AMBITION THAT OVERLEAPS ITSELF?
A RESPONSE TO STEPHEN TULLY'S CRITIQUE
OF THE GENERAL COMMENT ON
THE RIGHT TO WATER

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Abstract

In the March 2005 issue of this journal, Stephen Tully set out to critique General
Comment No. 15 on the Right to Water, issued in 2002 by the Committee overseeing
the International Covenant on Economic, Social and Cultural Rights. Tully argues that the
right to water cannot be implied from the Covenant, that its practical value is limited and,
quite paradoxically, that the Committee was not bold enough in imposing direct
obligations on multinational water corporations. This article contends that the general
comment was neither radical nor conservative but a reasonable interpretation of the
Covenant that was grounded in international law and practice. Further, the general
comment has demonstrated a practical utility and this article provides examples of where
the recognition of the human right to water has had an impact and also offers some
thoughts on how the influence of general comments should be evaluated. Tully's proposals
for reform of the Committee's approach to 'General Comment-making' are then
considered in the context of international law and the historical practice of the Committee.

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1. INTRODUCTION

Stephen Tully’s venture to constructively critique General Comment No. 15 on the Right to Water\(^1\) is to be welcomed for its intention but much less so for its result (see the March 2005 issue of this journal).\(^2\) The reader is left with the curious feeling that Tully seems to reach for a reviver whenever he approaches anything with the whiff of contentiousness. The end result is that Tully embraces three fundamentally contradictory positions on the general comment, issued by the UN Committee on Economic, Social and Cultural Rights in November 2002. He is at first deeply critical of the legal foundations and the pragmatic value of the general comment, which embraces a freestanding and independent human right to water. He then moves on to consider a variety of global water challenges, yet his analytical framework is often indistinguishable from that of the general comment. Lastly, after uncovering (quite rightly) the growing evidence on the failure of water privatisation policies, he makes recommendations for the reform of the Committee’s general comments that are so revolutionary in scope that serious doubt is left as to the validity of his earlier legal method.

This article will contend in response that the general comment was neither radical nor conservative but a reasonable interpretation of the International Covenant of Economic, Social and Cultural Rights (ICESCR), as section 2 will seek to show. Further, even within the space of a few years, the general comment has demonstrated a practical utility, as seen in the examples in section 3 of this article, that lays to rest rather simplistic statements that such instruments are ‘outdated’ or ‘unhelpful’.\(^3\) This is not to say, however, that the current structure and drafting of the general comments cannot be improved and Stephen Tully’s proposals are discussed in section 4. But proposals, such as the direct extension of the Covenant obligations to non-State actors, or the specification of precise targets for States, would surely stretch the hermeneutic boundaries of the ICESCR so far as to make its legal text unrecognisable.

2. LEGAL FOUNDATIONS OF THE HUMAN RIGHT TO WATER

The interpretive methods of judicial or quasi-judicial bodies are naturally the subject of a long philosophical debate. The chosen method of interpretation becomes particularly relevant where the phraseology of legal instruments is ambiguous, or it has become so due to societal changes or the revelation of new or unforeseen facts. This debate is epistemological, ranging from formalist arguments, that the meaning of legal texts is self-evident in the context of some jurisdictionally defined legal method, through to more relativist responses. It is also normative, with some advocating more backward-looking or historical approaches (discerning the intentions of the drafters or relying on earlier precedents) while others call for more teleological or purposive interpretations that may be more relevant to contemporary circumstances. While attempts to disentangle these approaches/relativism and conservative/progressive divides can often be embedded within their own paradoxes, interpretive approaches that acknowledge the processes by which judges seek to balance various criteria for interpretation are usually more helpful. For example, Ronald Dworkin argues that judges should seek the ‘best’ decision in light of the relevant criteria\(^4\) and the circumstances of the case.

In the context of international law, the issue is more settled. The official rules of interpretation contain a number of interpretive criteria that are biased in favour of a purposive approach that takes account of the evolution of international law. The Vienna Convention on the Law Treaties provides in Article 31(1) that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.\(^5\) Further, subsequent agreements, subsequent practice and any relevant rules of international law shall be taken into account: Article 31(3). Use of materials that concern the drafting of a treaty is strictly circumscribed, despite forming the basis for much of Tully’s case. Article 32 of the Vienna Convention provides that travaux préparatoires can only be used as an interpretative aide when the methods adopted under Article 31 would produce a meaning that is ‘ambiguous or obscure’ or lead to a result that is ‘manifestly absurd or unreasonable’.

The Committee on Economic, Social and Cultural Rights (‘Committee’) is situated within the interpretive scenario that has been sketched above. It has been tasked by States to interpret a treaty drafted between 1948 and 1966 in the context of today’s

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\(^3\) Ibidem, p. 35.

\(^4\) Dworkin argues that the ideal judge would seek to marry in each interpretation the principles of fairness, justice and due process; See Dworkin, R., Law’s Empire, Belknap Press of Harvard University Press, Cambridge, 1986.


