

CHAPTER 5

POVERTY, WOMEN AND THE HUMAN RIGHT TO WATER FOR GROWING FOOD

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Abstract

Access to water is very important to the sustenance of human beings. The Human Development Report 2006 states that the lack of access to water undermines productivity and economic growth, reinforcing the deep inequalities that characterise current patterns of globalisation and trapping vulnerable households in cycles of poverty. In order to reduce poverty, therefore, the guarantee of access to water that goes beyond health considerations but also a guarantee of water for some productive uses needs to be recognised.¹ The human right to water has emerged as an unenumerated right in international law amidst much criticism and vague content. This chapter explores whether the human right to water for growing food can be included in the normative content of the human right to water.

1 Introduction

There are numerous global partnerships, conferences, strategies and plans that demonstrate the commitment to remove the scourge of world poverty.² One core factor to achieve this is access to water from which poor people, especially women, draw multiple benefits. Such benefits include enhanced livelihood security, the generation of wealth, reduced health

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1 See RP Hall et al 'The human right to water: The importance of domestic and productive water rights' (2014) 20 *Science and Engineering Ethics* 849; see also J Thompson et al *Drawers of water II: 30 years of change in domestic water use and environmental health in East Africa* (2001) 31, arguing that the productive use of water is beneficial to rural households for both health and livelihood; RP Hall et al 'The productive use of rural piped water in Senegal' (2014) 7 *Water Alternatives* 480-492, revealing that in rural Senegal three-quarters of households are engaged in water-based economic activities that contribute to half the household income. B van Koppen 'Multiple-use water services to advance the Millennium Development Goals' (2006) *Research Report* 989.

2 Eg, Millennium Development Goals adopted by world leaders in the UN Millennium Declaration Resolution A/55/L.2 (2000). This has been replaced by the Sustainable Development Goals adopted by the UN General Assembly at the UN Sustainable Development Summit 2015, <https://sustainabledevelopment.un.org/post2015/summit> (accessed 15 August 2017).

risks and vulnerability.³ Water is also an important aspect in improving sustainable food production in order to reduce poverty, hunger and malnutrition.⁴ There are many productive uses of water at the household level that comprise mainly small-scale activities predominantly involving small home gardens for growing vegetables and fruit.⁵ Home gardens are a source of nourishment and contribute to achieving a balanced diet from the different types of vegetables and fruit; they are also a source of income through the sale of the produce which contributes to livelihood essentials such as clothes, school fees and medicines.⁶ This is most beneficial for women who represent the majority living in extreme poverty and who are the ones that manage such small gardens for their families.⁷ A lack of access to water is recognised as both a cause and consequence of poverty and inequality. It is the poor countries and poor people living in low-income, informal or illegal (peri-urban) and rural areas that tend to have lower levels of access to an improved water supply.⁸ The Human Development Report of 2006 states that the lack of access to water undermines productivity and economic growth, reinforcing the deep inequalities that characterise current patterns of globalisation and trapping vulnerable households in cycles of poverty.⁹ The United Nations General Assembly (UNGA) has recognised the human right to water for personal and domestic uses.¹⁰ In order to reduce poverty, this human right to water must also guarantee water for some productive uses.¹¹ The human right to water has emerged as an unenumerated right in international law amidst much criticism and vague content. This chapter explores whether the human right to water for growing food can be included in the normative content of the human right to water.

- 3 See generally Poverty-Environment Partnership (PEP) 'Linking poverty reduction and water management' (2006), http://esa.un.org/iys/docs/san_lib_docs/povety%20reduction%20and%20water.pdf (accessed 12 September 2014).
- 4 UN-Water 'Water and Food' (2014), <http://www.unwater.org/topics/water-and-food/en/> (accessed 16 December 2014). See also generally B van Koppen et al 'Fixing the leaks in women's human rights to water: Lessons from South Africa' in A Hellum, P Kameri-Mbote & B van Koppen (eds) *Water is life: Women's human rights in national and local water governance in Southern Africa* (2015) 457.
- 5 Other productive uses of water at the household level include livelihood raising, brick-making and beer brewing, which all contribute to livelihood. Thompson et al (n 1) 31; E van Houweling et al 'The role of productive water use in women's livelihoods: Evidence from rural Senegal' (2012) 5 *Water Alternatives* 658.
- 6 Van Houweling et al (n 5) 658; Van Koppen (n 1) 9-10.
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- 8 See WHO/UNICEF *Progress on drinking water and sanitation* (2014) vi, stating that 748 million people, mostly the poor and marginalised, lack access to an improved drinking water source.
- 9 UNDP Human Development Report *Beyond scarcity: Power, poverty and the global water crisis* (2006) 47 27.
- 10 *Right to water* (2002) UN Doc E/C.12/2002/11(GENERAL COMMENT 15); UN General Assembly (UNGA) 'The human right to water and sanitation' (2010) A/RES/64/292.
- 11 See Hall et al 'The human right to water' (n 1); see also Thompson et al (n 1); Hall et al 'The productive use of rural piped water in Senegal' (n 1) 480 492, see also Van Koppen (n 1) 9-11.

