targeted the water commodification policies of the World Bank and the argument around the efficiency of privatizing water supply. Public-Private-Partnerships (PPPs) in this sector were of particular interest to companies, as risks remained with the government and profits were high. The network lobbying for a human right to water was concerned that the scarcity of water in many regions in the world would lead to an increase of its value. Companies might take advantage and demand new terms for their PPP, so the risk of cutting the water supply as a means of pressure was high. Furthermore, advocates for a human right to water were afraid that this basic need would be subject to affordability. The network of actors supporting a human right to water therefore spread the idea of water as a basic need instead of as a commodity. They raised awareness that water should be acknowledged as an international human right, in order to effectively advocate for water policies at the domestic and international level.

However, their advocacy had to be channeled and several options were discussed. Should a human right to water be codified in a new treaty or an optional protocol? Or, conversely, should it be declared in a resolution of one of the intergovernmental bodies? These considerations resulted in the agreement that a human right to water would be best situated in connection to the ICESCR. This covenant included a right to food and a right to the highest attainable standard of health, both of which are closely related to a human right to water. The idea developed to make use of the instrument of a general comment, although this instrument interprets already existing norms of the treaty instead of creating new ones. When the civil society actors approached the committee and its members, these were generally open to the idea, but felt that the time was not yet right for such a bold venture.

In 2001, with the 2002 World Summit on Sustainable Development and the 2003 Third World Water Forum on the horizon, the Committee on Economic, Social and Cultural Rights (CESCR) decided that it was now the right time to take action. The organizational environment at the time provided a window of opportunity to draft and adopt a general comment on the right to water. This can be seen by the quick turnaround between the decision to draft a general comment on the right to water and its adoption.[6] In the opening remarks for the session in which the General Comment No. 15 was adopted, the Chairperson explains: “In 2001, the Committee had been asked to consider the issue in preparation for the International Year of Freshwater in 2003 and the World Water Forum that would be held in Japan in March 2003.”[7] This general comment would close a significant gap in international human rights law, as it was and still “is disquieting that a right so basic and fundamental for bare human survival has not been given explicit expression in the major UN human rights treaties.”[8] The CESCR shared the view expressed in the covenant that the lack of a human right to water was simply “startling”.

Content

General Comment No. 15 was adopted by the UN Committee on Economic, Social and Cultural Rights in the 51st meeting of the 29th session, in November 2002. The 18-page-long document provides guidelines for states on the interpretation of the right to water. This right to water is deducted from two articles of the ICESCR – Article 11 (the right to an adequate standard of living) and Article 12 (the right to health). In the introduction, General Comment No. 15 affirms the legal base of the right, namely that “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”. A right to water is argued not only with regards to the ICESCR, but also with reference to a wide range of international documents.

The second section of the General Comment clarifies the normative content of the right to water. It contains both freedoms and entitlements, and the CESCR acknowledges that adequacy of the right to water varies under different conditions. However, the right to water includes the elements ‘availability’, ‘quality’ and ‘accessibility’ under all circumstances, and the General Comment provides clear definitions of each element. The normative content of the right to water is also clarified with regards to different vulnerable groups to guarantee non-discrimination and equality.

The third and longest part of the General Comment lays out the obligations of the state

parties. Beside general legal obligations under the Covenant, there are three types of specific legal obligations for the state parties to the ICESCR: a) an obligation to respect the right to water by refraining from interfering directly or indirectly with the enjoyment of the right; b) an obligation to protect the right to water by preventing third parties from interfering in any way with the enjoyment of the right to water; c) an obligation to fulfil the right to water by adopting necessary measures for the full realization of this right. Furthermore, member states also have international obligations connected to the right to water, and the Comment specifies core obligations for every state regardless of the economic situation.

The fourth part of General Comment No. 15 considers the possible violation of the right but emphasizes that a state party cannot justify its non-compliance with the core obligations, which are non-negotiable. The Committee distinguishes between the inability of a state to comply with the obligations and its unwillingness. If a state is unwilling to use the maximum of its available resources for the realization of the right to water, this constitutes a violation.

The fifth part gives an overview of those measures which are needed for the implementation of the right to water at the national level: “Existing legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to water, and should be repealed, amended or changed if inconsistent with Covenant requirements”. The Committee also encourages the state parties to use indicators and benchmarks for their national water strategies, and to ensure universal access to legal remedies in case of violation.

Finally, the last part of the General Comment briefly points out the obligations of actors other than states, foremost international organizations and UN agencies. It encourages cooperation of these actors with state parties and demands the consideration of water as a human right when planning policies and programs.