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circumstances. Its mandate to do so is clear. The United Nations Economic and Social Council encouraged the Committee to "continue using that mechanism to develop a fuller appreciation of the obligations of State Parties under the Covenant". While general comments are in one sense not comparable to an ordinary judgement, since they are not developed in the context of a specific case, they are rooted in the jurisprudence generated by the Committee’s regular reviews of State’s party reports. Indeed, the primary function of the general comments, as the above ECOSOC resolution makes clear, is to guide States on the implementation of the treaty. The Committee has certainly not been in a rush to issue general comments – approximately one a year since 1989 – and its interpretations of the State Party obligations have for the most part been characterised by gradualism, a strong emphasis on legal reasoning and a significant modicum of caution, particularly when confronting positive obligations. This is not to say that the general comments are beyond reproach. Yet, even when the United States and Australia have expressed concern at some general comments, their principal content has often been accepted by many States (contrary to Tully’s assertions). To this date the annual resolution by member States of the UN Commission on Human Rights encourages the Committee on Economic, Social and Cultural Rights to draft:

[Further general comments to assist and promote the further implementation by States parties of the Covenant, and making the experience gained through the examination of States parties’ reports available for the benefit of all States parties.]

Turning to General Comment No. 15, Tully offers up five key arguments in order to de-legitimise the Committee’s conclusion that the human right to water is part of Articles 11 and 12 of the Covenant. First, that Article 11 offers no interpretive space for ‘new’ rights vis-à-vis its use of the word ‘including’ in the formulation. This provision recognises ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing’ (emphasis added). While Tully paradoxically accepts that rights can be implied from the

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7 Economic and Social Council Resolution 1990/45, para. 10.
8 See, e.g., “Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights and study of special problems which the developing countries face in their efforts to achieve these human rights,” Commission on Human Rights Resolution 2005/18, para. 11(a)(ii).
9 Tully also makes a passing claim that sanitation is only relevant to the right to health and that the effective inclusion of access to sanitation under Article 11 in General Comment No. 15 is a mistake. This argument can be dealt with briefly. The Committee has included sanitation under the cover of Article 11 as far back as 1991 in General Comment No. 4 on the Right to Housing, a document Tully approves of. Further, to argue that sanitation is simply a health issue ignores the fundamental issues of personal dignity and safety that surround the lack of adequate and accessible toilet facilities.

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10 He states that ‘a more convincing textual interpretation to Article 11(1) could support an implied right to access water necessary to grow food or satisfy housing needs’, Tully, loc.cit. (note 21), p. 57.
11 Ibid., p. 43.
12 General Comment No. 15, op.cit. (note 1), para. 3.

Community has 'recognised' a new human right, one can easily argue that States have given sufficient and separate recognition to the human right to water that the Committee was able to conclude that water was clearly in the class of food and housing and derivable from the right to health. A few examples: the United Nations Water Conference in 1977 recognized in the Mar del Plata Declaration 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'. In 2001, the Committee of Ministers to Member States on the European Charter on Water Resources declared in a recommendation that: 'Everyone has the right to a sufficient quantity of water for his or her basic needs'. Their legal reasoning is notable and virtually identical to that which was later contained in the general comment:

International human rights instruments recognize the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene.14

The Ministers went on to provide specific recommendations, for example on affordability and prevention of unfair disconnections.17

The Committee's carelessness in ensuring consistency with international law is further evident in their decision to omit a freestanding right to adequate sanitation in the general comment, a right that has only recently received some recognition.

See, for example, Cranston, M., What are Human Rights?, Taplinger, New York, 1973; and Alston, P., 'Conjuring Up New Human Rights: A Proposal for Quality Control', American Journal of International Law, Vol. 78, 1984, pp. 607-621. According to Cranston, there are three criteria: (1) the right can be universally enjoyed; (2) the entitlement is of paramount importance; and (3) can be ensured in practical terms. While these criteria were meant to preclude economic, social and cultural rights, an informed understanding of the current practice and jurisprudence on these rights would make one unhesitatingly accept that ESC rights, including the right to water, meet Cranston's criteria.

Alston on the other hand, adopts a procedural methodology. Human rights, in international law at least, are those declared, after careful consideration, by the United Nations General Assembly. This approach is perhaps more compelling in terms of achieving clarity in the midst of competing claims. However, it is not relevant to the current discussion since the key issue is whether the right to water is contained in Article 11 of a particular treaty and not in the general principles or international law or emerging or solidified customary international law. Nevertheless, the human right to water was affirmed by a UN conference of States in 1977 but it was not under the specific mantle of the General Assembly.

Recommendation 14 (2001), para. 5.

Idem.

The recommendation, idem, also states in paragraph 5: 'Social measures should be put in place to prevent the supply of water to destitute persons being cut off'. Paragraph 19 sets out a user pays system subject to the right to water: 'Without prejudice to the right to water to meet basic needs, the supply of water shall be subject to payment in order to cover financial costs associated with the production and utilisation of water resources.'