2 The human right to water

2.1 Recognition in international law

In international law women are guaranteed a human right to water explicitly in the two main instruments dealing with women's rights at the global and regional level. First, in 1979 the UNGA guaranteed water supply for rural women as a human right to ensure an adequate standard of living in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹² CEDAW, a landmark international agreement that affirms principles of human rights and equality for women, recognises the rural and urban divide and specifically aims to address discrimination or disadvantage based on locality or geography.¹³ CEDAW is among the few human rights instruments at the global level that guarantee the human right to water, but specifically for rural woman. In article 14 state parties are enjoined to take into account the particular problems faced by rural women and the significant roles that they play in the economic survival of their families, including their work in the non-monetised sectors of the economy, and to take all appropriate measures to ensure the application of the provisions of CEDAW to women in rural areas. It then calls for the provision of infrastructure and basic needs, including education, health care, water, sanitation, electricity, transport, and communications infrastructure, as conditions for adequate living. Such basic needs are recognised under the right to an adequate standard of living guaranteeing necessary conditions of life sufficient for well-being and human development in terms of physical, moral and mental development.¹⁴ It has been connected to the conditions necessary to enable a person to live in dignity, to participate in society and to make a living for themselves and their families.¹⁵

The survival and livelihood interest that the right to adequate standard of living guarantees is best expressed in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁶ Article 11(1) requires states to provide for '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'. The

12 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 art 14. This provision is part of efforts to eliminate discrimination against women in rural areas and to ensure participation in and benefit from rural development on the basis of equality with men.

13 LR Pruitt 'Deconstructing CEDAW's article 14: Naming and explaining rural difference (2010-2011) 17 *William and Mary Journal of Women and the Law* 347.

14 M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1998) 293.

15 See IT Winkler *The human right to water: Significance, legal status and implications for water allocation* (2012) 43.

16 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee) established that the human right to water is implicitly included in the list of rights required to ensure an adequate standard of living in article 11(1).¹⁷ In its General Comment 15, which is regarded as the most authoritative elaboration of the human right to water, the ESCR Committee relies mainly on the interdependence of human rights, especially the rights to an adequate standard of health, food, life and dignity, to arrive at an independent right to water in mainstream human rights instruments.¹⁸

Of interest for purposes of this article is the right to an adequate standard of living, understood as a right to a livelihood contributing to the continuous improvement in living conditions. Water is essential for survival by meeting basic human needs, but also as an enabling resource for livelihoods. As alluded to above, for poor households in the rural and peri-urban areas water supports livelihoods through small home gardens, livestock rearing and micro-enterprises. Further, an adequate supply of good quality water within a reasonable distance frees up time that would otherwise be spent in fetching water, contributes to good health, better education opportunities and ultimately enables people to work.¹⁹ This is crucial for poor people, particularly women, who constitute the majority of the poorest.

The Convention on the Rights of Persons with Disabilities (CRPD) similarly recognises the importance of water for livelihood and social protection.²⁰ In article 28(2)(a) water is explicitly guaranteed as part of the right to social protection. This right guarantees social support and security for poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.²¹ Winkler asserts that social protection and an

17 See TS Bulto *The extraterritorial application of the human right to water in Africa* (2014) 25, stating that the human right to water has emerged as a new right amidst much criticism and controversy due to the lack of an express provision in main human rights instruments. However, after decades of incremental recognition and varying levels of commitment to the human right to water, the UN General Assembly and UN Human Rights Council (HRC) in 2010 memorialised the international consensus on this right by declaring the right to safe drinking water and sanitation a human right. See generally UN Committee on Economic, Social and Cultural Rights General Comment 15, Right to water (2002) UN Doc E/C.12/2002/11; UN General Assembly The human right to water and sanitation (2010) A/RES/64/292; see also GS McGraw 'Defining and defending the right to water and its minimum core: Legal construction and the role of national jurisprudence' (2011) 8 *Loyola University Chicago International Law Review* 127 144, stating that by 2010 every member state of the UN had acknowledged the human right to water at least once whether by national legislation, declaration, treaty signature or membership of a supportive international organisation.

18 See generally General Comment 15 (n 17). See also MAS Salman & SA Mcinerney-Lankford *The human right to water: Legal and policy dimensions* (2004) 43.

19 S Copra 'The right to food and water: Dependencies and dilemmas' (2010) Paper prepared for the Institute for Human Rights and Business, http://www.ihrb.org/pdf/Right_to_Food_and_Water_Dependencies_and_Dilemmas.pdf (accessed 14 July 2012).

