

Crossfire: There is no human right to water for livelihoods

MELVIN WOODHOUSE and MALCOLM LANGFORD

In our debate between two experts, Crossfire invites Melvin Woodhouse and Malcolm Langford to debate the following: 'There is no human right to water for livelihoods, because the law can only protect a human right to basic needs'.

Dear Malcolm,

What is understood to be a 'human right to water' is increasingly recognized by nations and is resulting in a consistent, practical picture of what the right really is in the eyes of the law. A major part of the right is an obligation for nations to enable procedures to recognize and protect the right, together with some responsibilities to actually fulfil the right. But it is impossible to avoid the question of just how much water the law must protect in meeting this basic human need.

Both the law and national courts and science increasingly agree that a person requires 50 lcd (litres per capita per day) to meet their basic human needs including drinking, washing, food preparation and personal hygiene. This means that any

use of water above that level is beyond the basic human need and hence not protected by human rights law. This is of course only the tip of the iceberg in terms of how much water we really need to grow our food and pursue our livelihoods. So, obviously, meeting the basic need for water falls short of the amount of water people need to maintain their basic human dignity. But I will argue that we can only protect this right if it is based on an established minimum quantity that is applicable to all people in all circumstances.

Consider an example of someone living in a city in the desert; they might reasonably argue that their right to a volume of water is higher than the minimum standard. They would need more water for washing themselves, to grow some food and even water to maintain green spaces in their city – otherwise life would not be bearable. If the law accepts that the right becomes negotiable, then it would begin a system of claims over a volume rather than a fixed right. It then

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Melvin Woodhouse is a consultant and associate of the UNESCO Centre for Water Law, Policy and Science, University of Dundee. Malcolm Langford is a Research Fellow at the Norwegian Centre on Human Rights, University of Oslo.

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becomes very difficult to see how that system could work in the interest of human rights, especially when the rich and powerful turn their influence towards claiming a right to more water.

There may also be some situations in which there simply aren't the resources to protect more than a minimum provision, for example in what are truly inhospitable places.

As it stands the 'human right to water' only concerns basic human needs and these are defined as water for drinking, personal hygiene and sanitation. The argument is that having this minimum protected by law is a huge leap forwards from today's situation for many people in the world. It would mean that individuals are in a far stronger position to be responsible for their own health and well-being and much of the burden of assisting those people no longer falls on the state and other actors. To some degree the people would be stronger and healthier and could make a greater contribution to meeting their additional needs by themselves.

In some way this is analogous to the right to vote for women: once the right is there and equal to that of the rest of humanity then it ceases to be an issue. Even so the right to vote isn't a guarantee of good governance; that requires additional efforts from all citizens alike. Consequently if a universal right to

water for basic human needs was a reality, then clearly another agenda could emerge as the priority and people would be in a better position to pursue it.

Therefore, I would argue that the present human right to water has to be based on a minimum threshold for volume and that the volume cannot be contested on a case-by-case basis.

*Yours,
Melvin*

Dear Melvin,

You call for the human right to water to be universally fixed at a certain volume, 50 litres per person per day to meet basic domestic needs. To my mind, this singular approach represents a misunderstanding of the science, the law and, more deeply, the way in which human rights are claimed in practice.

Based on comparative research, experts such as Gleick (1996) do argue that 50 litres is a 'basic water requirement' that every state must be obliged to meet. This is largely backed up by the World Health Organization which states that 20 litres a day would represent a 'high health concern' while 50 litres would mean a 'low health concern'. Both studies were referenced in the standard-setting General Comment No. 15 on the Right to Water and were crucial in convincing a high court in South Africa that the free basic allocation of 25 litres to the poor was too low.

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These recommended levels are, however, based on fundamental health considerations, a largely rural setting and on assumptions about technological choices at modest levels of economic development: no showers or flush toilets, for example. International water experts such as Falkenmark (1997) argue that 100 litres is more appropriate for a 'decent and realistic quality of life in developing countries', even in the context of water scarcity, and USAID recommends 100 litres.

We should of course demand absolute minimums and General Comment No. 15 places a very high burden on governments to justify why they cannot reach this level. One may posit 50 litres as such a minimum level in many countries or possibly 20 litres in some places given, for example, the modest ambition of the Millennium Development Goals (MDGs). But we cannot stop there. The International Covenant on Economic, Social and Cultural Rights requires that the right to water be adequate and consistent with human dignity and states are under a duty to progressively realize the right to this level.

A fixation on a single international quantity can gloss over other critical elements of the human rights matrix. The General Comment No. 15 adds a caveat in its discussion on water quantity: 'Some individuals and groups may also require additional water due to health,

climate, and work conditions'. You address this issue by setting up the 'straw man' of the person living in the desert – more water is needed but is obviously unavailable. The example is somewhat extreme as there are a number of groups, for example persons living with HIV/AIDS, who require greater quantities of water each day. The *raison d'être* of human rights in practice is often to point to those groups who fall outside the averages.

