elsewhere in South Africa must continue through the courts and advocacy to ensure that the real changes desired on the ground are realised.

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References in this case review to the “City” also apply to Johannesburg Water (Pty) Ltd, a water company in which the City of Johannesburg is the sole shareholder and one of the respondents in the case.

COHRE was assisted in its amicus intervention in this case by the International Human Rights Clinic of the New York University School of Law and the Legal Resources Centre of South Africa.


International action to strengthen the right to water and sanitation

Claude Cahn

Recent actions by the United Nations (UN) human rights organs suggest a trend towards strengthening the international protection of the right to water and sanitation. These efforts have also met with vociferous opposition. Nevertheless, although regional approaches have varied, it is evident that access to water and sanitation is increasingly attracting international attention, after several decades of persistent agitation, advocacy and negotiation by various international and municipal actors.

Recognition of the right to water and sanitation

The right to water has been recognised explicitly in a number of international treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (article 14(2)(h)), the Convention on the Rights of the Child, 1989 (article 24(1)(c)), and the African Charter on the Rights and Welfare of the Child, 1990 (article 14(2)(c)). This right is also implicit in article 11 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). The UN Committee on Economic, Social and Cultural Rights has stated that “the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living” (General Comment 15 on the right to water, UN doc. E/C.12/2002/11 (2003)).

The Plan of Action of the 1977 Mar del Plata UN Water Conference recognises 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 equal to their basic needs” (Report of the UN Water Conference, Mar del Plata, 14–25 March 1977, UN doc. E/Conf.70/29 (1977) 66–71). In addition, at two UN world conferences, states have unanimously adopted international declarations affirming that the right to an adequate standard of living includes water and sanitation, in addition to food, clothing and housing (the 1994 International Conference on Population and Development, Cairo, in which 177 states participated, and the 1996 Second UN Conference on Human Settlements [Habitat II] Istanbul, in which 171 states participated). The 43 members of the Council of Europe and the 118 members of the Non-Aligned Movement also recognised the right to water in 2001 and 2006 respectively. The Asia-Pacific Water Forum, composed of 37 Asian countries, did likewise in 2007.

Furthermore, the UN Commission on Human Rights, precursor to the UN Human Rights Council (HRC), adopted two resolutions in 2004 and 2005 on the adverse effects of the illicit movement and dumping of toxic waste and dangerous products and wastes on the enjoyment of human rights (Resolution 2004/17, UN doc.
In the wake of the release of this study, the German and Spanish governments launched a joint undertaking to press for a resolution by the HRC on the right to water and sanitation during the first half of the sixth session of the HRC in September 2007. The aim of this effort is to establish a special procedure, such as a special rapporteur or other mechanism, on the right to water and sanitation. The establishment of such a special procedure would ensure that the right to water and sanitation is discussed regularly in the HRC. Consideration of this proposal was deferred to March 2008, when the seventh session of the HRC was held, because there was insufficient time for states to review the OHCHR report before the sixth session.

Informal discussions on the resolution began in January 2008. Several options were suggested:

- the establishment of a special rapporteur, independent expert or other special procedure to look into issues implicating the right to water and sanitation;
- the establishment of a new advisory committee as an adjunct body to the HRC with a mandate on the right to water and sanitation;
- the establishment of a UN Secretary-General special representative on the right to water and sanitation, with a mandate similar to that of John Ruggie, special representative of the UN Secretary-General on business and human rights (meaning that the special representative would have no powers to assess the situation of the right to water and sanitation in any country, but could only focus on the “clarification of the relevant norms”); or
- an assignment to the OHCHR to produce a report.

The fourth option was dismissed out of hand, while the rest were presented for discussion during the seventh session.

After open informal meetings held by the German and Spanish governments, a draft resolution was tabled on 20 March 2008. The resolution was jointly sponsored by Andorra, Belgium, Bulgaria, Burkina Faso, Cameroon, Chile, Colombia, Costa Rica, Cyprus, Denmark, El Salvador, Ecuador, Estonia, Finland, France, Germany, Greece, Guatemala, Guinea, Ireland, Italy, Kazakhstan, Croatia, Cuba, Luxembourg, the Maldives, Mali, Morocco, Monaco, Montenegro, the Netherlands, Nicaragua, Norway, Panama, Peru, Portugal, Serbia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Timor-Leste, Ukraine and Uruguay.