20 Convention on the Rights of Persons with Disabilities, 13 December 2006, entered into force 3 May 2008.

21 See ESCR Committee General Comment 19: The right to social security (art 9 of the Covenant), 4 February 2008, E/C.12/.

adequate standard of living are inextricably linked and cannot be clearly separated, hence the recognition of both rights in article 28 of CRPD.²²

At the African regional level, women's human rights to water have also been specifically provided for in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).²³ Unlike CEDAW, the Protocol does not limit this right to rural women. It recognises the human right to water for women in the context of the right to food. Article 15 on the right to food security obliges state parties to take appropriate measures to provide all women with 'access to drinking water, sources of domestic fuel, land, and the means of producing nutritious food'. Although only water for drinking is explicitly mentioned, water is essential to food security as no food can be produced without it. Food security in many ways contributes to poverty reduction and development such as contributing to personal health and to reducing the burden of families' health costs. The production of nutritious food also requires water beyond water for drinking, hence, arguably, there is an implicit recognition of the need for water for food as well, beyond what is explicitly provided for. Although the African Charter on Human and Peoples' Rights (African Charter), the main human rights instrument under the African human rights system, does not provide for an explicit human right to water, the African Commission on Human and Peoples' Rights (African Commission) has established that the right is implied in the protection of other rights.²⁴ The African Commission has derived the human right to water from a number of explicitly-guaranteed rights, including the rights to life, dignity, work, health, development and to a satisfactory environment.²⁵

Bulto argues that the teleological approach undertaken by the African Commission in its jurisprudence for an implied human right to water in the protection of other explicitly-provided rights failed to establish an

22 Winkler (n 15) 44.

23 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted on 11 July 2003, entered into force 25 November 2005). See F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Law Journal of Civil Rights and Social Justice* 11 for an appraisal of the impact and implementation of the Protocol.

24 See African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986). See also African Commission on Human and Peoples' Rights 'Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights' (Nairobi Guidelines) (2011), http://www.globalschool.co/files/recursos/fi_name_documento.41.pdf (accessed 22 March 2014).

25 Arts 4, 5, 16, 22 & 24 African Charter. See Nairobi Guidelines (n 24) para 87; *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 47; *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) paras 208-209; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (Endorois case). See also African Commission Resolution on the Right to Water Obligations ACHPR/Res.300 (EXT.OS/XVII) 20 adopted at its 17th extraordinary session held from 19-28 February 2015 in Banjul, The Gambia.

independent human right to water.²⁶ The recent developments by the African Commission, however, point to an independent human right to water that creates its own obligations for states. This is evident from the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in Africa,²⁷ the Reporting Guidelines for Economic, Social and Cultural Rights in Africa²⁸ and the Resolution on the Right to Water Obligations which develop the content of the right to water in Africa.²⁹ The human right to water has also been recognised in the AU Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, and the African Union Convention on Cross-Border Cooperation.³⁰

The different instruments and the jurisprudence of monitoring bodies have established and recognised an independent human right to water with explicit guarantees of this right for women in women's rights instruments. This has drawn global attention to the large number of people without access to water and the burden disproportionately borne by women in fetching water.³¹ The recognition has also been accompanied by an elaboration on the content of this right by the ESCR Committee and the African Commission by providing guidelines for states to realise this right for all, especially vulnerable groups such as women.

2.2 Definition and content: Is there a right to water for growing food?

The first issue to be settled is whether the right to water should be defined narrowly or broadly. Where the right does appear in global human rights instruments it is generally very narrowly defined. For example, article 24 of the Convention on the Rights of the Child (CRC) only mentions the provision of 'clean drinking water'.³² The human right to water is also referred to as the right to 'drinking water' by different UN bodies and resolutions. For instance, the Human Rights Council uses the phrase 'the human right to drinking water and sanitation', hence the special mechanism on issues of water was initially established as the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation.³³ This was changed to the Special Rapporteur on the Human Rights Obligations Related to Access to Safe

26 TS Bulto 'The human right to water in the corpus and jurisprudence of the African human rights system' (2011) 11 *African Human Rights Law Journal* 341.

27 Nairobi Guidelines (n 24).

28 Resolution on the Right to Water Obligations (n 25).

29 Resolution on the Right to Water Obligations (n 25).

30 Adopted 29 January, 2018; Adoption: 27 June, 2014.

31 This is because women typically are the water collectors and managers in the domestic sphere. See Van Houweling (n 5) 660.

32 Convention on the Rights of the Child (CRC) (adopted 20 November 1989 and entered into force 2 September 1990).

33 Human Rights Council (HRC) Resolution on human rights and safe drinking water and sanitation, 28 March 2008 A/HRC/RES/7/22 para 2.

Drinking Water and Sanitation (Special Rapporteur on Water).³⁴ Similarly, the former Special Rapporteur to the UN Economic and Social Council, El Hadji Guissé, used the term 'right to drinking water supply' before proposing the use of the term 'right to water' for the sake of consistency.³⁵

Regardless of the terminology used, it is clear from General Comment 15 that the human right to water does not simply denote the right to drinking water but, at the very least, also includes other domestic and personal uses, such as bathing, cleaning, cooking and sanitation.³⁶ General Comment 15 defines the substantive content of the human right to water as follows:³⁷

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for *personal and domestic uses*. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

General Comment 15 defines personal and domestic use to mean drinking, personal sanitation, the washing of clothes, food preparation, and personal and household hygiene.³⁸ It goes further to elaborate on these uses by stating that drinking entails water for consumption; sanitation is the disposal of human excreta (water is only necessary where water-based means are adopted); food preparation includes water for cooking or food hygiene; and hygiene means cleanliness.³⁹

This definition of what constitutes personal and domestic uses is still narrow, as it seems to exclude water for other uses, although these uses are often acknowledged as part of the human right to water.⁴⁰ However,

