validating legitimacy and the prospect of encroaching upon another's mandate remains omnipresent.

In conclusion, General Comment No. 15 should not be cited as legal authority for the existence of a human right to access water under general international law or human rights law. That proposition 'may be developing but for now remains debatable'.[108] Water access is an emergent right, for which General Comment No. 15 constitutes 'decisive progress'[109] towards its crystallisation. While few would dispute the moral imperative (and inevitability) of that process, an individual entitlement to access a resource as critical as water warrants the application of rigorous interpretative methods and accurate depictions of the available international legal material. Prospective implementation cannot be addressed without first securing authoritative legal recognition and Mr Langford's arguments go far towards trumping the objections of recalcitrant actors.

[108] Hildering, A., *International Law, Sustainable Development and Water Management*, Eburon Publishers, Delft, 2004, p. 75.

[109] World Water Council, *Frequently Asked Questions*, Marseille, 2006.

EXPECTATION OF PLENTY: RESPONSE TO STEPHEN TULLY

MALCOLM LANGFORD

Here's a farmer, that hanged himself on the expectation of plenty
Macbeth, Act 2, Scene III

Stephen Tully remains largely wedded to the idea that the general comment cannot be legally or practically justified and that it lacks political acceptance. But his more recent arguments, featured in his response to my rebuttal of his critique of General Comment No. 15 on the Right to Water, falter on a number of factual and conceptual misunderstandings, and, more deeply, on excessive and unwarranted expectations of legal interpretive method and the role of law in social change.

Tully concedes that the drafting debates, the *travaux préparatoires* of the International Covenant on Economic, Social and Cultural Rights, cannot be used as an argument for or against the implication of the right to water in the Covenant.[1] It is a vain exercise, both legally and pragmatically. But he takes up a new cudgel by contending that the Committee has exceeded the parameters of Article 11 – which contains 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing' – by also deriving the right to water from Article 12, the right to health. He suggests that even if water can be classed in the same grouping as 'food, clothing and housing', by virtue of the word' including', the Committee's concurrent derivation of the right to water from the right to health expands the scope of the right to water beyond the parameters of the right to an adequate standard of living. The result would be that the derived right was larger than its parent.

A glance at the opening of the general comment reveals the erroneousness of this assertion. After defining the right to water in paragraph 2, the Committee states that *this right* can be derived from Article 11 and is also inextricably related to the right to the highest attainable standard of health, and presumably given the title of the General Comment, also derived from the right to health. There is nothing following in the text of the document to suggest that the Committee's rather circumscribed definition of

[1] For an interesting discussion of the apparent silence of the Covenant with respect to water, see Craven, M., 'Some Thoughts on the Emergent Right to Water', in: Riedel, Eibe and Rothen, Peter (eds), *The Human Right to Water*, Berliner Wissenschafts Verlag, Berlin, 2006, Chapter 2.

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the right to water (*i.e.* for essential personal and domestic uses) is bolstered or enlarged by the right to health. Indeed, when surveying human rights and constitutional jurisprudence, it is not surprising to find a single right being derived from different human rights. In the case of the right to housing, the Supreme Court of India derived it from the right to life,[2] while the African Commission on Human and Peoples' Rights derived it from the right to property, health and family life.[3] As I noted in my first response, the same pattern emerges in national jurisprudence on the right to water.[4] Equally, the interdependence of human rights recognises that a single right normally cannot be adequately realised in the absence of other human rights.

Tully then reproaches me for my apparent disparagement of the right to internet access, which was in the context of my discussion of his earlier assertion that there is no reason why water should be explicitly elevated in Article 11 to the exclusion of other essential services, such as electricity, post and internet access. I certainly have no qualms in supporting the explicit recognition by the international community of these basic services as human rights, particularly access to energy in the immediate future. It may also be arguable that the human right to energy (for essential purposes), and adequate sanitation, are of sufficient importance to deserve recognition by the Committee under Article 11. But my essential point was that water is clearly of the same character as the rights to food, clothing and housing in Article 11, it is of undeniable and universal importance and has also received significant support from the international community. It was therefore not a difficult step for the Committee to take.

Tully also points to the lack of universal backing as a further argument against the implication of the right to water. He argues that customary law, which should be considered along-side conventional (treaty) sources of law, may challenge the Committee's interpretation of the ICESCR. The first response to this is that there is sufficient basis in the *treaty*, the International Covenant on Economic, Social and Cultural Rights, itself for the right to water. In interpreting the Covenant, the Committee is obliged to look to 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] On this test alone, the case for the right to water is sufficiently strong.