These considerations also lead to the rejection of the second claim, that an amendment of the Covenant was necessary. Indeed, since Tully embraces the idea that rights can be implied in the Covenant,18 this argument appears rhetorical. Nevertheless, it is important to analyse the construction of this claim, which is based on two secondary sources. While he implies that these references are somehow emblematic of a wider critical scholarship, a literature review does not lend such support.19 The first is a recent article by Dennis and Stewart, the former a long-serving official of the US State Department.20 These authors charge that the Committee was engaged in revisionism since the drafters of the Covenant rejected the inclusion of a right to water. But the right to water was never 'rejected' by the drafters since the record indicates that it was never discussed by the UN Commission on Human Rights or the Third Committee. Putting aside the fact that the Vienna Convention on the Law of Treaties places almost no weight on drafting debates,21 a better line of inquiry, for those who place great store on discerning the intentions of the drafters, would be to ask whether the participating States clearly and unequivocally intended that the word 'including' did not provide scope for further and appropriate interpretation. There appears to be no evidence of this in the relevant discussions, which will be taken up below.

The reliance on a quote from a second paper, by Katarina Tomasevic,22 to support this argument is equally problematic. Tomasevic's off-handed observation that the earlier general comments on older persons and people with disabilities undermined the principle of legal security, since these groups are not specifically mentioned in the Covenant, is both startling and misleading. The General Assembly and the UN Commission on Human Rights actually invited the Committee to monitor the compliance of States with their commitments under the relevant human rights

18 See quotation in note 10 supra.
21 See discussion supra at note 6.
instruments in order to ensure the full enjoyment of those rights by disabled persons' (emphasis added). Adopting a general comment to guide the monitoring process on people with disabilities is surely a natural starting point as it provides clarity to States as to their legal commitments. Indeed, this is entirely consistent with the mandate given to the Committee for the adoption of general comments. Further, the slew of international documents on the subjects of older persons and people with disabilities, and the inclusion of 'other status' as a prohibited ground of non-discrimination in the Covenant, makes it difficult to assert that including 'age' and 'disability' as prohibited grounds was unreasonable and unjustifiable.

The third principal charge, that deference must be given to original omission of water from the Covenant and the UN specialised agency system, is now as convincing as it might have been at first seen. As has been noted, the travaux préparatoires sits on the lowest rung in the hierarchy of interpretative methods for international treaties. In any event, an actual reading of the travaux préparatoires does not necessarily support Fuly's plea for deference. Constructing an over-arching and sensible narrative of the debates and votes during the drafting process is a somewhat impossible task but some points can be made. The majority of the discussion on Article 11 concerned whether to make the rights to housing, food and clothing as a separate article, to insert them under the umbrella of the right to an adequate standard of living, or to delete them entirely. Initial drafts placed them in separate articles. Positions varied between States, with Australia, and to some extent the United Kingdom, arguing for a simple and comprehensive right to adequate standard of living (with no mention of food, clothing...

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24 See discussion at notes 7-8 supra.


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26 The debates do not clearly indicate whether those proposing the simplified versions viewed food, clothing and housing as merely component elements or independent rights. The Australian representative thought that housing did not require specific mention since he remarkably hoped the problem would soon disappear. See Commission on Human Rights, Summary Record of the Two Hundred and Twenty-Second Meeting, 7th Session, 2 May 1951, UN Doc. E/AC.3/520/222; Commission on Human Rights, Summary Record of the Two Hundred and Twenty-Third Meeting, 7th Session, 2 May 1951, UN Doc. E/AC.3/520/223.


28 Gleick, _Doc. cit._ (note 19), makes this argument.

29 Third Committee of the General Assembly, 11th Session, 742nd Meeting, 25 January 1957, UN Doc. A/AC.3/520/742, para. 39. Mrs Mehta, representative of India stated that 'the idea of an adequate standard of living could be expanded to include education, health and so on. In the article under discussions essentials only should be included. The three most important were housing, food and clothing.' Commission on Human Rights, Summary Record of the Two Hundred and Twenty-Third Meeting, 7th Session. 2 May 1951, UN Doc. E/AC.3/520/223.

30 Mr Cassin, representative of France, stated that the 'standard of living was fundamentally a very general concept' and 'The Committee should have the courage to make a selection because it could not hope to include all economic and social rights in the Covenant'. Commission on Human Rights, Summary Record of the Two Hundred and Twenty-Second Meeting, 7th Session, 2 May 1951, UN Doc. E/AC.3/520/222. The Danish representative noted the difficulty of drafting a Covenant 'which would deal with the whole gamut of human rights'. See Commission on Human Rights, Summary Record of the Two Hundred and Seventy-Second Meeting, 7th Session, 19 April 1951, UN Doc. E/AC.3/520/207, p. 9.
only indicates the difficulties some delegates experienced with trying to tie down the broad wording of the right to an adequate standard of living. If anything, it confirms the wisdom inherent in the Vienna Declaration of Law of Treaties, which requires that the drafting documents only be used in exceptional circumstances.

Tully also supports his discussion on drafting intentions by arguing that the omission of water was intentional by virtue of the lack of a UN specialised agency for water. This hypothesis is obviously undercut by the absence of a UN body for ‘clothing’ and the late arrival of a specific UN body for housing matters in 1978. More importantly, UN agencies are increasingly taking a coordinated approach to water issues covered by the general comment, for instance under the newly created UN Water. Indeed, practitioners at UN agencies have been remarkably supportive of the right to water.