34 HRC *The human right to safe drinking water and sanitation*, 8 April 2011, A/HRC/RES/16/2.

35 UN Economic and Social Council (ECOSOC) *Realisation of the right to drinking water and sanitation. Report of the Special Rapporteur*, El Hadji Guissi, UN Doc E/CN.4/Sub.2/2005/25, 11 July 2005, Annex - Draft guidelines for the realisation of the right to drinking water and sanitation para 1.1. (Sub-Commission Guidelines) See also United Nations Sub-Commission on the Promotion and Protection of Human Rights Promotion of the Realisation of the Right to Drinking Water and Sanitation; Res 2006/10 (2006) Adopting the Draft Guidelines for the Realisation of the Right to Drinking Water and Sanitation (2005) UN Doc.E/CN.4/Sub.2/2005/25 (United Nations Sub-Commission on the Promotion and Protection of Human Rights, Res 2006/10, Promotion of the Realisation of the Right to Drinking Water and Sanitation 24 August 2006, UN Doc A/HRC/Sub.1/58/L11, adopting the Draft Guidelines for the Realisation of the Right to Drinking Water and Sanitation (2005), UN Doc E/CN.4/Sub.2/2005/25).

36 General Comment 15 (n 16) para 2.

37 As above.

38 General Comment 15 para 12.

39 General Comment 15 fn 13.

40 See eg General Comment 15 para 15 recognising that people may not be deprived of their means of subsistence.

General Comment 15 also includes the following:⁴¹

Water is required for a range of different purposes, *besides personal and domestic uses*, to realise many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.

General Comment 15 thus seems to include both a narrow and a broad definition of the human right to water. The narrow definition is limited to water for personal and domestic use; the broad definition includes water for food production, environmental protection, generating a livelihood, and performing cultural practices.

Although many agree that water for personal and domestic use is essential, stopping at the narrow definition of the right has been criticised by Van Koppen and others.⁴² It is argued that this domestic approach overlooks the benefit of productive use of water that is essential for poor households.⁴³ This is also known as the 'domestic-plus' approach or 'multiple uses' approach to the human right to water. For instance, it is pointed out that the productive use of water at household level that comprises small-scale economic activities, including small home gardens for growing vegetables and fruit, rearing livestock, brewing beer and brick making, contributes to the household income and livelihood for many poor people.⁴⁴ Women, in particular, rely on home gardens as a source of nourishment and through the sale of the produce as a supplement to sources of income.⁴⁵ Empirical evidence shows that in practice, even when water facilities are designed for a single use, rural communities use their facilities for productive activities that contribute to food security and/or income.⁴⁶ Van Koppen and others argue for the 'domestic-plus' approach whereby designs of water delivery systems are made to enhance water

41 General Comment 15 (n 16) para 6. See also para 7 providing that a people may not be deprived of its means of subsistence in line with art 1 paragraph 2 of ICESCR. It also makes reference to the United Nations Convention on the Law of Non-Navigational Uses of Watercourses (adopted on 21 May 1997 and entered into force 17 August 2014), which declares that, in determining vital human needs in the event of conflicts over the use of water courses, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation. Women farmers must be guaranteed access to water for food production.

42 See generally Hall (n 10).

43 See Thompson et al (n 1) 31, RP Hall et al '(n 1) 480 492, see also van Koppen (n 4) 9 11.

44 See Van Houweling et al (n 5) 658.

45 As above; Van Koppen (n 4) 9-10.

46 See Hall (n 10) generally; Van Koppen (n 4) 2, stating that the single-use approach is based on the assumption that other sectors will take care of the other needs or uses of water. See also K Mokgope & JA Butterworth 'Rural water supply and productive uses: A rapid survey in the Sand River catchment' (2001) WHIRL Project Working Paper 1-21.

quantities while maintaining water quality for humans.⁴⁷ An expanded understanding of what ‘domestic’ use entails will ensure that the human right to water not only ‘keeps the heads of the people above the water’ but also guarantees adequate supplies of water that support livelihoods for the poor.⁴⁸ This, according to Hellum, would ‘capture the integrated way in which water is used for a multiplicity of livelihood purposes’ from a rural or semi-urban household perspective.⁴⁹

General Comment 15 recognises that people should not be deprived of their subsistence and even calls on states to ensure that water for subsistence farming, for instance, should be guaranteed especially for women.⁵⁰ The ESCR Committee also makes reference to the UN Convention on the Law of Non-Navigational Uses of Water Courses, which declares that in determining vital human needs in the event of conflicts over the use of water courses, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation. Furthermore, the ESCR Committee specifies that water both for domestic purposes and for the prevention of starvation and disease must be prioritised.⁵¹ This would suggest that General Comment 15 supports the ‘domestic-plus’ approach and particularly home gardening which is a means of subsistence requiring access to water. However, it does require that ‘priority in the allocation of water must be given to the right to water for personal and domestic uses’.