One of the main debates during the drafting process centered around the meaning of sanitation. Some participating civil society actors from the field of development were unsuccessfully advocating for a right to water and sanitation. Sanitation was also included in the text of the General Comment No. 15, but not as a right itself. It is frequently mentioned throughout the document, but mostly in footnotes. At the time, it was regarded as too contested, due to its far-reaching obligations. Access to a clean toilet is an obligation which requires investments, and at the same time this access is predominantly restricted in the poorest countries in the world. However, the General Comment acknowledged that water supply must be available to everyone for personal sanitation and includes a paragraph on this under the heading of state parties’ legal obligations to fulfil (paragraph 29). As a result, these efforts led to the establishment of the office of the first UN Special Rapporteur on the Human Rights to safe drinking water and sanitation in 2008.

Unsurprisingly, privatization was the most controversial topic considered by the committee. As a result, the General Comment avoided taking a clear stance on this point. Instead, it only mentions that private companies and civil society should work together as addressees of states, to inform and collaborate for a right to water strategy. On the state

parties' obligation to fulfil affordability, the General Comment stated: "Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups." (paragraph 27).

While the standard of a right to water was welcomed, many state parties were generally alarmed that "an adequate standard of living will be further deconstructed into an all-encompassing concept containing several novel rights."[9] This argument stems from the view that the treaty bodies are overstepping their mandate when using the general comments to create new legal norms instead of interpreting the content of the existing obligations. With regards to the right to water, some states felt pressured to deny the existence of such a right altogether. In a view submitted to OHCHR in June 2007, the United States of America openly criticized the CESCR for this general comment: "The United States does not share the view that a 'right to water' (…) exists under international human rights law."[10] Given that they are signatory state, but never ratified the treaty, the statement from the US is remarkable, as it reflects a perspective which sees the provision of healthcare and food as a matter of private effort and not a duty of the state. . Thus, the general comment does not apply.

Impact

The adoption of the General Comment No. 15 on a human right to water had far-reaching effects. First of all, it spurred debates on the practice of dynamic treaty interpretation. It was not only the right to water itself which was subject to this debate. Rather, it led to the question whether the treaty bodies possess the authority to create new legal standards. General Comment No. 15 sparked academic debates in human rights journals, wherein one scholar accused the other of "assault" and "Macbethian overleaping ambition" in regards to the General Comment No. 15 .[11] The discussion amongst lawyers was highly controversial as to whether the CESCR had overstepped its mandate to interpret the treaty's norms by creating a new norm. When state parties signed and ratified the ICESCR, a right to water as such was not included in the treaty. Hence, scholarly opinions ranged from appraisal of the CESCR's legal reasoning to criticism that the treaty bodies were putting the credibility of the general comments as an instrument for the interpretation of human rights norms at risk. While it can be argued from an academic perspective that the creation of new standards through interpretation is in line with provisions for treaty interpretation, a General Assembly resolution in 2014 demanded that treaty bodies consult with state parties when drafting general comments. In return, the Chairpersons of the treaty bodies emphasized that they had the authority to apply their own rules of procedure for the development of general comments.[12] This debate thus continues at the political level. Many general comments have substantially developed human rights law,[13] but this development is not always received positively by state parties concerned with sovereignty.

Secondly, it had an impact on international law and the recognition of water at the international level. In 2010, the General Assembly adopted resolution 64/292 with the title "The human right to water and sanitation", referring to General Comment No. 15 as the basis for this resolution. A human right to water was herewith recognized by 122 governments, and affirmed the treaty body's authority in the development of human rights

norms. Furthermore, the omission of a right to sanitation in the General Comment mobilized its supporters among governments, specialized agencies and civil society, and the resolution finally acknowledged sanitation as a human right. In April 2011, the intergovernmental Human Rights Council consensually adopted a resolution affirming the decision of the General Assembly to acknowledge a human right to water and to sanitation. Other treaty bodies have subsequently adopted general comments referring to the human right to water, and new treaties adopted after General Comment No. 15 included the human right to water in the treaty text.[14] The work of the UN in global development also promoted "water and sanitation" from a target in the Millennium Development Goals to one of the Sustainable Development Goals.

