

# 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<sup>1</sup> is to be welcomed for its intention but much less so for its result (see the March 2005 issue of this journal).<sup>2</sup> The reader is left with the curious feeling that Tully seems to reach for a revolver 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'.<sup>3</sup> 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

<sup>1</sup> Committee on Economic, Social and Cultural Rights, *General Comment 15, The right to water* (29th Session, 2003), UN Doc. E/C.12/2002/11 (2003).

<sup>2</sup> Tully, S., 'A Human Right to Access Water? A Critique of General Comment No. 15', *Netherlands Quarterly of Human Rights*, Vol. 23, No. 1, 2005, pp. 35-63.

<sup>3</sup> *Ibidem*, p. 35.

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 literalist 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 literalism/relativism and conservative/progressive divides can often be embroiled 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<sup>4</sup> and the circumstances of the case.<sup>5</sup>

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 of 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'.<sup>6</sup> Further, *subsequent* agreements, *subsequent* practice and any relevant rules of international law shall be taken into account: Article 31(3). Use of materials that concerns 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 interpretive 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

<sup>4</sup> 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*, Balknap Press of Harvard University Press, Cambridge, 1986.

<sup>5</sup> Dworkin's theory has been criticised, most notably for overlooking post-modernist concerns. See Fish, S., 'Working on the Chain Gang: Interpretation in the Law and in Literary Criticism', in: Mitchell, W. (ed.), *The Politics of Interpretation*, University of Chicago Press, Chicago, 1983, pp. 271-286; and Dworkin, R., 'My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk about Objectivity Anymore', in: *ibidem*, pp. 287-313. Dworkin does acknowledge that law is essentially a 'social construction' and that individual judicial prejudice will influence legal interpretation. However, his central point, that judges mostly seek to, or should seek to, operate with a certain interpretive framework with a sufficient level of integrity, remains persuasive.

<sup>6</sup> 23 May 1969, 1155 *United Nations Treaty Series* 331.

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'.<sup>7</sup> 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:

[F]urther 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.<sup>8</sup>

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.<sup>9</sup> 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

<sup>7</sup> Economic and Social Council Resolution 1990/45, para. 10.

<sup>8</sup> 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 2003/18, para. 11(a)(ii).

<sup>9</sup> 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.

Covenant,<sup>10</sup> he mockingly considers the seemingly endless list of rights that could be added to Article 11, for example 'postal delivery' and 'access to the internet'. Second, he claims that an amendment to the Covenant under Article 29 is legally required in order to incorporate the right to water in the treaty. Third, that deference must be given to the State's omission of water in the drafting of the Covenant and the fact that no UN agency has exclusive responsibility for water resources as intended by Article 24 of the Covenant. Fourth, that the general comment has received only a lukewarm or negative reaction from States. Fifth, that the topic of access to water would be better placed within rights to food, housing and health. These considerations lead Tully to conclude 'that an entitlement to access water for personal or domestic use available to all does not exist under contemporary international law'.<sup>11</sup>

Each of these contentions will be dealt with separately. Tully's charge that a restrictive interpretation should be made of the word 'including', in order to avoid a flood of new rights, avoids mention of the key aspects of the Committee's reasoning, as well as the adoption of the right to water in a range of other international instruments. The Committee makes clear in paragraph 2 of the general comment that the fundamental human need for water unquestionably furnishes it with a special status:

The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.<sup>12</sup>

Later in this paragraph, the Committee refers specifically to the right to life, not unsurprising since unclean water is essentially responsible for the deaths of approximately 3900 children a day.<sup>13</sup> Water is patently not comparable or reducible to postal delivery and internet access.

This interpretive step is bolstered by the existence of many international instruments that have recognised an independent right to water. Many of these are actually referenced in the latter part of Tully's article. This is not to say that all these documents possess the same authority or buttress the right with the same degree of support, as Tully correctly observes. Nor would I contend that governments habitually include the right to water in every international declaration concerning water issues. While there have been different tests proposed for whether the international

<sup>10</sup> 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 2), p. 37.

<sup>11</sup> *Ibidem*, p. 43.

<sup>12</sup> General Comment No. 15, *op.cit.* (note 1), para. 3.

<sup>13</sup> The UNDP notes, 'Diarrhoea is a major killer of young children: in the 1990s it killed more children than all the people lost to armed conflict since the Second World War'; *Human Development Report 1993, Millennium Development Goals: A compact among nations to end human poverty*, Oxford University Press, New York, 2003, p. 9.

community has 'recognised' a new human right,<sup>14</sup> 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 recognised 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'.<sup>15</sup> Their legal reasoning is notable and virtually identical to that which was later contained in the general comment:

International human rights instruments recognise 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.<sup>16</sup>

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

The Committee's carefulness 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.

<sup>14</sup> 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.

<sup>15</sup> Recommendation 14 (2001), para. 5.