In the next argument, Tully charges in essence that ‘sleeping dogs should have been left to lie’. The Committee could have, or had already, sufficiently addressed the issue under the human rights to food, housing and health. The related Special Rapporteurs, appointed by the UN Commission on Human Rights, possessed mandates covering water concerns. While this approach presents one way of dealing with water in the context of human rights, it is not satisfactory for legal or practical reasons as will now be argued.

With respect to the right to food, water is curiously absent from the Committee’s General Comment No. 12 on the Right to Adequate Food. The Committee partially redressed this in General Comment No. 15. It made it clear that the right to food, and not the right to water, covered access to water for food production, particularly when it concerned subsistence agriculture. There are not though sufficient reasons for locating the human right to water under the right to food. It somewhat stretches the definition of food to argue that it adequately covers drinking water. Other international conventions – such as the 1949 Geneva Conventions – have always distinguished between food and water. Indeed, there was a somewhat convoluted attempt by authors in one draft paper on the right to water to distinguish between solid, semi-liquid and liquid foods. They eventually supported the right to water. In any case, the types of water uses covered by the Committee go beyond consumption, for example cooking, cleaning and sanitation. A review of the reports of the Special Rapporteur on the Right to Adequate Food also indicates that the issue has not been given sustained prominence. The reports that immediately followed the general comment did analyse the right to water, and they present some case studies, but recent reports have focused on other issues more pertinent to the right to food.

With regard to the human rights to housing and health, it might be technically easier to locate water issues under these rights but this ignores a number of key concerns. As discussed, there is an independent recognition of water in other international documents but there is also an increasing tendency at the national level to recognise an independent right to water. It is contained for example in a number of constitutions including the South African constitution and the draft Kenyan constitution. The right to water was also inserted in the Uruguayan constitution after an overwhelmingly successful referendum in October 2004. While Tully relies on national jurisprudence to show that water is covered by other human rights, his examples prove the opposite. In India, the judiciary derived a free standing right to water from the right to life, as they have done with other rights such as shelter, work and education. Likewise, in Argentina and Belgium, the Courts have explicitly derived the right to water from other human rights.

31 UN Water was established in September 2003 to promote coherence in, and coordination of, UN actions aimed at the implementation of the agenda defined by the Millennium Declaration and the World Summit on Sustainable Development. It coordinates 23 different United Nations agencies working on the subject. See Terms of Reference – UN Water, available at: www.unwater.org (last accessed 28 July 2006).
34 General Comment on the Right to Water, op. cit. (note 1), para. 7.
36 Article 27(1)(b) states that ‘Everyone has the right to have access to sufficient food...and water.’ The right to water and the right to sanitation are contained in all official draft constitutions being considered.
38 FK Husain v Union of India, High Court of Kerala OP 2741/1996, 26 February 1996.
39 See, for example, Olga Teissier v Benhav Municipal Corporation (1985), 2 SCC SCR 51 (India); (1987) LRC (Cont) 351; Ahmedabad Municipal Corporation vs Nasim Khan Kalub Khan & Ors [(1996), 11 SCC 121; and Malini Amin vs State of Karnataka (1992), 3 SCC 666.
Simply subsuming the right to water under the right to health or housing is also inadequate for instrumental reasons. When unclean water is essentially one of the world's greatest killers and a specific and identifiable 'water sector' exists at the local, national and international level (both governmental and non-governmental), an independent human right to water accurately captures both the rights of beneficiaries and the concerns of the sector. The general comments on right to housing and health simply do not express the critical obligations of States as they relate to water. The right to health is almost comparable to the right to life in its reach, from the protection of traditional health systems to the facilitation of medical care infrastructure. In the case of the right to housing, water is simply relegated to a line on a laundry list of necessary services and infrastructure items. The monitoring work of the Special Rapporteur on health and housing also reveals the marginalisation of water issues. The Special Rapporteur on the right to adequate housing addressed the right to water in earlier reports, particularly from 2001 to 2003, but this was also not maintained.

42 See Avrion 25/88 du 1 Avril 1998, Commune de Witten, Moniteur Belge, 24 April 1998. This Belgian Court of Arbitration recognised the right of everyone to a minimum supply of drinking water utilising Article 23 of the Constitution: the right to the protection of a healthy environment.


48 McCaffrey comments that, '[Hus far state parties to the Covenant have not objected to the interpretation contained in the General Comment', loc. cit. (note 19).


53 European Parliament, Resolution on water management in developing countries and priorities for EU development cooperation, 4 September 2003.
the UN Commission on Human Rights, in its omnibus resolution on economic, social and cultural rights has taken note of the General Comment on the Right to Water. The resolution was remarkably co-sponsored in 2005 by no less than 66 States. The United States, however, with Australia and Saudi Arabia, abstained. In its explanation on its voting a representative of the United States, which has not ratified the Covenant, stated:

With respect to General Comment 15 of the Committee on Economic, Social and Cultural Rights, the United States notes that it does not share the view of the Covenant expressed in that document.55

Furthermore, in its 2004 resolution on toxic wastes, strongly supported by developing States, the Commission on Human Rights referred to a range of rights, including the right to water.54