Although there was opposition from some states such as India, the HRC adopted the resolution by consensus on 28 March 2008 [UN doc. A/HRC/7/L.16 (2008)]. The resolution established an independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation. The appointment is for a period of three years, during which the independent expert is mandated to:

- develop a dialogue with governments, the relevant UN bodies, the private sector, local authorities, national human rights institutions, civil society organisations and academic institutions to identify, promote and exchange views on best practices related to access to safe drinking water and sanitation;
drinking water and sanitation, and, in that regard, to prepare a compendium of best practices;
• advance the work by undertaking a study, in cooperation with and reflecting the views of governments and relevant UN bodies, and in further cooperation with the private sector, local authorities, national human rights institutions, civil society organisations and academic institutions, on the further clarification of the content of human rights obligations, including non-discrimination obligations, in relation to access to safe drinking water and sanitation;
• make recommendations that could help the realisation of the Millennium Development Goals, particularly Goal 7;
• apply a gender perspective, including through the identification of gender-specific vulnerabilities;
• work in close coordination, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the HRC, relevant UN bodies and the treaty bodies, taking into account the views of other stakeholders, including relevant regional human rights mechanisms, national human rights institutions, civil society organisations and academic institutions; and
• submit a report, including conclusions and recommendations, to the HRC at its tenth session (para 2).
Since its establishment in 2006, the HRC has generally not been keen on establishing new special procedures. It had only established one new mandate before its seventh session, and it has steadily eliminated a number of them, especially country-specific mandates. Early indications that a number of governments were uncomfortable with the establishment of a new special procedure led the initiating governments to prioritise “the promotion and exchange of best practices” as a mode of garnering consensus on the proposed special procedure for the right to water and sanitation.

Despite this effort, explicit provisions allowing country visits, which would facilitate the promotion and exchange of best practices, were deleted from the final resolution. Country visits are now only implicit in the provision calling upon all governments to “cooperate with the independent expert and … share best practices with the independent expert, and to provide him/her with all the necessary information related to the mandate to enable him/her to fulfil the mandate” (para 4).

The major lightning rod of the resolution was the description of the mandate, in the title of the resolution and elsewhere. To secure support for the resolution - and thus the establishment of a special procedure - references to the “right to water and sanitation” were deleted, under the weight of unbending objections primarily from Canada, the United States of America and other countries which, though expressing their support for the right to water, did not support the right to sanitation. The “right to water and sanitation” was thus replaced with “human rights and access to safe drinking water and sanitation”. It should be noted, however, that these countries had earlier endorsed the declarations of the 1994 International Conference on Population and Development and the 1996 UN Conference on Human Settlements, which explicitly stated that the right to an adequate standard of living included water and sanitation.

These setbacks were, to a certain extent, ameliorated by the inclusion in the preamble to the resolution of the following:

Emphasizing that international human rights law instruments, including the Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, entail obligations in relation to access to safe drinking water and sanitation, ... This provision established both the link between water and sanitation on one hand and that between these issues and international human rights law on the other. By extension, it also implied that the right to water and sanitation entailed positive obligations for the state. This is particularly important for sanitation, the less developed of the two components of the right.

The process for adopting the resolution establishing the independent expert on the right to water and sanitation has thus been the latest battleground for the international debate on the justiciability of economic, social and cultural rights. The dissenting governments - now in a minority in the HRC - undermined the resolution, but could not ultimately block it. However, the perceived need to adopt the resolution by consensus
dictated that the adopted measure was significantly weaker than it might otherwise have been, particularly in the area of the normative description of the right at issue. Nonetheless, the resolution is an important breakthrough and will reinforce the protection of the right to water and sanitation in international law.

Conclusion
The recognition of real human rights concerns in the area of water and sanitation has advanced the protection of the right to water and sanitation. Between 2002 and 2007, the number of countries formally recognising the right to water in their legal or policy frameworks increased from six to 24, at least six of which have, in addition, recognised the right to sanitation. In some countries, such as Kenya, governments have begun to adopt policies that explicitly recognise the right to water and sanitation and take measures to expand access to this right. And in the developed North, traditionally conservative bodies such as the European Court of Human Rights have, within the confines of the applicable treaties, which primarily focus on civil and political rights, handed down decisions vindicating the right to water in such areas as the arbitrary denial of water provision (see, eg, Butan and Dragomir v Romania, Application No. 40067/06, European Court of Human Rights, judgment of 14 February 2008).

The HRC will address this issue again at its tenth session in 2009. It is important for non-governmental organisations and other stakeholders to advocate for an explicit reference in subsequent resolutions to the “right to water and sanitation” as an independent right contained within the ICESCR.

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The world food crisis


1. The CESCR is alarmed at the rapid worldwide rise in food prices and the soaring energy prices that have precipitated a global food crisis and are adversely affecting the right to adequate food and freedom from hunger as well as other human rights of more than 100 million people.

2. The world has lived for too many years with a chronic crisis of 854 million people suffering from food insecurity and two billion people suffering from malnutrition and undernutrition.

3. Prices of basic staple foods (including rice, maize, wheat etc) have risen by up to 60 per cent around the world. The poorest people in the world are the most severely affected as they already spend up to 60–80 per cent of their income on food, compared with 20 per cent in the developed world.

4. The food crisis underscores the interdependence of all human rights, as the enjoyment of the human right to adequate food and freedom from hunger is of paramount importance for the enjoyment of all other rights, including the right to life.

5. The Committee calls upon all States to revisit their obligations under article 25 of the Universal Declaration of Human Rights, and article 11 of the ICESCR. Under article 11(1) of the Covenant, States parties recognize “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions.”

6. In its General Comment No 12 (1999) on the right to adequate food, the Committee affirms that “the right to adequate food is indisputably linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights enshrined in the International Bill of Human Rights (See General Comment 12, para. 4).