<sup>16</sup> *Idem*.

<sup>17</sup> The recommendation, *idem*, also states in paragraph 5: 'Social measures should be put in place to prevent the supply of water to destitute persons from 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,<sup>18</sup> 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.<sup>19</sup> The first is a recent article by Dennis and Stewart, the former a long-serving official of the US State Department.<sup>20</sup> 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 records indicate 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,<sup>21</sup> 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 Tomaševski,<sup>22</sup> to support this argument is equally problematic. Tomaševski'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

<sup>18</sup> See quotation in note 10 *supra*.

<sup>19</sup> Cf. McCaffrey, S., 'A Human Right to Water: Domestic and International Implications', *Georgetown International Environmental Law Review*, Vol. V, No. 1, 1992, pp. 1-24; Gleick, P., 'The Human Right to Water', *Water Policy*, Vol. 1, No. 5, 1999, pp. 487-503; Smets, Henri, 'Le Droit de chacun à l'eau' [The right of everyone to water], *Revue européenne de droit de l'environnement*, No. 2, 2002, pp. 123-170; Vidar, Margret and Mekouar, Mohamed Ali, 'Water, Health and Human Rights', WHO, Geneva, 2001; Salman, S. and McInerney-Lankford, S., *The Human Right to Water: Legal and Policy Dimensions*, World Bank, Washington DC, 2004; McCaffrey, S., 'The Human Right to Water Revisited', in: Brown Weiss, E., Boisson De Charzoune, L. and Bernasconi-Osterwalder, N. (eds), *Water and International Economic Law*, Oxford University Press, Oxford, 2005.

<sup>20</sup> Dennis, M. and Stewart, D., 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?', *American Journal of International Law*, Vol. 98, 2004, pp. 462-515.

<sup>21</sup> See discussion *supra* at note 6.

<sup>22</sup> See Commission on Human Rights, *Experiences with legal enforcement of the right to education as food-for-thought in exploring models for an optional protocol to the International Covenant on Economic, Social and Cultural Rights*, Information provided by the Special Rapporteur on the Right to Education, Ms Katarina Tomaševski, UN Doc. E/CN.4/2004/WG.23/CRP.4, para. 8.



instruments in order to ensure the full enjoyment of those *rights by disabled persons*' (emphasis added).<sup>23</sup> 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.<sup>24</sup> 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 not as convincing as it might at first seem. 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 Tully'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.<sup>25</sup> 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

or housing)<sup>26</sup> while socialist States tended to favour separate articles. The United States expressed very strong support for a separate article on the right to housing. Most States expressed intermediary views and the compromise formula, as now contained in Article 11 (and Article 25 of the earlier Universal Declaration, though in a different form), was eventually adopted.

Two aspects of the discussion are of note. China proposed the inclusion of the right to transport amongst the explicit list of rights but this was rejected by some States on the grounds that it was not comparable to the other rights.<sup>27</sup> We can only speculate whether water might have been included had it been proposed.<sup>28</sup> Further, in the general debate on the scope of Article 11, a number of States provided their views on the content of the article and its relationship to other economic and social rights. Mr Tsuruoka, the representative of Japan, stated that 'article 11 had a place distinct from other articles, for it was concerned with matters of life and death; for example, education and hygiene were not essential to survival, as food and clothing were',<sup>29</sup> a position echoed in the opening paragraphs of General Comment No. 15. Others took a slightly different view noting that the right to an adequate standard of living potentially covered many economic and social rights and the Commission simply had to make a choice as to which ones should be specifically mentioned.<sup>30</sup> Australia, with occasional support from some Asian States, however, was more disinclined to include rights to housing, clothing and food. Nonetheless, the *travaux préparatoires* provides little guidance as to the interpretation of the currently worded Article 11 and really

<sup>23</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 5, Persons with disabilities*, 11th session, 1994, UN Doc. E/1995/22, at 19 (1995), para. 2. In particular see the World Programme of Action concerning Disabled Persons, adopted by the General Assembly by its Resolution 37/52 of 3 December 1982, para. 165; and Commission on Human Rights in Resolutions 1992/48, para. 4, and 1993/29, para. 7.

<sup>24</sup> See discussion at notes 7-8 *supra*.