To this could be added various incidents of national practice. In 2005, in Belgium, the federal government adopted a ‘water resolution’ which recognised the human right to access to safe water and the need for its inclusion in the constitution.55 The resolution calls for a significant increase in development aid for drinking water and sanitation and demands that developing countries should not be pressured by international financial or trade institutions to liberalise or privatise their water markets. The document also stressed the importance of user involvement (especially of women), integrated water resources management, strengthening the capacities of central and local government, the need for progressive water tariffs to protect the poor, and the establishment of an international ‘water court’ under the auspices of the UN.56 Earlier, the Walloon region of Belgium had adopted a detailed code on water, which recognised the right to water and included a number of provisions concerning affordability, the primary role of the public sector and the allocation of sufficient funding.57 In Uruguay, a referendum was passed in 2004 successfully incorporating the right to water in the constitution while in Germany a number of bipartisan parliamentary resolutions recognising the right to water have been passed by parliament. None of this is of course decisive but it does indicate a certain level of acceptance of the general comment’s view that there is a freestanding right to water in international law.

3. BENEFITS OF THE GENERAL COMMENT

After reviewing a number of ‘policy justifications’ for the right to water, Tully concludes in the second section of his article that, ‘[F]or the general comment’s view that there is a freestanding right to water in international law.

3.1. IMPROVING ACCESS

The first is to disparage in Benthamic fashion the role of human rights legal texts in realising social objectives. Noting that the ‘attractive simplicity of governmental guarantees’ to meet certain targets for water access by 1990, 2000, and now 2015, have not been met, Tully argues that access to water therefore remains a ‘long-term programmatic objective’. While he later turns on this argument by wishing for stronger language from the Committee, and acknowledging that the right to water might have implications for actual practice of actors such as corporations, Tully’s position demonstrates a fundamental misunderstanding of the role of human rights standards. If one has messianic expectations for general comments, and human rights in general, disappointment will surely follow.60 But if a more reasonable set of evaluation criteria were used, it is clear that the general comments have, and can, play an important role in shaping public policy and practice and creating a framework for a wider civil society movement.

Local successes have already been achieved through direct reliance on the general comment, which is remarkable given the timeframe. The Centre for Legal and Social Studies (CELS) and the Centre on Housing Rights and Evictions (COHRE) assisted a community in a poor neighbourhood in Buenos Aires invoke their right to water in a series of petitions to various authorities. The result was that the community was

56 Ibid.
58 See discussion at notes 38 supra and 93 infra.
60 Tully, loc. cit. (note 21), p. 50.
exceptionally added to the plans of Aguas Argentina to construct new networks for piped water. Follow-up work to strengthen community organisation and advocacy strategies has been undertaken in order to ensure that the network will be extended. These strategies are also feeding into a broader advocacy campaign on the accessibility and affordability of water provided by multinational corporations. CELS and other NGOs successfully obtained, for the first time, the right to intervene in the case of Sues/Zivendel v Argentina, being heard by the International Centre for Settlement of Investment Disputes (ICSID), an arm of the World Bank. This tribunal, which normally conducts private hearings, recognised that virtually all cases of investment treaty arbitration involved matters of public interest and, in the present case, this involved large-scale urban water distribution and sewage systems. The tribunal stated that, “these systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations.”

Further, in Argentina, the Center for Human Rights and Environment (CEDHA) launched legal action against provincial and municipal authorities for failing to prevent pollution of communal water sources. An under-maintained and overstretched sewer-treatment plant caused the pollution. The Court implied the right to water from the constitutional right to health, making specific reference to the General Comment No. 15 and ordered as follows:

[T]he municipality of Córdoba adopt all of the measures necessary relative to the functioning of the [facility], in order to minimise the environmental impact caused by it, until a permanent solution can be attained with respect to its functioning; and that the Provincial State assure the [plaintiffs] a provision of 200 daily litres of safe drinking water until the appropriate public works be carried out to ensure the full access to the public water service, as per decree 529/94.

The judgement has so far had an impact. CEDHA reports that the municipality presented an ‘integral sewage plan’, budgeted at USD 7.75 million, for rehabilitation and expansion of plant capacity. In December 2004, the Province of Córdoba commenced a range of public works and has recently finished construction of the main

section of the water system. The initial laying of the main pipes for providing water to the neighbourhoods of Chacras de la Merced, Cooperativas Unidas, and Villa la Merced has now commenced and the municipality has promised to provide the necessary pipes for home connections. The Municipal Executive ordered by decree that ‘the Executive will not authorise new sewage connections until [the Municipality] improves the capacity of the sewage plant which aligns the position of NGOs with important economic actors such as the Construction Council and the Engineering, Architects and Real Estate Associations. The Municipal Congress also recently passed a law dictating that all sewage and sanitation taxes – approximately USD 10 million a year – are to be invested exclusively in the sewage system.

More broadly, the general comment plays a critical role in shifting the discourse on water issues towards a rights-based approach, which Tully desperately wants. A rights-based approach should focus our attention on accountability for powerful actors, inclusion of marginalised groups, adequate and effective participation, sufficient legislative protections, the adequacy of investment in infrastructure, nuanced pricing policies and the protection of water sources for current and future generations. A non-rights based approach tends to be more concerned with general and abstract questions of water scarcity, tokenistic participation (often called consultation), top-down expensive solutions, unblinking insistence on universal payment of user fees and an allocation of most budgetary resources to the provision of water and sanitation infrastructure for wealthier neighbourhoods.