The human right to water is much broader than water for personal and domestic use which has to be prioritised. According to Winkler, this is partly because drinking, cooking, washing and personal hygiene cannot be substituted, and require direct access to water by each person. The other uses such as for food or livelihood needs can be met through a variety of means, other than subsistence farming, and do not require everyone to have direct access to water.⁵² Winkler concludes that priority must be given to needs that exclusively rely on water.⁵³ Another factor is that non-domestic uses require higher quantities of water than personal

47 Van Koppen (n 4) 7.

48 Mokgope & Butterworth (n 46 above) 2. See also B van Koppen & B Schreiner ‘Priority general authorisation in rights-based water use authorisation in South Africa (2014) *Water Policy* 1-19, arguing that most statutory water laws in sub-Saharan Africa through the licence (or permit) system deny and discriminate against poor people in relation to access to water for small-scale gardens. This is because licensing disregards customary water laws, results in administrative discrimination due to a lack of government capacity to process their applications and relegates them to second-class entitlement with no access to water for basic livelihood under the right to water, food and adequate standard of living.

49 A Hellum ‘Engendering the right to water and sanitation: Taking the lived realities of women and girls as starting point’ in A Russel & M Landgford (eds) *The right to water: Theory, prospects and practice* (2017).

50 General Comment 15 (n 16) para 7.

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52 Winkler (n 50) 3-4; Winkler (n 15) 130 158-167, arguing that the state has a variety of policy options regarding how to realise the right to foods other than to provide direct access to water.

53 Winkler (n 50) 3-4; see also Winkler (n 15 above) 129-131.

and domestic uses.⁵⁴ For instance, whereas the World Health Organisation (WHO) has established that between 50 and 100 litres per capita per day are sufficient for domestic purposes, at least 2 000 litres per capita per day are required for producing food.⁵⁵ It therefore is argued that including a human right to water for growing food would be guaranteeing claims to large quantities of water.⁵⁶ Winkler argues against the 'domestic-plus' approach of Van Koppen and others. She is of the view that if water for producing food for basic consumption were taken to be guaranteed by the right to water, there would be no reason from a normative perspective to stop only at that and to not include water for agriculture on a larger scale and all other uses to realise any human right.⁵⁷ Her argument is that there is a danger of guaranteeing water for all human rights under the human right to water as this would make the right less tangible and focused.

Bulto, who also argues for a narrow definition, posits that states cannot deliver water for all conceivable uses.⁵⁸ According to Bulto this narrow definition serves the purpose only of identifying the 'amount of a non-derogable bare minimum amounts of water per se and the related implementation duties of states'.⁵⁹ He also acknowledges that General Comment 15 prioritises water for personal and domestic use, but does not preclude the possibility of claiming water for the other recognised uses, such as for food production, culture and livelihood.⁶⁰

Although the concerns of large quantities of water creating a huge burden are valid, there is no justification for apprehension as the human right to water as elaborated in General Comment 15 clearly already identifies the hierarchy for realising this right considering both the narrow definition and the broader aspect of the right to water guaranteed.⁶¹ It should be accepted that all the water uses included under the broad definition are part of what the human right to water entails, that is, the human right to water guarantees even the large amounts of water needed for food production and generating a livelihood (excluding commercial and industrial uses). However, priority should rightly be given to personal and domestic uses.⁶² The personal and domestic uses are prioritised to prevent disease and the narrow definition is best understood as forming the minimum core content of the human right to water, as will be elaborated further below. Non-domestic uses are guaranteed under the human right to water, to be realised progressively after meeting the domestic water

54 Eg, whereas the WHO has established that 100 litres per capita per day is sufficient for domestic purposes, at least 2 000 litres per capita per day are required for producing food. See Winkler (n 15) 3-4.

55 G Howard & J Bartram *Domestic water quantity, service level and health* (2003) 22. See also World Water Assessment Programme (WWAP) *Water, a shared responsibility* (2006) 247.

56 Winkler (n 50) 3-4.

57 Winkler (n 15) 130.

58 Winkler 56.

59 Winkler 60 61-62. He argues further that prioritising water for personal and domestic has been part of 'long-standing state practice'.

60 As above.

61 See General Comment 15 (n 16) para 6. See also page 9 for a discussion of this.

62 See General Comment 15 para 37.

requirements. After domestic use, the next priority are situations of disaster relief, where water for the prevention of starvation and disease must be provided.⁶³ This priority guarantees both water for personal and domestic use and water for food production.⁶⁴ Water required to meet the core obligations of each of the Covenant rights is next in priority. Of particular interest for purposes of this chapter is the right to food which ordinarily would be closely related to the right to water for food production. According to the former UN Special Rapporteur on the Right to Food, Olivier de Schutter, the right to food 'protects the right of all human beings to feed themselves in dignity, either by producing their food or by purchasing it'.⁶⁵ This right has a clearly-stated core obligation, namely, to mitigate and alleviate hunger.⁶⁶ To ensure that everyone is free from hunger, states must adopt national strategies to ensure food and nutrition security for all.⁶⁷ Water is indispensable to realising food and nutrition security as it contributes to growing food, processing for transformation and preparation. The right to food is dependent on access to water as no food can be produced without it. Further, the largest use of water is for growing food: Agriculture accounts for 70 per cent of all water use. It therefore would be important to recognise a human right to water for food production, to prevent starvation and for a healthy life.⁶⁸ This point was raised by the UN Special Rapporteur on the Right to Food, J Ziegler, when commenting on an initial draft of General Comment 15. He stated that water should be viewed as a source of food security and included in the content of the right to water besides domestic uses.⁶⁹ Thus, a human right to water for food production would also fall under this priority to meet core obligations for other rights.⁷⁰