<sup>25</sup> See Commission on Human Rights, *Summary Record of the Two Hundred and Seventh Meeting*, 7th Session, 19 April 1951, UN Doc. E/CN.2/SR.207; Commission on Human Rights, *Summary Record of the Two Hundred Ninth Meeting*, 7th Session, 20 April 1951, UN Doc. E/CN.4/SR.209; Commission on Human Rights, *Summary Record of the Two Hundred and Twenty-Second Meeting*, 7th Session, 2 May 1951, UN Doc. E/CN.4/SR.222; Commission on Human Rights, *Summary Record of the Two Hundred and Twenty-Third Meeting*, 7th Session, 2 May 1951, UN Doc. E/CN.4/SR.223; Commission on Human Rights, *Summary Record of the Two Hundred and Ninety-Sixth Meeting*, 7th Session, 15 May 1952, UN Doc. E/CN.4/SR.296; Third Committee of the General Assembly, 6th Session, 369<sup>th</sup> Meeting, 18 December 1951, UN Doc. A/AC.3/SR.369; Third Committee of the General Assembly, 11th Session, 739<sup>th</sup> Meeting, 23 January 1957, UN Doc. A/AC.3/SR.739; Third Committee of the General Assembly, 11th Session, 740<sup>th</sup> Meeting, 24 January 1957, UN Doc. A/AC.3/SR.740; Third Committee of the General Assembly, 11th Session, 742nd Meeting, 25 January 1957, UN Doc. A/AC.3/SR.742; Third Committee of the General Assembly, 11th Session, 739<sup>th</sup> Meeting, 28 January 1957, UN Doc. A/AC.3/SR.743.

<sup>26</sup> 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/CN.4/SR.222, p. 20.

<sup>27</sup> See Commission on Human Rights, *Summary Record of the Two Hundred and Twenty-Second Meeting*, 7th Session, 2 May 1951, UN Doc. E/CN.4/SR.222; Commission on Human Rights, *Summary Record of the Two Hundred and Twenty-Third Meeting*, 7th Session, 2 May 1951, UN Doc. E/CN.4/SR.223.

<sup>28</sup> Gleick, *loc.cit.* (note 19), makes this argument.

<sup>29</sup> Third Committee of the General Assembly, 11th Session, 742nd Meeting, 25 January 1957, UN Doc. A/AC.3/SR.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/CN.4/SR.223.

<sup>30</sup> Mr Cassin, representative of France, stated that the 'standard of living was fundamentally a very general concept' and 'The Commission 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/CN.4/SR.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 Seventh Meeting*, 7th Session, 19 April 1951, UN Doc. E/CN.2/SR.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.<sup>31</sup> Indeed, practitioners at UN agencies have been remarkably supportive of the right to water.<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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<sup>36</sup> and the draft Kenyan constitution.<sup>37</sup> The right to water was also inserted in the Uruguayan constitution after an overwhelmingly successful referendum in October 2004.<sup>38</sup> 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,<sup>39</sup> as they have done with other rights such as shelter, work and education.<sup>40</sup> Likewise, in Argentina<sup>41</sup> and Belgium,<sup>42</sup> the Courts have explicitly derived the right to water from other human rights.

<sup>31</sup> 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 topic. See *Terms of Reference – UN Water*, available at: [www.unwater.org](http://www.unwater.org) (last accessed 28 July 2006).

<sup>32</sup> The WHO and FAO made detailed submissions to the Committee's Day of Discussion on the right to water. See also WHO, *Right to Water*, WHO, Geneva, 2003; and contributions of UNICEF, UN-Habitat and WHO in: Roaf, V., Khalfan, A. and Langford, M., *Monitoring Implementation of the Right to Water: A Framework for Developing Indicators*, Global Issue Papers, No. 14, Heinrich Böll Foundation, Berlin, 2005.

<sup>33</sup> Committee on Economic, Social and Cultural Rights, *General Comment 12, Right to adequate food* (20th session, 1999), UN Doc. E/C.12/1999/5 (1999).

<sup>34</sup> General Comment on the Right to Water, *op.cit.* (note 1), para. 7.

<sup>35</sup> See *Report of the Special Rapporteur on the right to food, Mr. Jean Ziegler*, Commission on Human Rights, UN Doc. E/CN.4/2005/47, 24 January 2005; *Report submitted by the Special Rapporteur on the right to food to the General Assembly*, 27 September 2004, UN Doc. A/59/385; *Report submitted by the Special Rapporteur on the right to food, Mr. Jean Ziegler*, Commission on Human Rights, 9 February 2004, UN Doc. E/CN.4/2004/10; *Report submitted by the Special Rapporteur on the right to food to the General Assembly*, 28 August 2003, UN Doc. A/58/330; *Report submitted by the Special Rapporteur on the right to food, Jean Ziegler*, Commission on Human Rights, 10 January 2003, UN Doc. W/CN.4/2003/54; *Report submitted by the Special Rapporteur on the right to food, Mr. Jean Ziegler*, Commission on Human Rights, 10 January 2002, UN Doc. E/CN.4/2002/58; *Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler*, Commission on Human Rights, UN Doc. E/CN.4/2001/53; *Report submitted by the Special Rapporteur on the right to food to the General Assembly*, 23 July 2001, UN Doc. A/56/210; and *Report submitted by the Special Rapporteur on the right to food to the Commission*, UN Doc. E/CN.4/2001/53.