Emilie Filmer-Wilson has set out a right-based approach to development in the case of the right to water in the June 2005 issue of this journal. She also provides a number of useful examples of where rights-based approaches to water and sanitation issues have been adopted, particularly in the areas of equality and non-discrimination, participation and international water conflicts. Indeed, a particular area ignored in Tully’s analysis is that of marginalised groups. These may include, minorities or slum-dwellers to which public or private actors refuse to provide water and sanitation

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63 The Center for Legal and Social Studies, The Civil Association for Equality and Justice (ACII), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, Unión de Usuarios y Consumidores, and the Center for International Environmental Law (CEIL), Media release, 28 June 2005.
65 Idem.
66 Tully, loc.cit. (note 2), at p. 46, states, for example, that the ‘principal barriers to universal water coverage are not absolute water scarcity or individual financial capacity but rather improving international water governance and attracting the substantial expenditure required to construct or upgrade water infrastructure’.
services. For example, many Roma and travellers in Europe reside in slum settlements and experience levels of access to water and sanitation that are comparable with larger slums in developing countries. Rights-based approaches are therefore critical, and often the only strategy available, due to the level of discrimination and prejudice against such groups. Likewise women are often excluded from key decisions on water resources and projects despite carrying much of the responsibility for providing water within their communities.

Filmer-Wilson also makes a number of important comments on the criteria for evaluating the success of the human rights-based approach. Successful short-term human rights approaches are only likely to occur where there is a receptive political environment, communities are well organised, NGO staff have sufficient competence, and stakeholders have adopted realistic strategies. While some claim that human rights are just a rhetorical icing for existing development activities, in many cases it is the opposite. Filmer-Wilson is absolutely right to point out the paradigm shift that is needed in many development organisations. Therefore, we need to be realistic about assuming that a rights-based approach will quickly permeate traditional approaches.

The Committee on Economic, Social and Cultural Rights can obviously play a limited role in ensuring accountability and Tully’s attack on the Committee are somewhat unwarranted in this regard. Its key power is to conduct a five-yearly period review as to the compliance by States parties to the Covenant. Though in some cases, the Committee’s concluding observations, issued after its review of State party reports, have had a demonstrable and direct impact. Yet, it is the Committee’s catalytic role in pushing States and other actors to adopt international standards and establish a system of national level accountability that is most important.

At the national level, a number of States already have clear legislative systems explicitly or implicitly premised on the right to water and sanitation. For example, the stated objective of the Water Services Act in South Africa is to provide for the ‘right to access to basic water supply and the right to basic sanitation necessary to secure sufficient water’. In significant detail, the Act obliges every ‘water institution’ to take reasonable measures towards progressive realisation of the right to water, guards against unfair disconnections, sets the conditions for provision of water, requires that water services institutions give priority to ensuring basic access for all and mandates that tariffs take into account the right to water as well as operational efficiency. Water services authorities must develop plans and submit to a system of monitoring. South Africa has significantly increased coverage with approximately 10 million new connections between 1994 and 2004. There is significant debate though over the numbers of disconnections that have occurred in this period.

Some disconnection cases have also reached the South African courts. Tully quotes an early South African High Court decision on disconnection, the Manquele Case, where the judge opined that without legislative guidance the constitutional right to water was undefined and unenforceable. However, commentators have noted that this case was poorly argued, constitutional arguments were not made in the founding and organising themselves to exploit their greater numbers and construct their own street-level water and sanitation systems that would link up to a wider system. All of this would of course take time but is likely to prove a more durable solution to some of the temporary development solutions that have been brought to Kibera.


The Minister for Water Affairs and Forestry in his 2003 budget speech acknowledged that the monthly rate of disconnections in the three largest municipalities was 17,800 households. While the Minister argues that many of the disconnections were only for short periods and the method for extrapolating the figures nation-wide has been the subject of fierce debate, the number of disconnections is undoubtedly significant.

Manquele vs Durban, Transitional Metropolitan Council 2002, (6) SA 423D, 427D-E.

papers for the case and it was generally inconsistent with the landmark Groothoom decision of the Constitutional Court.\textsuperscript{79} Moreover, in a later decision in \textit{Bon Vista Mansions},\textsuperscript{80} the High Court actually found a violation of the constitutional right to water as a result of a disconnection:

On the facts of this case, the Applicants had existing access to water before the Council disconnected the supply. The act of disconnecting the supply was \textit{prima facie} in breach of the Council's constitutional duty to respect the right of access to water, in that it deprived the Applicants of existing access.\textsuperscript{81}

An interim injunction was issued ordering the local authority to restore the water supply to the residents.\textsuperscript{82}

NGOs and international policymakers will also play a key role in ensuring that a rights-based approach to water set out in the general comment is mirrored in practice. Indeed the number of international advocacy reports on the right to water since November 2002 is remarkable.\textsuperscript{83} Further, The Millennium Project Taskforce, a highly influential body established by the UN Secretary General, recommended that the international community explore ways to use the General Comment on the Right to Water to influence national policy on water and sanitation,\textsuperscript{84} although there is a significant way to go before governments begin to incorporate human rights approaches in their Millennium Development Goal strategies.\textsuperscript{85} In European countries, there is also a clear sign of an emerging link between the right to water and levels of developments assistance.\textsuperscript{86} Resolutions of the European Parliament and the Government of Belgium on the right to water have both called for greater foreign aid for water and sanitation.\textsuperscript{87}