The human right to food and, more specifically, the right to be free from hunger is recognised as part of an adequate standard of living in ICESCR and other human rights instruments.⁷¹ This right may also form

63 General Comment 15.

64 United Nations Conventions on the Law of Non-Navigational Uses of Watercourses; see also M Windfuhr *Water for food: A human rights obligation how states can manage conflicts between the human right to water and the human right to adequate food* 19, available at https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Study_Water_for_Food_a_Human_Rights_Obligation.pdf (accessed 20 May 2019)

65 O de Schutter 'The right to food', <http://www.srfood.org/en/right-to-food> (accessed 8 March 2014).

66 General Comment 12 The Right to Adequate Food (Art 11) Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 12 May 1999] para 6.

67 General Comment 12 para 21.

68 BD Brooks 'Human right to water in Northern Africa and the Middle East: What is new and what is not; what is important and what is not' (2007) 23 *Water Resources Development* 227 233.

69 A Cahill 'The human right to water – a right of unique status': the legal status and normative content of the right to water' (2005)9: 3 *The International Journal of Human Rights* 396

70 General Comment 12 paras 12 & 21. See also Water for Food Security and Nutrition: A Report by the High-Level Panel of Experts on Food Security and Nutrition, May 2015. Water for realising the human right to food goes beyond production, to also contribute to livelihoods and income necessary for economic access to food. However, this is beyond the scope of this chapter.

71 Art 11.

the basis for deriving the human right to water for food production as it is impossible to realise this right without water, as alluded to above. For purposes of this chapter, I maintain that the right to water is the basis for the human right to water for food production.

The last priority in General Comment 15 identified by Windhurf is water for agriculture with a focus on groups that need it for their subsistence.⁷² General Comment 15 in paragraph 7 recognises the indispensability of water for agriculture to realise the right to adequate food. It then provides that water for agriculture should be provided to women farmers, indigenous peoples and other farmers to ensure subsistence farming and to secure livelihoods.⁷³ The General Comment notes that the provision of water for food production can be achieved through different water management systems and techniques such as water harvesting and irrigation technologies. Herein is another guarantee for women's rights to water for growing food contained within the human right to water.

The African Commission's Nairobi Guidelines, as General Comment 15, recognises the right to water for food production under the human right to water. It provides that 'the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal, domestic, and agricultural uses'.⁷⁴ Similar to General Comment 15, water for domestic and personal use is the minimum core obligation but the Guidelines also recognise the broader content of the right.⁷⁵ Women farmers and other disadvantaged and marginalised farmers together with indigenous peoples are also the focus for ensuring access to water for agriculture.⁷⁶ In the Nairobi Guidelines it is not clear whether water for agriculture is to be restricted to subsistence farming and securing livelihoods as this is only mentioned with regard to indigenous people. However, the Draft Guidelines on the Right to Water in Africa (Draft Guidelines) being developed clarify this.⁷⁷ In these Draft Guidelines the human right to water is recognised to include both the narrow and broad definitions as the right extends beyond domestic and personal use to water for agriculture.⁷⁸ This definition is later qualified and further extended by requiring that states must as a priority make available water to meet human needs which includes water for domestic and personal use, sanitation, subsistence agriculture and other means of subsistence.⁷⁹ The document contains no terminology of minimum core obligations, but under the heading of 'minimum amount of water' states are enjoined to ensure access to minimum quantities of water for personal and domestic use, for subsistence farming and for securing the livelihoods of peoples,

72 Windfuhr (n 64) 20.

73 General Comment 15 para 7.

74 Nairobi Guidelines para 88.

75 Nairobi Guidelines para 92(a).

76 Nairobi Guidelines paras 92 (t) & (d).

77 African Commission Draft Guidelines on the Right to Water in Africa.

78 Draft Guidelines para 11.1.

79 Draft Guidelines para 12.1.

particularly for indigenous communities.⁸⁰ This again points to a human right to water for growing food within the right to water. Women farmers are particularly mentioned to ensure that they have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology.⁸¹

I have thus far argued that a human right to water encompasses both a narrow and broad definition and forms the basis for a human right to water for growing food. This right requires larger quantities of water than that required for domestic and personal use. However, states are still under an obligation to realise this right for all people with a particular focus on women and other disadvantaged and vulnerable groups. Basically, where resources permit, states must move beyond the narrow domestic approach to the broader domestic-plus or productive use approach which goes beyond simply providing water for consumption and cooking. This is the progressive realisation of the right envisaged for all socio-economic rights, as will be discussed in the next part as I seek to clarify the normative content of and states' obligations under the human right to water for growing food.