<sup>36</sup> Article 27(1)(b) states that 'Everyone has the right to have access to sufficient food and water'.

<sup>37</sup> The right to water and the right to sanitation are contained in all official draft constitutions being considered.

<sup>38</sup> See 'Referendum Gives Resounding 'No' to the Privatisation of Water, *Inter Press Service News Agency*, 1 November 2005, available at: [www.ipsnews.net/print.asp?idnews=26097](http://www.ipsnews.net/print.asp?idnews=26097) (last accessed 3 August 2006).

<sup>39</sup> *FK Hussain vs Union of India*, High Court of Kerala OP 2741/1988, 26 February 1990.

<sup>40</sup> See, for example, *Olga Tellis vs Bombay Municipality Corporation* [1985], 2 Supp SCR 51 (India); (1987) 1 LRC (Const) 351; *Ahmedabad Municipal Corporation vs Nawab Khan Gulab Khan & Ors* (1997), 11 SCC 121; and *Mohini Jain vs State of Karnataka* (1992), 3 SCC 666.

<sup>41</sup> See Picolotti, R., 'The Right to Safe Drinking Water as a Human Right', *Housing & ESC Rights Quarterly*, Vol. 1, No. 4, 2005, p. 1, available at: [www.cohre.org/litigation](http://www.cohre.org/litigation).

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.<sup>43</sup> 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.<sup>44</sup> The monitoring work of the Special Rapporteurs on health<sup>45</sup> and housing<sup>46</sup> 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.

<sup>42</sup> See *Arrêt no. 36/98 du 1 Avril 1998*, Commune de Wemmel, *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.

<sup>43</sup> See Committee on Economic, Social and Cultural Rights, *General Comment 14, The right to the highest attainable standard of health*, 22nd Session 2000, UN Doc. E/C.12/2000/4 (2000).

<sup>44</sup> See Committee on Economic, Social and Cultural Rights, *General Comment 4, The right to adequate housing*, 6th Session 1991, UN Doc. E/1992/23, annex III, at 114 (1991), para. 8(b).

<sup>45</sup> See *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Mr. Paul Hunt, Commission on Human Rights, 11 February 2005, UN Doc. E/CN.4/2005/51; *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Mr. Paul Hunt, Commission on Human Rights, 16 February 2004, UN Doc. E/CN.4/2004/49; *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, *Report of the Special Rapporteur*, Mr. Paul Hunt, Addendum, Mission to the World Trade Organization, 1 March 2004, UN Doc. E/CN.4/2004/49/Add.1; *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Mr. Paul Hunt, Commission on Human Rights, 13 February 2003, UN Doc. E/CN.4/2003/58.

<sup>46</sup> See *Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Mr. Miloon Kothari, Commission on Human Rights, 3 March 2005, UN Doc. E/CN.4/2005/48; *Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Commission on Human Rights, 8 March 2004, UN Doc. E/CN.4/2004/48; *Women and adequate housing*, Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination, Mr. Miloon Kothari, in accordance with Commission Resolution 2002/49, Commission on Human Rights, 3 March 2003, UN Doc. E/CN.4/2003/5; *Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination*, Mr. Miloon Kothari, Commission on Human Rights, 26 March 2003, UN Doc. E/CN.4/2003/55; *Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Mr. Miloon Kothari, Commission on Human Rights, 1 March 2002, UN Doc. E/CN.4/2002/59; and *Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Mr. Miloon Kothari, Commission on Human Rights, 25 January 2001, UN Doc. E/CN.4/2001/51.

This is not meant as a criticism but is simply an acknowledgment of the breadth of their tasks.

The last argument proffered is that States are 'yet to generally accept the General Comment as constituting *de lege ferenda*' and Tully refers to the unresponsiveness of States at the Third World Water Forum in Kyoto, where the right to water was not included in the final declaration. In many respects, Tully later devalues the impact of his 'evidence' by pointing out in section 5 that at the June 2002 Johannesburg World Summit on Sustainable Development 'most' governments accepted that the right to water was a human right but there was much less consensus 'on how to put this right into practice'.

A more careful examination of the various declarations of the international community provides a more complex picture, and certainly one that does not lend itself to Tully's suggestion of a cold-shouldered response,<sup>47</sup> to the extent that such a response is relevant to the interpretation of a treaty by a human rights treaty body. Since the 1977 Mar Del Plata Declaration, the right to water has not featured consistently in declarations emanating from international 'water' meetings. It is contained in the Dublin Principles<sup>48</sup> and action plans emanating from the Rio<sup>49</sup> and Cairo<sup>50</sup> summits but it was not explicitly included in the final statements at a number of international meetings on water.<sup>51</sup> Tully is right to point to the influence of those countries outside the category of 'most governments'. A number of States have strongly lobbied in those meetings against the inclusion of the right to water, principally those that currently adopt hostile attitudes to some or all aspects of economic and social rights, namely the United States, Japan, China and Australia.