3.2. MULTINATIONAL WATER CORPORATIONS

Tully's second critique of the pragmatic value of the general comment is that it fails to address the key culprit in the 'water crisis', the multinational water corporations: "The General Comment template is symptomatic of continued reliance upon an increasingly obsolete State-centric model.\textsuperscript{88} A focus on corporate responsibility (and possibly that of the World Bank which has strongly pushed privatisation) would have been more productive according to Tully. Yet, as Tully constantly shifts backward and forward on the consequences of the general comment for the private sector, it is difficult to be sure of his exact opinion. Tully constantly worries that multinational corporations could use the general comment to justify privatisation but in his conclusion to the article he takes the exact opposite view: by imposing human rights responsibilities upon \textit{States} the committee prefers mechanisms of governance and not markets for ensuring universal water access.\textsuperscript{89}

The key to perhaps understanding this wavering critique is the careful middle road the Committee has taken on privatisation and the role of the corporations. Since its landmark General Comment No. 3, the Committee has refused to bless a particular type of economic model for the progressive realisation of economic, social and cultural rights.\textsuperscript{90} Rather it has focused on articulating:

\textsuperscript{79} 2000 (11) BCLR 1169 (CC).

\textsuperscript{80} Residents of \textit{Bon Vista Mansions} vs SMLC 2001, High Court, Application No. 12312 (South Africa).

\textsuperscript{81} \textit{Ibidem}, para. 20.

\textsuperscript{82} \textit{Ibidem}, para. 35.


- Process standards (e.g., due process in cases of interferences with the rights, participation, presumption against delibrately regressive measures, non-discrimination);
- Conduct standards (e.g., adoption of legislation and action plans, adequate allocation of financial and technical resources and the establishment of monitoring and accountability institutions, including penalties for non-compliance); and
- Result standards (e.g., immediate realisation of some aspects of the right and progressive realisation of the full rights consistent with the rights to equality and non-discrimination).

None of these three categories presupposes any type of economic system. In the case of private actors and the right to water, the Committee has emphasised the State's protective role, ensuring that there is participation in decisions concerning privatisation and the establishment of a regulatory framework to ensure the private sector is prevented 'from compromising equal, affordable, and physical access to sufficient, safe and acceptable water'. The overall duty to progressively realise the right to water is also still carried by the State. Indeed, the Committee's language on this topic in General Comment No. 15 is perhaps its strongest yet and reflects the large amount of information it receives during its regular reviews on the subject of privatisation, including privatisation of water services.

But is this approach sufficient? Does it provide any protection against the triumvirate of the World Bank, national finance ministries and multinational corporations that relentlessly push the privatisation option without conforming to the above standards? In the short term, the answer is partly 'no'. Indeed, it is doubtful whether any framework will make a difference in some cases. In Ghana, after a ten-year gap, high-profile and highly-coordinated civil society campaign against water privatisation, the World Bank announced in late 2004 that privatisation would proceed, and on the most astonishing terms. The price of water was to be linked to the exchange rate, in order to satisfy overseas investors, and not to the income levels of Ghanaians. While the research arm of the World Bank has endorsed the right to water and General Comment No. 15, it is clearly not mainstreamed in the investment arm. This bipolarism is most evident in a recent World Bank evaluation of its water


91 See generally, Langford, loc.cit. (note 67).
92 General Comment No. 15 on the Right to Water, op.cit. (note 1), at p. 51.
94 Salmon and Langford, op.cit. (note 19).
96 See news report at supra note 38.
97 Case No. 1277/2001 (unreported).
99 Tully, loc.cit. (note 2), p. 57, states for example that, ‘It is unclear how a human rights orientation to water as a social resource will interact with an ecosystem approach to water as an environmental resource, thereby entailing *inter alia* the application of the precautionary and polluter pays principles.’
100 ‘Environmental legislation which employs pollution abatement schemes and economic incentives for water and pollution will help to complement human rights framework.’ *Ibid.*
101 In particular see paragraphs 21, 23 and 28 which comprehensively address the duties of States parties to respect, protect and fulfill the environmental aspects of the right to water, General Comment No. 15 on the Right to Water, op.cit. (note 1).
one of the principal causes of water contamination, conflicts between the human right to water and the environment are likely to be the exception rather than the rule.

Tully, however, does state at the end of his article that 'General Comment No. 15 ignores the responsibility incumbent upon individuals to minimise wastage since tariff systems which discourage over-consumption can finance universal water access.' Since the Covenant is directed at States parties it is not clear how the Committee should have addressed this issue. Nevertheless, the issue is actually addressed in the general comment through the prism of State obligations. The Committee indicates that one way of preserving water for current and future generations is to increase the efficient use of water by end-users and reduce 'water wastage in its distribution'.