Thirdly, the General Comment No. 15 impacted domestic law and policies. More than 50 countries now accept the right to water in their domestic laws.[15] and courts have referred to the General Comment when rendering these decisions.[16] The re-framing of water as a basic human need and a right gave leverage to NGO initiatives pressuring local and national governments to adopt policies which provide sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.[17] The General Comment facilitated the water-related work of human rights, environment, and development NGOs, and many stakeholders later emphasized its importance for the development of monitoring mechanisms.[18]

The General Comment on the right to water influenced human rights law, policies and advocacy at different levels. While this certainly does not hold true for every general comment adopted, the instrument has developed into a powerful tool for treaty interpretation, human rights standard-setting and norm clarification. This is a development, which was not foreseen in the beginning of the treaty system, and the debate about who the treaty bodies may consult for the elaboration of general comments shows two things: firstly, that states acknowledge the effect general comments might have on human rights protection as a cause for their skepticism on who might have a say in the process, and secondly, that the treaty bodies oppose any interference in their working methods, arguing that the treaties gave them the authority to adopt their own rules of procedure. In order to ensure the effectiveness of the human rights treaty system, it will be crucial to see how this conflict plays out in the future.

Annotated bibliography

Malcolm Langford: Ambition That Overleaps Itself? A Response to Stephan Tully's Critique of the General Comment on the Right to Water, in: Netherlands Quarterly of Human Rights 24:3 (2006), 433-459.
Stephen Tully: A Human Right to Access Water – A Critique of General Comment No. 15, in: Netherlands Quarterly of Human Rights 23 (2005), 35-63.

These two articles present the core arguments in the debate around the legality and legitimacy of General Comment No. 15. While Tully is very critical of the initiative of the CESCR, Langford provides justifications for the General Comment, based on his own insights during the decision-making process.

Eibe Riedel, Peter Rothen (eds.): The Human Right to Water. Berlin 2006.

This edited volume includes more than 20 contributions by experts - academics and practitioners alike - on the right to water. It is the outcome of a conference on the right to water in 2005, hosted by the German Government and the UN High Commissioner for Human Rights. The contributions reflect the variety of opinions connected to the General Comment No. 15 and is especially insightful as all stakeholders are given the opportunity to speak out on controversial aspects such as sanitation and privatization. One of the editors, Eibe Riedel, was rapporteur of the General Comment No. 15.

Right to Water Network www.righttowater.info

This website provides an information portal on how the rights to water and sanitation was interpreted in human rights law from 2003 onwards – seven years before the right to safe and clean drinking water and sanitation was explicitly affirmed as a human right in international law. It was established after the adoption of General Comment No. 15 and presents a valuable collection of sources related to the development of the right to water. The Handbook by the Special Rapporteur on the human rights to water and sanitation is also hosted on the site. Current partners of the site are End Water Poverty, FAN, WASH United and WaterAid.

United Nations Office of the High Commissioner for Human Rights www.ohchr.org

The first port of call for information about the status of ratification of all human rights treaties, the agenda of the treaty bodies and current developments in international human rights law. The site also hosts a database with documents from different stakeholders, relating to the work of the treaty bodies.

Winkler, Inga T.: The Human Right to Water: Significance, Legal Status and Implications for Water Allocation. London/Oxford/New York 2012.

Inga Winkler has written a well-researched in-depth study of the human right to water and offers many new insights into the question of how this right is connected to water allocation. Its scope goes beyond the General Comment No. 15 but points out its significance for a right to water and sanitation at the international level. Inga Winkler is a legal scholar and was also Legal Advisor to the UN Special Rapporteur on the Human Rights to Water and Sanitation from 2009 to 2014.

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Fußnoten

1. ICESCR Art. 11
2. As only two treaties, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), use the term “General Recommendations”, this paper uses the term “General Comments” and including the latter.
3. United Nations: Report of the UN Water Conference.
4. Gleick: Human Right to Water.
5. Boli/Thomas: World Culture, 171-190.
6. Riedel: Human Right to Water.
7. ECOSOC, Committee on Economic, Social and Cultural Rights: Summary Record of the First Part of the 50th Meeting.
8. Bulto: Emergence, 2.
9. Tully: A Human Right, 37.
10. Views of the United States of America on Human Rights and Access to Water, para. 4.
11. In response to: Tully: A Human Right; Langford: Ambition, 158.
12. Report of the Twenty-seventh meeting of chairpersons of the human rights treaty bodies in San José, 22-26 June 2015; in response to GA Res. 68/268, para 14.
13. General Recommendation No. 19/CEDAW, for example, has been referred to as “historic” because it framed violence against women as a form of gender-based discrimination in 1992.
14. E.g. CRPD Article 28.
15. Brunner et al.: The Human Right to Water in Law and Implementation, S. 414.
16. For an overview of water law worldwide see WaterLex.
17. UN-Water Decade Programme.
18. One outcome of the consultation with civil society actors was the manual COHRE, AAAS, SDC and UN-HABITAT: Manual on the Right to Water.

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