However, a review of the practice of States in other forums, particularly those concerning human rights, indicates that too much weight should not be given to the conclusions of international 'water' meetings. I have already alluded to examples of governmental affirmations of the right to water made before the adoption of the general comment, for example the Committee of Ministers at the Council of Europe. The European Parliament declared in 2003 that water was a human right.<sup>52</sup> Since 2003,

<sup>47</sup> McCaffrey, comments that, '[t]hus far states parties to the Covenant have not objected to the interpretation contained in the General Comment', *loc.cit.* (note 19).

<sup>48</sup> *Dublin Statement on Water and Sustainable Development*, International Conference on Water and the Environment: Development Issues for the 21st Century, UN Doc. A/CONF.151/PC/112 (1992).

<sup>49</sup> Agenda 21, Report of the United Nations Conference on Environment and Development 1992.

<sup>50</sup> Principle No. 2, Programme of Action of The United Nations International Conference On Population and Development.

<sup>51</sup> See *Ministerial Declaration of the Third World Water Forum*, Kyoto, 23 March 2003; *Ministerial Declaration of The Hague on Water Security in the 21st Century*, The Hague, the Netherlands, 22 March, 2000; *Final Declaration*, International Conference on Water and Sustainable Development, Paris, 21 March 1998.

<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup> Earlier, the Wallonia 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.<sup>57</sup> In Uruguay, a referendum was passed in 2004 successfully incorporating the right to water in the constitution<sup>58</sup> while in Germany a number of bipartisan parliamentary resolutions recognising the right to water have been passed by

<sup>53</sup> 'Explanation of Vote', Statement Delivered by Joel Daniels, US Delegation to the 61th Commission on Human Rights, 15 April 2005 (on file with author).

<sup>54</sup> *Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*, Commission on Human Rights Resolution 2004/17, UN Doc. E/CN.4/RES/2004/17. The resolution passed in 2005 carried similar language, Commission on Human Rights Resolution 2005/15, UN Doc. E/CN.4/RES/2005/15.

<sup>55</sup> 'Belgium: government recognises water as a human right, more development aid for water', 20 April 2005, available at: [www.irc.nl/page/17853](http://www.irc.nl/page/17853) (last accessed 28 July 2006).

<sup>56</sup> *Idem*.

<sup>57</sup> Code de l'eau de la région Wallonne, Livre II du Code de l'environnement, décret du 27 mai 2004 [Wallonia Code for Water, Book II of the Environmental Code].

<sup>58</sup> See discussion at notes 38 *supra* and 93 *infra*.

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, '[u]niversal water coverage will not be realistically achieved by benchmarking access against the Covenant'. This position is later partially undercut when Tully deploys the language of the general comment, for example to attack the potential for forced privatisation of water services under the General Agreement for Trade in Services.<sup>59</sup> His attack on the benefits of the general comment has three elements as follows.

#### 3.1. IMPROVING ACCESS

The first is to disparage in Benthamite 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 or will not be 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.<sup>60</sup> 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

<sup>59</sup> Tully, *loc.cit.* (note 2), p. 50.

<sup>60</sup> Indeed, it would be rather pointless to measure the value of human rights by the current level of compliance by States. It is preferable to appreciate human rights for their non-consequentialist embodiment of universally-held values as well as their instrumental ability to improve human and institutional behaviour. See, generally, Booth, K., 'Three Tyrannies', in: Dunne, T. and Wheeler, N. (eds), *Human Rights in Global Politics*, Cambridge University Press, Cambridge, 1999.



exceptionally added to the plans of *Aguas Argentina* to construct new networks for piped water.<sup>61</sup> Follow-up work to strengthen community organisation and advocacy strategies has been undertaken in order to ensure that the network will be extended.<sup>62</sup> 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 *Suez/Vivendi vs 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.'<sup>63</sup>

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.<sup>64</sup> An under-maintained and over-stretched 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.<sup>65</sup> 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

<sup>61</sup> See Centre on Housing Rights and Evictions, *Progress on the Human Rights to Water? A Year in Review*, 22 March 2005, p. 1, available at: [www.cohre.org/water](http://www.cohre.org/water) (last accessed 28 July 2006).

<sup>62</sup> See Fairstein, Carolina and Khalfan, Ashfaq, *Community Empowerment and Access to Water in Buenos Aires*, available at: [www.cohre.org/water](http://www.cohre.org/water) (last accessed 28 July 2006).

<sup>63</sup> The Center for Legal and Social Studies, The Civil Association for Equality and Justice (ACIJ), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, Unión de Usuarios y Consumidores, and the Center for International Environmental Law (CIEL), Media release, 28 June 2005.

<sup>64</sup> See Picolotti, *loc.cit.* (note 41), p. 1.