4. REFORMING GENERAL COMMENTS

Tully lastly proposes a radical overhaul of the general comments. After concluding that the Committee's expectations are unimaginatively skewed against governments he 'wonders to what extent General Comments which omit the essential private sector role account for the poor prospects for implementing the right to access water'. Tully notes the comment by El Hadji Guissè, the Independent Expert on the right to drinking water supply and sanitation from the UN Sub-Commission on the Promotion and Protection of Human Rights, that the Committee can depart from its usual template, although Guissè's later reports actually accept the approach of the general comment in its entirety. However, Tully makes no suggestions as to how exactly the Committee might have imbued multinational corporations with legal obligations given that the Covenant makes States the duty bearers. Indeed, the legal interpretive premise in Tully's basic argument is exceedingly more radical than the implication of the human right to water in the Covenant. Moreover, Tully fails to recognise that the General Comment on the Right to Water is perhaps the Committee's strongest yet as regards the private sector. It devotes a detailed paragraph to the effective regulation of private actors and the monitoring of privatisation processes and it later makes clear that States have duties to monitor the activities of multinational water corporations registered or operating from their respective territory. However, the Committee could have made, in its more general remarks on non-State actors in the concluding paragraph of the general comment, a reference to those international instruments which do place some form of obligation upon corporations, for example the 1976 OECD Guidelines on Multinational Enterprises, and briefly commented on their potential application.

The remainder of Tully's criticisms of the template of general comments - first adopted in 1999 and applied in General Comment No. 12 on the Right to Adequate Food - are more technical in nature. He seems to rail against the use of consistent concepts and expression across the various general comments, arguing, if I follow correctly, that each human right deserves its own sui generis treatment. He argues that a universalist approach is somehow 'misleading and inaccurate'. Unfortunately Tully offers no concrete examples. A regular reader of the Committee's general comments is obviously frustrated at the repetition of common phrases. Committee members and many users of the general comments have defended this practice on the basis that each general comment speaks to a particular sector, who are likely to read only one general comment. Repetition is thus a problem for the generalist and the international lawyer. Tully is, however, rightly critical of the lumping together of international instruments in a footnote and the sometimes interchangeable use of different terms although the definitions in the general comment on the right to water are relatively clear to the reader.

More deeply, the use of the same interpretive concepts across the latest series of general comments is problematic at times but perhaps not in the way that Tully indicates. The template can be more cogently and better criticised on three grounds. First, the Committee's formulation of the elements of the rights should not necessarily and always rigidly hold to the three elements of availability, quality and accessibility. If this approach was adopted with the right to housing in 1991, when the Committee issued its General Comment No. 4, it might have omitted its first-stated element, the right to secure tenure, which is undoubtedly the most critical aspect of the right to housing. The Committee might also consider straightforward adjectives such as sufficient, safe and accessible, which indicate that a certain standard is inherent in each right, not just a broad category. This is partly rectified in General Comment No. 15.

Secondly, the Committee has not adequately articulated the clear legal boundaries between the obligations to respect, protect and fulfil and has often given insufficient attention to defining precisely the extent of States parties obligations to respect and

103 General Comment No. 15 on the Right to Water, op.cit. (note 1), paras 28(f) and (g) respectively.
105 Ibidem, p. 57.
108 For example, the most quoted phrase of General Comment No. 15 is 'The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.' See General Comment No. 15 on the Right to Water, op.cit. (note 1), para. 2.
gave too much attention to the human aspects, for example indicators and benchmarks, and less to the obligations of States to prevent interferences with the rights. Again, General Comment No. 15 partly rectifies this through its more detailed paragraphs on disconnections and private actors.109

Lastly, the Committee’s use of the category of minimum core obligations is perhaps the most controversial and has been attacked from a number of sides.110 While General Comment No. 3 sets out the minimum core obligation of States to immediately realise the basic level of the right, unless resources were demonstrably unavailable, later general comments have expanded this category. This approach has been critiqued by some as imposing unrealistic obligations on poorer States while others have argued that the Committee has left the richer States off the hook.111 However, a closer examination of the Committee’s work reveals that the Committee has almost always simply, and perhaps unconsciously, repeated obligations of conduct (which are immediate) – for example, duties of non-discrimination or adoption of and implementation of plans and strategies. The one consistent additional obligation of result is that of ensuring that there is an equal distribution of facilities – e.g., hospital or water services – although it is difficult to see how this can always be achieved in the short-run. While non-lawyers have generally heralded the minimum core section of the general comments, since the key aspects are detailed in bullet point form, the Committee would do well to carefully scrutinise how this category is used in the future and whether a summary of the key rights and obligations might be preferable.

5. CONCLUSION

The general comments of the UN Committee on Economic, Social and Cultural Rights are not beyond reproach. It would be surprising if they were. But a Macbethian overreaching ambition marks Tully’s assault on the General Comment No. 15 on the Right to Water. Every possible criticism of the general comment is trawled and then patched together in order to provide a ‘critique’ despite the inherent contradictions between the positions and the shaky foundations of many of the arguments. Nevertheless, since Tully has given voice to a number of powerful opponents of the right to water, notably the Government of the United States, it has been important to

109 See Boden, paras 55 and 56.
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\textsuperscript{99} See ibidem, paras 55 and 56.