Related to this point is the inherent Western and urban understanding of domestic uses. In many rural contexts, domestic water use includes subsistence gardening and livestock. While we may not want to include these uses in any international standard, and they can be placed under the human right to food, we should be open to and even encourage national contextualization. For example, in the Water Act of 1999 in Zimbabwe, reasonable uses of water which don't require a permit are defined to include basic domestic human needs 'in or about the area of residential premises', 'support of animal life, other than fish in fish farms or animals or poultry in feedlots', the making of bricks for private use and for dip tanks.

Quantity debates gloss over discrimination and equality rights. Not only is discrimination proscribed by law but inequalities at the national level are acutely felt and often the basis for armed conflict.

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The continued occupation of Palestinian territories has led to a fall in average water consumption to less than 100 litres per day, with half the Palestinian population consuming less than 50 litres per day. Research by the Centre for Economic and Social Rights points out that the average Jewish settler in the territories uses a staggering 600 litres per day. Can we really expect Palestinians to be satisfied with such retrogression, and hope that Jewish settlers might in turn moderate their consumption? It is notable that the UN Committee on Economic, Social and Cultural Rights first explicitly mentioned the right to water when dealing with Israel's report in 1998.

Lastly, universal quantitative standards can have their value in giving some flesh to universal concepts, but application at the national level is a different matter. Even UNDP accepts that the MDGs, with their universal quantitative targets, should be adjusted at the national level. It is crucial that the human rights paradigm is not trapped by a focus on meeting averages and one-size-fits-all, supply-driven solutions that can sometimes dominate development thinking. Issues such as the right to *affordable* water can for example fall by the wayside – affordability of water was included in the Millennium Declaration but excised from the MDG list.

The human rights movement has always progressed by focus-

ing on concrete cases of violations that call for local, national and international response. A legitimate 'quest for ahistorical universals and absolutes', according to Bruce Porter, does not automatically require the creation of a universalist legal framework. We must follow the 'grounded' path of civil and political rights which have been 'adjudicated in historical contexts and must incorporate understanding of the subjective component of the dignity related interests'.

*Yours,
Malcolm*

Dear Malcolm,

I entirely agree with you about the human rights approach to water as a basic need and how it could be developed to recognize specific disadvantaged groups. I think we need both an absolute minimum threshold as well as a mechanism to lift the bar for the disadvantaged. Countries have a legal obligation to sort out the volumes and mechanisms to meet the obligation to the best possible outcome. But the question at hand is whether a rights-based mechanism can also ensure the additional 3,500 lcd needed to produce a daily requirement of 3,000 kcal of food, much less the requirement for livelihoods overall (SIWI et al., 2005).

To begin to deal in such quantities we hit two barriers with regard to the present law on a human right to water. Firstly,

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GC15 concerns obligations of a government to its citizens, and not water sharing obligations between governments. This is important because many countries are not self-sufficient in water. Secondly, although law can be seen to succeed in applying a volumetric threshold for basic needs, would that also work when multiplied 70- or a hundred fold to realize water for every human's right to water for their livelihood?

You say that the right could be placed under the right to food rather than as an international standard, but I am not sure that would render a workable solution either. Doesn't the right to food sidestep the tricky political question of self-sufficiency in food and suggest that 'access to food' is the essence of that right? Crudely put that means one country isn't obliged to grow food for another – or to give another country water to grow its food. Instead the humanitarian imperative suggests that a country assists another with free or subsidized food if they can, such that food is accessible where it is needed.

At present international law concerning the sharing of waters across countries provides the principle of 'reasonable and equitable utilization', which is determined by the countries themselves on the basis of a number of factors including 'vital human needs', but it makes no mention of human rights to water. So under that mechanism

there is no volume reserved under human rights which has to flow across borders. Instead all avenues are considered open to negotiate and to share out what is available within very realistic limits.

My concern therefore is that a human rights approach to water for livelihoods would be unworkable, firstly because it may be physically impossible to recognize this right for every human being and secondly because at the volumes suggested it would turn the legal mechanism for transboundary water sharing from one of principled cooperative negotiation to an outright competition of numbers.

As for the crude volumes concerned, Israel presently has 991 lcd of available water for its citizens while Palestine has 197 lcd (Phillips et al., 2006). The Palestinians' secure water future appears to depend upon cooperation with their neighbours and not a 'water race' based on the size of population and speculative livelihood demands.