<sup>65</sup> *Idem.*

section of the water system. The initial laying of the main pipes for providing water to the neighbourhoods of *Chacras de la Merced*, *Cooperatives Unidos*, 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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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

<sup>66</sup> 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'.

<sup>67</sup> See, generally, Langford, M., 'The UN Concept of the Right to Water: New Paradigm for Old Problems?', *International Journal of Water Resources Development*, Vol. 21, No. 2, 2005, pp. 273-282; and Khalfan, Ashfaq, 'Implementing General Comment No. 15 on the Right to Water in National and International Law and Policy', Discussion Paper, Bread for the World Germany and Centre on Housing Rights and Evictions, March 2005, available at: [www.cohre.org/water](http://www.cohre.org/water) (last accessed 28 July 2006). On a rights-based approach to development, see Darrow, M. and Tomas, A., 'Power, Capture and Conflict: A Call for Human Rights Accountability in Development Cooperation', *Human Rights Quarterly*, Vol. 27, No. 2, 2005, pp. 471-538.

<sup>68</sup> Filmer-Wilson, E., 'Human Rights-Based Approach to Development: The Right to Water', *Netherlands Quarterly of Human Rights*, Vol. 23, No. 2, 2005, pp. 213-241.

<sup>69</sup> *Ibidem*, pp. 232-240.

services.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> While some claim that human rights are just a rhetorical icing for existing development activities, in many cases it is the opposite.<sup>73</sup> 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.

<sup>70</sup> For example, see *Comments of the European Roma Rights Centre and Centre on Housing Rights and Evictions on the occasion of the Article 16 Review of Greece, Hungary and Turkey under the European Social Charter supervision cycle XVII-I*, 1 December 2003, available at [www.errc.org/db/01/25/m00000125.doc](http://www.errc.org/db/01/25/m00000125.doc) (last accessed 28 July 2006).

<sup>71</sup> For example, in the Romani settlement Slavko Zlatanović in the southern Serbian town of Leskovac, many Roma have reportedly contracted skin diseases as a consequence of poor housing conditions and lack of clean water. The settlement is within the range of the Leskovac municipal water supply system and several foreign foundations have reportedly offered financial support for building infrastructure. However, local authorities have stated that this is not possible since the streets were built without legal permission, and because building a new water supply system would be too complicated and costly. See *The Protection of Roma Rights in Serbia and Montenegro*, prepared by the European Roma Rights Centre (ERRC) in association with the UN Office of the High Commissioner for Human Rights, Human Rights Field Operation in Serbia and Montenegro, UN OHCHR, 2003.

<sup>72</sup> Filmer-Wilson, *loc.cit.* (note 68), pp. 225-226. She also importantly notes that donors might need to extend their time horizons for projects and not focus on 'concrete' results in the short-term.

<sup>73</sup> For example, if a development practitioner asked a community 'how are we going to build a well or sanitation block?', then a certain set of answers might be expected, particularly relating to costs and location. This might be good enough if the well draws from a clean water source, land ownership issues are clear, official corruption is minimal, women are sufficiently included in the decision-making process and the system can be maintained by the community in the medium to long-term. Yet, none of this is axiomatic. A rights-based approach would address all of them. But if the question is asked 'how do you think you should achieve your right to water?', then different and perhaps troubling answers might be forthcoming. For example, in Kibera, the largest slum in Africa, residents pay 3 to 30 times the price paid by the middle class for water. Otherwise, they are forced to drink unclean water from a nearby polluted dam or river. When the community were made aware of the extent of money they were paying for water and health care, which often concerned diarrhoea and the existence of a 'water mafia' that had essentially shut down water booths established by some donors, then the possible solution to the problem involved a much wider range of actions. It included, for example, negotiating with the local water company for their right to receive more forms of direct access to water, addressing corruption in the informal water sector and local government structures

The Committee on Economic, Social and Cultural Rights can obviously play a limited role in ensuring accountability and Tully's attacks upon the Committee are somewhat unwarranted in this regard. Its key power is to conduct a five-yearly periodic 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.<sup>74</sup> 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.<sup>75</sup> For example, the stated objective of the Water Services Act in South Africa is to provide for the 'the right to access of 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.<sup>76</sup>

Some disconnection cases have also reached the South African courts. Tully quotes an early South African High Court decision on disconnection, the *Manquele Case*,<sup>77</sup> 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,<sup>78</sup> 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.

<sup>74</sup> See Langford, M., *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, COHRE, Geneva, 2003.

<sup>75</sup> See Langford, M., Khalfan, A., Fairstein, C. and Jones, H., *Legal Resources for the Right to Water: International and National Standards*, COHRE, Geneva, 2004.

<sup>76</sup> 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.

<sup>77</sup> *Manquele vs Durban*, Transitional Metropolitan Council 2002, (6) SA 423D, 427D-E.