But the Committee must also take into account '*subsequent* agreements, *subsequent* practice and any relevant rules of international law' and, as argued, there was certainly sufficient backing for the right to water, particularly from international declarations. Tully remains almost wilfully blind though to the recognition that States have given to

2 See *Shanti Star Builders* vs *Narayan K. Totame* (1990), 1 SCC 520.

3 See *SERAC* vs *Nigeria*, Communication 155/96.

4 See footnotes 39-42 of my article.

5 Vienna Convention on the Law of Treaties 1969, 23 May 1969, 1155 *United Nations Treaty Series* 331; 8 *International Legal Materials* 679 (1969), Article 31(1).

the right to water dating back to 1977.[6] From a numerical point of view, all States have accepted declarations containing the right to water (the Cairo Programme of Action, Agenda 21). Almost all developing country States have voted in the United National General Assembly in favour of a resolution that referred to the right to water.[7] In 2001, all members of the Council of Europe unanimously recognised that the right to water was contained in international human rights instruments.[8] Since the issuance of the general comment in 2002, only the United States (which is not a party to the ICESCR) and Canada have publicly challenged the existence of the right to water – although the latter country appears to be reconsidering its position.[9]

Tully does not appear to be satisfied with the fact that most States have recognised the right to water. He apparently suggests that an unclear provision in a treaty requires the existence of a customary rule in order to provide clarity. However, while the Vienna Convention on the Law of Treaties permits customary law to be taken into account in treaty interpretation, it does not require its use. Tully's interpretive approach is unduly restrictive given that customary law in the human rights field is normally limited in comparison to treaty law.[10] Even Tully's arguments that the right to water is not part of international customary law are somewhat unorthodox and strained. If we were to travel down this route of considering whether the right to water is part of international customary law, it is difficult to follow Tully's argument that the views of two opposing States, the United States and Canada, can have great influence on the state of international customary law when most have taken diametrically opposed positions. Tully's contention that these States are 'specially affected' and have a 'heavier footprint in the formation of customary law' introduces unusual criteria into the determination of customary law that are unjustified as they are not recognised methods of determining customary law and apparently seek to give more developed or more powerful States asymmetric influence in international law. Rather, such States might be considered persistent objectors and be relieved of the customary obligation. Yet, even where it were appropriate to take account of which State is more affected than others, then greater weight needs to be given to the views of developing countries where significant portions of the population lack access to clean water.

6 See section 2 of my article.

7 UNGA Res. 54/175 (2000), 'The Right to Development', para. 12(a). The countries who voted against or abstained on this resolution, who were all developed countries, indicated that their concerns related to the scope of the right to development, UN Press Release GA/9690, 17 December 1999.

8 Recommendation 14 (2001), para 5.

9 Letter by the then Prime Minister of Canada, Paul Martin, to Development Peace (a Canadian non-governmental organisation), 5 January 2005.

10 Simma, B. and Alston, P., 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', *Australian Year Book of International Law*, Vol. 12, 1992, pp. 82-108; and Higgins, R., *Problems and Process: International Law and How we Use it*, Clarendon, Oxford, 1994, p. 19.

Tully then turns to the question of whether the general comment has been ufficiently accepted by States since its adoption. He notes that the recent reports of tates parties to the Covenant indicate a diversity of responses with many States ɔcating the issue of access to water or water resources under various Covenant rights. his is not at all surprising, since the Committee's reporting guidelines have yet to be mended to take account of General Comment No. 15 and water is a cross-cutting sue, as reflected in various general comments of the Committee. But in time, the ommittee's commendable intention to highlight the human right to water as a natter requiring specific and targeted attention will undoubtedly contribute to State arty reports having a particular focus on the right to water. Several countries have eflected the right to water in legislation since 2002, including Algeria (2005), emocratic Republic of Congo (2006), Indonesia (2005), Mauritania (2005), licaragua (2003) and Uruguay (2004). Prior to 2002, the right to water had been ecognised in the constitutions or laws of Belgium (specifically the jurisdictions of Vallonia (1999), Flanders (1996) and Brussels (1994)), Burkina Faso (2001), Ecuador 1998), South Africa (1996), Uganda (1995) and Ukraine (1994).[11]