2.3 Normative content of the human right to water for growing food

General Comment 15 and the Nairobi Guidelines provide authoritative interpretation guides for the human right to water and, thus, also the human right to water for growing food. Both provide for the substantive and procedural content of this right. The substantive content entitles every person, especially women, to available, accessible, acceptable and an adequate quality of water on a non-discriminatory basis to enable one to produce food for subsistence and securing an adequate standard of living. The procedural content requires participation in water governance. This right to water for growing food must be implemented progressively having regard to available resources. I will discuss further the substantive and procedural content of the human right to water, then states' obligations, but I start with a discussion of the concept of progressive realisation.

In order to implement this human right to water for growing food, standards or entitlements that can be enforced or claimed must be identified. The concept of progressive realisation encapsulates the fact that all economic, social and cultural rights generally will not be able to be achieved in a short period. This is because economic, social and cultural rights are resource-intensive and there is recognition that states may not always have the required resources. Although the realisation of these rights may be attained gradually over a long period of time, states are under an obligation to move as expeditiously as possible towards their full

80 Draft Guidelines para 12.2.

81 Draft Guidelines para 18.2.

realisation.⁸² Progressive realisation has two policy implications.⁸³ First, it allows for a delay in the strategy for human rights fulfilment.⁸⁴ For instance, the quality of the services and goods implied by the full realisation of the right will be attained over a period of time.⁸⁵ Second, it allows for setting priorities among different rights and considering trade-offs among them as resources may not permit pursuing all of them simultaneously or with equal vigour.⁸⁶ State parties have a clear obligation within this flexible device to take steps within the maximum available resources and move as expeditiously and effectively as possible towards the full realisation of rights.⁸⁷ This obligation requires states to immediately start to carry out the implementation of the right.⁸⁸ Hence, as discussed above, regarding water uses it may not be possible to ensure that both domestic and productive uses are equally realized. Where there are resource constraints states are permitted to prioritise domestic use while moving as expeditiously and effectively as possible towards guaranteeing water for other uses, including for food production.⁸⁹

Hall, Van Koppen and Van Houweling posit that although this has thus far been the case, there has been no movement to operationalise

- 82 See ESCR Committee General Comment 3: The Nature of States Parties' Obligations (art 2(1) of the Covenant) 1990 UN Doc E/1991/23 para 9; UN Commission on Human Rights Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Doc E/CN.4/1987/1 Principle 21. See also International Commission of Jurists (ICJ) Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 26 January 1997 Guideline 8, <http://www.eschnet> (accessed 12 February 2011). The Maastricht Guidelines state that progressive realisation does not alter the nature of the legal obligation of states which requires that certain steps be taken as soon as possible.
- 83 RE Robertson 'Measuring state compliance with the obligations to devote the maximum available resources to realising economic, social and cultural rights' (1994) 16 *Human Rights Quarterly* 703. See also UN Office of the High Commissioner for Human Rights (OHCHR) *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* 2006 HR/PUB/06/12 para 49, <http://www.unhcr.org/refworld/docid/46ceaf92.html> (accessed 22 February 2012). See also C de Albuquerque & V Roaf *On the right track: Good practices in realising the rights to water and sanitation* (2012) 32 stating that progressive realisation is to ensure that states do not attempt to meet their international obligations with empty promises and half-measures.
- 84 OHCHR (n 63) para 49.
- 85 As above; ESCR Committee General Comment 3 (n 82) para 9; Craven (n 14) 133. This applies to both developed and developing states. A Chapman & S Russell *Core obligations: Developing a framework for economic, social and cultural rights* (2002) 4, stating that progressive realisation does not mean the gradual increase in the number of people who enjoy the right but rather the gradual improvement of the level of enjoyment of the right for all. See D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 198.
- 86 Chapman & Russell (n 65) 4.
- 87 General Comment 3 (n 82) para 9.
- 88 The obligation to take steps and several specific rights in ICESCR are not subject to progressive realisation. The rights that have been worded similar to ICCPR requiring states to 'ensure' and 'guarantee' entails an immediate obligation on states to implement the rights, including art 3 on the right to equality; art 7(a)(i) on the right to equal remuneration for work of equal value; art 8 on the rights to form and join trade unions and to strike; art 13(3) on liberty of parents to choose their children's school; art 15(3) on freedom for scientific research and creative activity. See arts 10(3), 13(2)(a), 13(4) also with immediate obligations. MM Sepulveda & MMS Carmona *The nature of the obligations under the International Covenant on Economic, Social, and Cultural Rights* (2003) 175.
- 89 General Comment 3 (n 82) para 9.

the provision of water beyond the basic domestic requirement.⁹⁰ This is unfortunate, as progressive realisation does not allow states to drag their feet or to indefinitely defer their obligations.⁹¹ Progressive realisation must be understood within the overall objective and purpose of ICESCR, which is to establish clear obligations for state parties to realise the full extent of the rights.⁹² State parties have a clear obligation within this flexible device to maximise available resources, to take steps that are immediate and tangible towards the realisation of rights, and to ensure there are no retrogressive steps and non-discrimination in the measures adopted.⁹³

Generally, the recognition of progressive realisation poses great difficulties in developing the normative content and enforcement of economic, social and cultural rights. On the one hand there are those that advocate a contextual approach to defining the normative content and enforcing economic, social and cultural rights grounded in a particular institutional, doctrinal and cultural context.⁹⁴ On the other hand, there is the universalist approach which advances transcendental components of economic, social and cultural rights developed from a comparative analysis of rights in different jurisdictions that is deemed applicable generally. Both approaches, however, are weak in ensuring the enjoyment of the human right to water for growing food.