<sup>78</sup> See De Visser, J., 'Manquele v. Durban: Disconnection of Water Supply', *Local Government Law Bulletin*, Vol. 3, No. 1, 2001, available at: [www.communitylawcentre.org.za/localgovbulletin2001/2001\\_1\\_manquele.php#manquele](http://www.communitylawcentre.org.za/localgovbulletin2001/2001_1_manquele.php#manquele) (last accessed 28 July 2006).

papers for the case and it was generally inconsistent with the landmark *Grootboom* decision of the Constitutional Court.<sup>79</sup> Moreover, in a later decision in *Bon Vista Mansions*,<sup>80</sup> 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 *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.<sup>81</sup>

An interim injunction was issued ordering the local authority to restore the water supply to the residents.<sup>82</sup>

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 issued on the right to water since November 2002 is remarkable.<sup>83</sup> 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,<sup>84</sup> although there is a significant way to go before governments begin to incorporate human rights approaches in their Millennium Development Goal strategies.<sup>85</sup> In European countries, there is also a clear sign of an emerging link between the right to water

and levels of developments assistance.<sup>86</sup> 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.<sup>87</sup>

### 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'.<sup>88</sup> 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 [States] the committee prefers mechanisms of governance and not markets for ensuring universal water access'.<sup>89</sup>

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.<sup>90</sup> Rather it has focused on articulating:

<sup>79</sup> 2000 (11) BCLR 1169 (CC).

<sup>80</sup> *Residents of Bon Vista Mansions vs SMLC 2001*, High Court, Application No. 12312 (South Africa).

<sup>81</sup> *Ibidem*, para. 20.

<sup>82</sup> *Ibidem*, para. 35.

<sup>83</sup> See for example, FIAN International and Bread for the World, *Right to Water in India*, Fact Finding Mission Report, FIAN, Heidelberg, March 2004; Center on Economic and Social Rights, *Thirsting for Justice: Israeli Violations of the Human Right to Water in the Occupied Palestinian Territories*, Submission to the Committee on Economic, Social and Cultural Rights, 1 May 2003, available at: [www.cesr.org/palestine](http://www.cesr.org/palestine) (last accessed 28 July 2006); Assaf, K. *et al.*, *Water as a Human Right: the Understanding of Water in the Arab Countries of the Middle East – a Four Country Analysis*, Global Issue Paper, No. 11, Heinrich Böll Foundation, Berlin, 2004; *Report of the International Fact-Finding Mission on Water Sector Reform in Ghana*, 1 August 2003, available at: [www.cesr.org/reports](http://www.cesr.org/reports) (last accessed 28 July 2006).

<sup>84</sup> Task Force on Water and Sanitation, *Health, dignity, and development: what will it take? UN Taskforce Report* (Millennium Development Library, June 2005), p.178. I am indebted to Ashfaq Khalfan for pointing out this reference.

<sup>85</sup> See Alston, P., 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', *Human Rights Quarterly*, Vol. 27, No. 3, 2005, pp. 755-829.

<sup>86</sup> General Comment No. 15, para. 34, states: 'Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required. In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water'.

<sup>87</sup> See discussion *supra* at notes 52 and 55 respectively.

<sup>88</sup> Tully, *loc.cit.* (note 2), at p. 51.

<sup>89</sup> See *ibidem*, p. 63.

<sup>90</sup> The Committee stated, 'Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question'. Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties' obligations*, 5th Session, 1990, UN Doc. E/1991/23 (1990), annex III, at 86, para. 8.

- Process standards (e.g., due process in cases of interferences with the rights, participation, presumption against deliberatively retrogressive 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,<sup>91</sup> 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'.<sup>92</sup> 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 triumvirates 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, 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.<sup>93</sup> 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,<sup>94</sup> it is clearly not mainstreamed in the investment arm. This bipolarism is most evident in a recent World Bank evaluation of its water

privatisation policies.<sup>95</sup> It found that they had been oversold but nevertheless recommended that the policy remain in place.

At the same time, there are some examples of successful campaigns. In Bolivia, the multinational *Bechtel* withdrew after street protests erupted in response to a three-fold increase in the price of water. In Uruguay, an explicitly rights-based approach was adopted. A referendum in October 2004 inserted the right to water in the constitution with a rider that the water supply was to remain in public hands.<sup>96</sup> Debate now continues as to whether past privatisations are unconstitutional. In terms of legal approaches, few cases have reached the courts on water privatisation. However, in *Nkonkobe Municipality vs Water Services South Africa (PTY) Ltd and others*,<sup>97</sup> the municipality were successful in nullifying a six year-old water privatisation contract. They brought the application after they could no longer afford the high management fees of Rand 400,000 per month being charged by the private contractor. The Court's reasoning is most poignant. They eventually nullified the contract because the municipality did not comply with the necessary consultation and public participation requirements. Another case relating to access and affordability for users of private water services has now been filed in South Africa.<sup>98</sup>

### 3.3. ENVIRONMENT

The article by Tully also indicates in various places that the right to water may somehow conflict with environmental concerns.<sup>99</sup> Tully seems to conclude after a brief analysis that the two interests are largely complementary<sup>100</sup> although he fails to mention the relevant parts of the general comment that demonstrate this compatibility.<sup>101</sup> In any case, if we consider that water for personal and domestic needs constitutes a miniscule proportion of overall water usage, that the provision of drinking water demands the highest quality of water and that the lack of sanitation is

<sup>91</sup> See, generally, Langford, *loc.cit.* (note 67).

