Response to the request for comments for the Thematic Report to the Human Rights Council 54th session: “Fulfilling the human rights of those living in poverty and restoring the health of aquatic ecosystems: two converging challenges”

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In response to the request for comments for the Thematic Report to the Human Rights Council 54th session: “Fulfilling the human rights of those living in poverty and restoring the health of aquatic ecosystems: two converging challenges”, this report will greatly benefit from a clear distinction between water quality and water quantities/volumes, and between water infrastructure and the naturally available surface and groundwater resources flowing into the water infrastructure, for the following reasons.

With regard to water quality, there is certainly a case for safeguarding water quality to meet ‘drinking’ water needs. It can be an appealing message, even though it is idealistic and unaffordable to suppose that all naturally available freshwater resources (such as water falling on roofs, run-off, streams, lakes, wetlands and even aquifers) will ever get to the drinking water quality of untouched springs, mountainous streams or deep, unpolluted groundwater. Fish and other aquatic life may not even be able to survive in water of drinking water quality. Some form of treatment of the 3 lpcd needed for drinking is almost always needed and should be affordable. Nevertheless, the need to safeguard water quality if feasible to the highest standards for drinking, and to high standards for other uses is important and converges well with human right perspectives, for drinking water and a safe environment.

However, for the water quantities, ‘healthy ecosystems’ and the human right to access to affordable, nearby safe drinking water do NOT converge, and are even contradictory in the sense that the right to drinking water is a right to *take water out of* what is usually interpreted as ‘ecosystem’ in the water world, which coincides with environmental flows. Women still carrying containers take water *out* of streams/environmental flows to their homes The human right to drinking implies an implementation of less labour-intensive means, but still very much to take water *out of* the naturally available water resources and bring water to homes, year-round. This contradicts proponents of ecosystems as pristine health and aquatic life. They persistently argue to keep water *in* the source because any taking of water out of the ecosystem affects aquatic life, so they portray people and nature as opposite. However, naturally available water resources also include devastating flooding. It is also well known how an unrealistic, romanticized version of ‘nature’ has too often been abused as justification to evict customary communities out of their lands in green imperialism or green apartheid throughout history and still today, for example on behalf of the tourist industry seeking to enjoy ‘wilderness’ (Thakholi and Büscher 2021). In sum, it is a silly proposal in the 21st century that humanity should avoid taking out any water from ecosystems for human use and basically go back to pre-historic life. At the same time, an emphasis on marginalized people who are mainly the ones to use water directly from the ecosystem/environmental flow (as they do for some uses, such as fisheries) risks romanticizing a lack of water infrastructure, excepting women to continue carrying containers.

There is an alternative that avoids the risks of such confusion about ‘ecosystem’ and of fruitless and discriminatory romanticizing about ‘nature’ and ‘healthy ecosystems’ as ever being able to converge with humankind’s need for water at certain locations, also during the dry seasons. This is to separate quality and quantity, and highlight the need to safeguard water quality for the health of both humans and aquatic life on the one hand, and on the other hand, for water volumes, the equitable development and use of water stored and conveyed by infrastructure to meet not only the human right to drinking water, but also all other water uses that contribute to the right to food, non-starvation, dignity, including the rights of indigenous peoples, as in General Comment 15. This is NOT a commitment by states to also provide infrastructure (as it is in the human right to drinking water), but a state commitment to prioritize water resources that flow into peoples’ or government’s water infrastructure that contribute to realizing these other human rights.

This raises the vital issue of equitable water resource allocation and inevitable prioritization when competition grows – as it typically first does during dry seasons, droughts and spells. In the current human right to drinking water (which emphasizes the *infrastructure* to take water out of naturally available water resources), only implicitly assumes that the relative volumes of water taken out to flow into the infrastructure are also available. However, streams or aquifers can dry up and affect even domestic uses. This should have a priority. However, the much bigger issue regards productive uses. For the productive water use and water resource management sectors, the volumes for domestic uses are so tiny that they are neglected in the overall planning and distribution of the volumes of naturally available water resources. It is true that the livestock of pastoralist families already drink much more water than the family itself does for drinking and other domestic uses. Watering a vegetable garden for nutritious food at homesteads also requires more water (including re-use of water already used for domestic purposes). All these uses align with the much broader human rights to water as defined in General Comment 15 (Hellum et al 2015). The issue is not among small-scale users, but between small-scale users and high impact users.

Even though competition for productive water uses in the dry season, dry spells or during droughts, is growing, prioritization to mitigate conflicts is still hardly debated. Silence benefits the powerful high impact users, who typically use much more water, at the expense of the poor. The Gini coefficient of the distribution of water resources can be as high as 0.96 (as found in South Africa by Cullis and Van Koppen 2007). For example, when a powerful mine draws groundwater with deepest boreholes, this may dry up all shallow wells that provide water for domestic and basic productive uses. Or streams run dry by upstream large-scale corporate farming, even affecting the tiny volumes needed for domestic uses downstream.

FAO (FAO 2020; RRI/ELI 2020) is addressing this issue by recognizing customary water tenure, making visible how, since time immemorial, rural communities have managed their various surface and groundwater sources flowing over and under their territories, especially by investing in water infrastructure for self supply for domestic uses, livestock and plots. By now, both the WASH and irrigation sectors recognize the wide spread and importance of self supply (Sutton 2021; Izzi et al 2021). With 60% of land customarily governed in Sub Saharan Africa, customary water tenure is a key in indigenous peoples’ rights. Water law tends to ignore customary water tenure since colonial times (Van Koppen and Schreiner 2018). Other legislation (constitutions, indigenous peoples’ rights, land rights etc) often better recognize and protect customary water tenure than water law (RRI/ELI 2020).

It is still an unanswered question whether states should also be duty bearers to universally support the *infrastructure* for such productive uses – in the same way as the human right to drinking water is a right to both the infrastructure and, implicitly, the water resources that flow into that infrastructure. Although General Comment 15 highlight this importance, the question is a bit more complicated: not everyone takes up water for productive uses as in the case of universal domestic uses. Moreover, productive uses vary (livestock, irrigation, forestry, small-scale enterprise, combinations, etc). Also, there is a clear duty bearer for domestic water uses: municipalities/local government. State responsibilities with regard to productive water uses are less clearly institutionalized in, e.g. departments of agriculture, social affairs, etc. Nevertheless, in practice, support to infrastructure for self supply is increasing up, for example by introduction and training of women and men for affordable technologies (pumps, pipes, tanks, water filters etc), exchange, financing facilities, linking with markets etc. Such support can certainly be promoted, but it is probably too soon and complex to operationalize that already today. Recognition and respecting that people anyhow also already develop their own infrastructure (or use water directly from the flows), is a first, evident step a) for states as public trustees to ensure equitable distribution of water resources that prioritize all water uses of General Comment 15 and b) in collaboration with FAO to elaborate the recognition of customary water tenure.

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