The omission of the right to water from the final text of the Ministerial Declaration manating from the World Water Forum in March 2006 is also highlighted. Again, ome key facts are missing from Tully's account. He does not mention that the World Vater Forum is not a negotiating forum in the same manner as United Nations onferences where ministerial functions are better understood. Indeed, ministerial eclarations from the World Water Forum have been characterised as 'uncritical', weak' and 'awash in generalisations and compromising language'.[12] In practice, the ost State drafts a ministerial declaration based on informal consultations. As ndicated by the Spanish environment minister, Christina Narbona,[13] the Declaration n Mexico was not open for negotiation, and thus cannot be taken as an authoritative ndication of the views of States. A few States can play a blocking role, distorting the therwise general acceptance of a right. The failure of Bolivia to include the right to vater into the Ministerial Declaration indicates only that Mexico was unwilling to

1 The list given in the body of the text does not include the numerous countries where a law sets out duties of States to ensure access to water (*e.g.* Zambia) or an entitlement of citizens to access water (*e.g.* Ethiopia), but without mention of the term 'right'. Nor does it include countries where the right to water is covered by recognition of the right to access all public services (*e.g.* Cordoba Province in Argentina) or by a general recognition of economic, social and cultural rights generally (*e.g.* Senegal and Romania), See Langford, M., Khalfan, A., Fairstein, C. and Jones, H., *Legal Resources for the Right to Water: International and National Standards*, COHRE, Geneva, 2004, pp. 46-52 and 68; and Smets, Henri, *The Right to Water in National Legislations*, Agence française de développement, 2006, pp. 47-49; as well as personal communication from Henri Smets, 8 June 2006.

2 Gleick, Peter and Lane, Jon, 'Large International Meetings: Time for a Reappraisal', *Water International*, Vol. 30, No. 3, 2005, pp. 410-414, at p. 413.

3 'I have been involved in international meetings for many years and this is the first time when there is no chance of changing the final declaration of a ministerial meeting', quoted in: 'Spain: Mexico's exclusion of right to water surprising', *Xinhua News Agency*, 21 March 2006.

amend the Declaration, probably due to pressure from one or two other States. Tully gives great legal weight to the preparatory documents of the Forum, which is questionable since the Forum, although quite influential, is an event managed by a non-governmental organisation (the World Water Council) in partnership with a single government.

In the lapse of time since the preparation of my earlier article, more examples of acceptance can be pointed to: Argentina referred to the right to water in a Federal decree cancelling the concession given to Aguas Argentinas,[14] Germany's 2005 Human Rights Action Plan on external relations and the German development ministry's action plan for overseas development cooperation in the years 2004 to 2007 both include the right, while Bolivia, Cuba, Venezuela and Uruguay issued a declaration on the right to water.[15]

The matter is also now on the agenda of the Human Rights Council for specific and separate treatment. At the opening session of the Human Rights Council in June 2006, Spain and Germany announced that they would be requesting a three-step process once the Human Rights Council was formed, namely a study by the Office of the High Commissioner, the appointment of a special rapporteur on the right to water and then a full-bodied resolution to strengthen the right to water. Informal consultations indicate this project has the support of many States.

In addition, there is a growing use by the judiciary of the general comment, for example, the Inter-American Court of Human Rights in *Yakye Axa Indigenous Community* vs *Paraguay*[16]:

> Citing General Comments 12, 14 and 15 of the U.N. Committee on Economic, Social and Cultural Rights (on the rights to food, health and water, respectively), the Court underscored the close link between access by indigenous peoples to their ancestral territory and enjoyment of their rights to health, to food, to clean water, to education, and to cultural identity, all of which it views as ensuring 'the right to a dignified existence'.[17]

14 Ministerio de planificacion federal, inversion publica y servicios, *Rescíndese el Contrato de Concesión suscripto entre el Estado Nacional y la empresa Aguas Argentinas S.A., por culpa del Concesionario* [Ministry of Federal Planning Public Investments and Utilities, Rescission of Concession Contract between the National State and Aguas Argentinas S.A., due to the fault of the Concessionaire], 21 March 2006.

15 *Declaracion complementaria en el Marco del IV Foro Mundial del Agua* [Complementary Declaration of the Fourth World Water Forum], 22 March 2006.