<sup>92</sup> General Comment No. 15 on the Right to Water, *op.cit.* (note 1), at p. 51.

<sup>93</sup> World Bank, 'Project Appraisal Document on a proposed credit in the amount of SDR 71 million (USD 103 million equivalent) to the Republic of Ghana for an Urbanwater Project', 1 July 2004, available at: [www-wds.worldbank.org/servlet/WDSContentServer?WDSPath=IB/2004/07/12/000090341\\_20040712101848/Rendered/INDEX/285570GH.txt](http://www-wds.worldbank.org/servlet/WDSContentServer?WDSPath=IB/2004/07/12/000090341_20040712101848/Rendered/INDEX/285570GH.txt) (last accessed 28 July 2006).

<sup>94</sup> Salman and Lankford, *op.cit.* (note 19).

<sup>95</sup> See discussion in Roaf, V., *After Privatisation: What Next?*, Global Issue Paper No. 28, Heinrich Böll Foundation, Berlin, March 2006.

<sup>96</sup> See news report at *supra* note 38.

<sup>97</sup> Case No. 1277/2001 (unreported).

<sup>98</sup> Kinley, D., 'South Africa Policies Challenge the Constitutional Right to Water', *Defend the Global Commons*, January 2005.

<sup>99</sup> 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.'

<sup>100</sup> 'Environmental legislation which employs pollution abatement schemes and economic incentives for water conservation or recycling could usefully complement a human rights framework.' *Idem*.

<sup>101</sup> In particular see paragraphs 21, 23 and 28 which comprehensively address the duty of States parties to respect, protect and fulfil 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'.<sup>102</sup> 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'.<sup>103</sup>

#### 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'<sup>104</sup> 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'.<sup>105</sup> Tully notes the comment by El Hadji Guissé, 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 Guissé's later reports actually accept the approach of the general comment in its entirety.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup>

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

<sup>102</sup> Tully, *loc.cit.* (note 2), p. 62.

<sup>103</sup> General Comment No. 15 on the Right to Water, *op.cit.* (note 1), paras 28(f) and (g) respectively.

<sup>104</sup> Tully, *loc.cit.* (note 2), p. 53.

<sup>105</sup> *Ibidem*, p. 57.

<sup>106</sup> *Final report of the Special Rapporteur on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation*, 14 July 2004, UN Doc. E/CN.4/Sub.2/2004/20.

<sup>107</sup> See Centre on Housing Rights and Evictions, *Listening to the Poor: Housing Rights in Nairobi, Kenya*, Final Report, COHRE, Geneva, 2006; Leckie, M., *When Push Comes to Shove: Forced Evictions and Human Rights*, Habitat International Coalition, 1995; and Sheridan Bartlett, *Urban Children and the Physical Environment*, City University of New York and the International Institute for Environment and Development (London), available at: [www.araburban.org/childcity/Papers/English/Sheridan%20Bartlett.pdf](http://www.araburban.org/childcity/Papers/English/Sheridan%20Bartlett.pdf) (last accessed 28 July 2006).

<sup>108</sup> 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.

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.<sup>109</sup>

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.<sup>110</sup> 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.<sup>111</sup> 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 overleaping 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

demonstrate that General Comment No. 15 is neither radical nor ineffective. It may have been a bold step by the Committee but it is entirely defensible on standard legal interpretive methods, particularly those used in international law. Moreover, the general comment has helped lay a base for new and ongoing action that seeks to transform the human right to water into effective discourses, practices and legal frameworks.

<sup>109</sup> See *ibidem*, paras 55 and 56.

<sup>110</sup> For an overview of some of the arguments, see Chapman, A. and Russell, S., 'Introduction', in: Chapman, A. and Russell, S. (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, Antwerp/Oxford, 2002, pp. 8–19. Chapman and Russell, however, strongly support the minimum core obligations approach.

<sup>111</sup> See Porter, B., 'The Crisis of ESC Rights and Strategies for Addressing It', in: Squires, J., Langford, M. and Thiele, B. (eds), *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights*, Australian Human Rights Centre and University of NSW Press, Sydney, 2005, chapter 4.

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