Why did the South African court use an international minimum standard from GC15 and Gleick's affidavit, rather than a principle enabling negotiation of a rights-based volume? (High Court of S. Africa. *Witwatersrand local division Case No: 06/013865 30 April 2008*. at 183.5.1) I don't know the answer – but every litre of water ring-fenced by human rights in the heavily water interdepen-

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dent SADC (Southern African Development Community) region, could be seen as a litre to claw back rather than a litre to negotiate over. If every upstream human had a right to ring-fence 3 or 4 m³ of flow a day this could be a major threat to the notion of peaceful negotiation on the basis of reasonable and equitable utilization.

The 'straw man' is not extreme; it's a very real perspective in the water hungry southern US states and the powerful but arid downstream states of major rivers.

*Best wishes,
Melvin*

Dear Melvin,

Or should I say Malthus?

First up, it seems we can perhaps agree on the vision of the human right to water constituting a demand for some minimum quantity of water and that equality and difference must be factored. However, you seem cautious about any embrace of contextualization, and ask why the South African court opted for an international minimum standard based on Gleick's affidavit as opposed to a more contextual approach. It didn't. It adopted the standard South African reasonableness approach but gave it some teeth in this case. The judge found that the government's decision to set 25 litres as a minimum was reasonable but that the City of Johannesburg's decision not to increase to 50 litres, given its

existing resources, was unreasonable.

But your 'question at hand' invites me to argue that the right to water should be extended to include water for food and livelihoods. I can't be tempted. At the global level it is simply impossible to universalize such an entitlement: the water required for each individual's livelihood varies so dramatically to make the idea meaningless. An orange farmer needs considerably more than a pen-pusher. And both of them may import their food from every corner of the globe.

You nonetheless skewer my earlier attempt to place this issue under the rubric of right to food on the grounds of practicability and law. You point out that ensuring we all get 3,000 calories a day requires 3,500 litres per person per day. Even if we adopt this 'averages approach' to the right to food, the world, until recently, has not been in dire straits. We have been able to produce enough food calories per person but not enough food to satisfy middle-class lifestyles, particularly high consumption of meat. The problem has been one of unconscionable, unequal distribution of food, caused by the unequal distribution of income, land and power.

I acknowledge we now face two challenges. The first is the movement of fertile land away from essential food uses towards high end products such as beef (which uses 15 times as much water as cereals) and cash crops

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such as biofuels. A World Bank paper singles out biofuels as being responsible for up to 70% of recent food price increases. The second is that if the population does grow to 9 billion (a big if) then, based on current water use practices and a daily diet of 3,000 kcalories, we need at least twice as much water. But this predicted Malthusian apocalypse, like others before it, will not necessarily materialize. More importantly, there are rights-based paths to avoid the potential catastrophe. One of the authors of the SIWI paper you cite on this topic, Falkenmark (2005: 27), with Lannerstad, wrote contemporaneously that we must adapt water use systems to the demands of the right to food, not the other way around: 'globally food must be regarded as a human right. Hence maintained and expanded global food production cannot be avoided... Agriculture is by no means a static activity, new modes will develop. Adjustment to an escalating water scarcity situation will take time'.

But let us not fall into the same rigid quantitative trap as we did above; human rights bring a qualitative dimension. In GC15, the UN Committee avoids reference to quantities when discussing water for the right to food and points to how existing scarce water resources are allocated: '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' (para. 6). It specifically refers to disadvantaged and marginalized farmers, including women farmers, having equitable access to water and water management systems. This is critical for the right to food as small farmers are more likely to produce food crops than larger farmers.

You conclude by elevating the concern to a transnational level, whereby meeting food and livelihood needs would require better sharing of international watercourses. You point out that that water reserved for 'vital human needs' in the Watercourse Convention 1997 is not referred to as a right. Putting aside the fact that extra-territorial human rights obligations are focused on rights of individuals, not the rights of states as in watercourse law, we can find some parallels between the two legal regimes. The 'statement of understanding' to the Watercourse Convention says, 'In determining "vital human need", special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation'. This is virtually identical to the language from GC15 quoted above.

But then you backtrack and argue that, even if we did have the right to food and livelihood rights in transboundary watercourse law, it would frustrate cooperation. I am not so sure

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and the example of Israel and Palestine you give is perhaps apposite. (Putting aside of course the simple fact that enforcement of the current Palestinian right to self-determination in international law would render many Israeli claims null and void from the outset.) Israel is using the overwhelming bulk of the water it traps for non-essential needs of its citizens. Forcing Israel to immediately provide sufficient water to meet the basic levels of the right to food and water of Palestinians is reasonable. Once we move to livelihoods, one could argue that rights to work and an adequate standard of living must be considered in the determination of equitable utilisation – a factor required in some national legislation on water licensing. Human rights is not just about straightforward entitlements to minimum quantities; it provides a subtle and principled framework for ensuring that the allocation of goods and services is not based simply on the distribution of power and wealth but is made to respect human dignity.

*Yours,
Malcolm*

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