16 *Yakye Axa Indigenous Community* vs *Paraguay*, Judgement of 17 June 2005, Inter-American Court of Human Rights, Serie C, No. 125.

17 Melish, T. 'Inter-American Court on Human Rights', in: Langford, M. (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative* Law, Cambridge University Press, New York, forthcoming 2006.

The practical benefits of the general comment are briefly disputed by Tully,[18] although his statement sits uneasily next to his call for the Committee to impose strong obligations on multinational water companies – this plea would indicate that the general comment has a role to play. In a simple and breathtaking sentence, Tully concludes that the failure of the general comment to solve the world water problem (after a mere three and half years of existence) denudes it of any value. Again, Tully succumbs to the strawman criterion of evaluating the impact of human rights standards: if a legal instrument fails to immediately cure the ill, it is worthless. But this expectation of plenty would lead us, in a primeval Hobbesian fashion, to rid ourselves of all new or un-enforced laws, whether national or international, without any appreciation for their current or future role. Instead, we should appreciate international human rights standards and the UN system as being a 'light on the hill' for States, intergovernmental agencies, courts, private actors and civil society. Documents such as general comments can provide guidance and the UN system can provide at least a model for a more rigorous national system of accountability. If the Committee is to reach Tully's expectations though, it would need to send out waves of UN blue helmets to arrest polluters and force governments at gunpoint to roll out water services for deprived urban and rural areas. Since such a scenario is more than unrealistic for the near future, we should look to how the general comment has already been used as a tool in practice – I gave several examples in my earlier response[19] – and how we can replicate such actions elsewhere.

But possibly, Tully misunderstands the human rights approach. For example, earlier in his rejoinder he excludes from the realm of human rights such NGO strategies as 'targeting governments, lobbying favourable *fora* and submitting *amicus curiae* briefs to arbitrations', all typical human rights strategies! In the footnoted example of the latter strategy, Tully notes NGOs who lobbied the ICSID tribunal for *amicus curiae* status, but the NGOs were actually quoting from the general comment and indeed much of their earlier advocacy had been motivated by the general comment. A human rights document, like the general comment, only becomes useful when used, and Tully's own example demonstrates that point. You cannot evaluate its impact by its mere presence.

The rejoinder then turns to the question of the private sector and particularly multinational corporations. Tully now appears to concede that it was not possible for the Committee to place direct obligations on multinationals and simply castigates the Committee for failing to refer to the UN Norms on the Responsibilities of Transnational Corporations. But these norms were only adopted by the Sub-Commission in August 2003, which was after the General Comment was issued. The alternative would have been to quote the OECD guidelines as I suggested in my response.

Tully also worries that the Committee has somehow captured the field with the right to water and suggests that this is the cause of the drop-off in the focus on water in reports emanating from special rapporteurs on rights to housing, health and food. I note this latter fact in my article but Tully seems to misunderstand the point. The Committee's general comment clearly prompted these three rapporteurs to look at water issues – there is a clear spike just after November 2002 – but their inability to keep a sustained focus on water demonstrates the need for a specific focus on right to water and a special rapporteur on the topic.[20]

The general comment stands as one of a number of authorities for the existence of the right to water in the International Covenant on Economic, Social and Cultural Rights. In the almost four years that have elapsed since the issuance of the general comment, the document has had perhaps more impact and influence than the drafters initially expected.

[18] Tully also comments on my optimism that clashes between personal uses of water and other uses will not be significant, and he notes some examples of conflicts, particularly environmental uses. However, I was referring to the macro situation in most countries, where there is sufficient water to meet essential personal and domestic water needs, which normally constitute less than 10 percent of water use. At the micro level, there will of course be water-stressed areas as Tully points out, and this may require a balancing exercise, but most national governments have the necessary water resources to meet the needs, but possibly not always the financial and technical resources. Overall, meeting the right to water for personal and domestic uses (as opposed to industrial and commercial agriculture) will more often than not be complementary with environmental concerns. The general comment specifically indicates that the manner of the realisation of the right to water must be sustainable (para. 11), and refers to Agenda 21 and the Rio Declaration on Environment and Development, documents that address the manner in which human and environmental needs can be balanced and realised in tandem. See also paragraphs 21, 25 and 28-29 of the general comment.

[19] See section 3.1. of my article.

[20] See footnotes 35, 45 and 46 of my article in this issue.