This is provided in the substantive content of the right. First there is the entitlement or obligation to ensure the availability of water. As alluded to above, the right guarantees equitable access to water primarily for subsistence farming or securing a livelihood to ensure an adequate standard of living, particularly for disadvantaged and vulnerable people. The availability to women would thus refer to an adequate quantity of water to meet the needs for subsistence farming and for securing their livelihoods.⁹⁵ The water supply must be continuous or regular. The actual quantity needed for this will vary depending on specific conditions and context where the right is being realised. Water is rapidly decreasing into a scarce commodity due to overexploitation, climate change and natural and man-made disasters, among other factors.⁹⁶ Agriculture is a main consumer of water, taking up to 70 per cent of all water withdrawals globally and this has potential to undermine the sustainability of the resource if not carefully managed.⁹⁷ States are thus called upon to ensure water management systems and strategies technologies for rain water harvesting, use and reuse that enhance water efficiency and productivity

90 Hall (n 11) 857.

91 Robertson (n 62) 703. See also De Albuquerque (n 62) 32.

92 General Comment 3 (n 82) para 9.

93 As above.

94 M Tushnet *Weak courts, strong rights: Judicial review and social welfare rights in comparative constitutional law* (2009) 10.

95 General Comment 15 para 7; Draft Guidelines para 12.

96 General Comment 15 para 1 states that this is exacerbating existing poverty.

97 Water for food security and nutrition (n 72) 9

in agriculture⁹⁸

Accessibility has been divided into four categories, namely, physical, economic, non-discrimination and information accessibility. Physical accessibility entails access to water within a reasonable distance that also guarantees security should be available to everyone including members of vulnerable and disadvantaged groups, for whom special measures may be necessary.⁹⁹ Economic accessibility or affordability is a requirement to ensure that the cost of acquiring water for growing food should not exclude people by threatening or compromising their enjoyment of other rights. Thus, the Nairobi Guidelines require states to ensure equitable access to water and water management systems for women and other disadvantaged farmers.¹⁰⁰

Acceptability and adequate quality calls for the protection of water resources and the prevention of disease and other threats to health from the use of unsafe and toxic water.¹⁰¹ This is particularly important where water for non-domestic use is concerned. Water must be fit for use without compromising the health of the user. Water quality for agriculture is different from that of domestic and personal use, as the latter may involve direct consumption by humans, whereas the former is intended for, for instance, fisheries, crops and livestock. The principle requiring cultural and quality as standards is also applicable to water for growing food, but this has not been specifically elaborated.

The human right to water guarantees procedural rights to access information and participation in decisions regarding water that also extend to the right to water for growing food. Access to information is an integral part of procedural rights that act to safeguard equity and accountability in realising the human right to water. Everyone is guaranteed the right to seek, receive and impart information concerning water issues. The participatory right to water for growing food requires that the process within which the state crafts strategies, policies and laws to ensure the right standards and norms to meet the goal of universal access must be undertaken in collaboration with people. It particularly requires that poor, disadvantaged and marginalised groups be given an equal opportunity to take part in and influence such processes. General Comment 15 specifically advances a participatory right to water in line with the primacy of equity in the struggle to secure access to water. Participation thus is regarded as an empowerment right to challenge inequality.

Further, although the human right to water for growing food is acknowledged in General Comment 15, this is vague and unclear. The ESCR Committee should thus clearly define this right through further

98 General Comment 15 para 7; Nairobi Guidelines Cfs Water for food security and nutrition (n72)13. Resolution 300 calls on states to ensure protection of resources from abusive use and pollution.

99 Nairobi Guidelines para 3(a).

100 Nairobi Guidelines para 92(t).

101 General Comment 15 para 8.

elaboration and in its role as the monitoring body should encourage states to move beyond the provision of water for domestic use to 'domestic-plus'. This will go a long way towards ensuring that the human right to water for growing food does not remain in the shadows but that it the right attracts the necessary global attention and effort to realise it.

3 Conclusion

The chapter has argued that the human right to water includes a right to water for growing food, which is especially important for the poverty alleviation of poor women. Access to water for such productive uses would contribute to their household nutrition, food security and income by maintaining, for instance, a small vegetable garden. This will require guaranteeing women large quantities of water beyond the ordinary quantities to meet domestic use by operationalising the progressive realisation of the human right to water. States must be encouraged to move from the domestic approach tied to public health concerns to the 'domestic-plus' approach that ensures that people also have a livelihood and thus enjoy an adequate standard of living. This is a challenge as states usually are content with meeting the bare minimum requirements of their obligations. It thus is important that the clear recognition of the human right to water for growing food be established in international law. Furthermore, the ESCR Committee should establish this right among the criteria to monitor progress on realising the human right to water. Through advocacy and further research on the link between poverty and water, states will be compelled to move beyond meeting basic human needs for water to productive uses such as for growing food to ensure poverty alleviation, particularly of women who bear the burden of the scourge.

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