



# Focus: Right to Water and Sanitation

*“Deeply concerned that approximately 884 million people lack access to improved water resources and that more than 2.6 billion people do not have access to improved sanitation (...), (the UN Human Rights Council) urges development partners to adopt a human rights-based approach when designing and implementing development programmes in support of national initiatives and plans of action related to the right to safe drinking water and sanitation.”*

UN Human Rights Council, The human right to safe drinking water and sanitation, 12 October 2011, A/HRC/RES/18/1, preamble and par. 9.

## Summary

In recent years, many resolutions have been adopted by the General Assembly and the Human Rights Council of the United Nations (UN) that among other things *explicitly* recognise the right to water and sanitation as a human right and call on donors to apply the human rights-based approach when carrying out projects in the water sector. The right to water is not new, however. Drawing inferences from other human rights, such as the right to an adequate standard of living and the right to health, the UN Committee on Economic, Social and Cultural Rights set out in its General Comment No. 15 of 2002 what rights and duties derive from the right to water. Based on these and similar documents and in keeping with the human rights-based approach, the right to water and sanitation has also been established in Austrian Development Cooperation (ADC) since it issued its policy document on water in 2008.

The right to water and sanitation influences the work of Austrian Development Cooperation in the water sector because ADC supports the target population as rights holders and the partner organisations (ministries, local authorities, etc.) as duty bearers. The right also entails core obligations for states that the partner countries are often unable to meet alone. This also places obligations on donors and non-governmental actors.

## Introduction

As the quality and availability of water is very important for personal, individual and public health and for the economic development of human society, legal regulations are essential for its protection. This is also apparent from the long history of legal norms in the water sector. Water law is regarded as one of the very first forms of legislation, because as soon as people began to settle and engage in crop and livestock farming, there was a major need to regulate access to water and its distribution.

The best known example of early lawmaking is the Code of Hammurabi,<sup>1</sup> which besides comprehensive legal provisions also contains standards for the maintenance of irrigation facilities. In ancient Greece, access to water, wells and other sources of drinking water was regulated and although the Napoleonic Code protected private property it acknowledged the need for all people to have access to drinking water to meet their basic needs.

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<sup>1</sup> The Code of Hammurabi is a body of laws enacted by King Hammurabi of Babylon (1810-1750 B.C.) and is regarded as one of the oldest and best preserved Mesopotamian sets of laws in the world.



Today, water law mostly regulates the protection of water in natural water cycle, rights of use and the safeguarding of entitlements and water needs of the general population.

From a human rights perspective, the right to water derives directly from other human rights. In general, human rights define minimum standards and rules of procedure that those in power (mostly state bodies, such as governments or police but also increasingly non-governmental actors, such as commercial enterprises) must abide by in their treatment of people, particularly within their own national borders.

## Is the right to water legally binding?

In its General Comment No. 15: The Right to Water (2002), the Committee on Economic, Social and Cultural Rights<sup>2</sup> specified the right to water and explicitly recognised it as a human right. Previously, it had already been expressly enshrined in international human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (Article 14 par. 2), in the Convention on the Rights of the Child (Article 24 par. 2) and also in regional human rights treaties, such as the African Charter on the Rights and Welfare of the Child (1990) and/or in international humanitarian law, such as in the Geneva Convention (IV) relative to the Protection of Civilian Persons in Times of War (e.g. Article 85).

Under General Comment No. 15, the right to water **derives** in particular **from the human rights** to an adequate standard of living (Article 11 of the Covenant), health (Article 12 of the Covenant) and life (Article 6 of the International Covenant on Civil and Political Rights), as it is essential for the implementation of these and other human rights (e.g. the right to food or education). Therefore, and in accordance with the human rights-based approach, the right to water was already anchored in the ADC water policy document in 2008.

The adoption of the resolutions of the UN General Assembly (2010)<sup>3</sup> and the UN Human Rights Council on the right to water and sanitation (2010 and 2011) emphasised the legal recognition as human **right** and confirmed and recognised its basis in other human rights. It has often been asserted that this definitively settled the question of whether the right to water is **legally binding**. As these resolutions are not, however, binding under international law as such - they can only contribute to establishing international customary law and thus come to have binding effect under certain circumstances - and general comments of the Committee on Economic, Social and Cultural Rights do not as such carry legal force, the dispute over the legally binding nature of the right to water has still not been fully settled.

The resolutions nevertheless constitutes a strong policy commitment to the right to water. This is also embodied in many national laws (also in some constitutions) and is increasingly enforced by national courts, although to differing extents. Regional and international bodies have also often affirmed the existence of the right to water and the General Comment of the Committee on Economic, Social and Cultural Rights is seen as a robust, authoritative framework for the interpretation of the provisions of the Covenant. Altogether then, both the existence and the **legally binding force** of the right to water has been emphasised and/or confirmed by many international legal experts.

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<sup>2</sup> The Committee on Economic, Social and Cultural Rights is in charge of implementing the International Covenant on Economic, Social and Cultural Rights (Covenant)- G.A. Res. 2200 A (XXI). The Covenant was adopted by the UN General Assembly in 1966 and presently includes (as at April 2012) 160 states parties. Compliance with the Covenant is ensured by the Committee on Economic, Social and Cultural rights appointed by the Economic and Social Council (ECOSOC) in 1985.

<sup>3</sup> A/RES/64/292. Of the 163 countries attendant in New York, 41 abstained from voting, including Australia, Botswana, the United Kingdom, Canada, Austria, the USA and another 16 EU states. The abstentions thus largely came from industrialised nations, while almost all developing countries approved the resolution. Austria and the USA justified their abstention with the argument that the consequences and possible obligations arising from the human right to water were in need of clarification. The compendium of best practices compiled by the Special Rapporteur on the human right to safe drinking water and sanitation for the 18th meeting of the Human Rights Council (in 2011) (A/HRC/18/33/ Add.1.) then clarified major areas, so that Austria was able to agree to Resolution A/HRC/RES/18/1.



## Who are the right holders and duty bearers of the right to water?

**Right holders** of the right to water are persons who are under the sovereign power of a state party<sup>4</sup> of the Covenant and/or persons located in territories where it wields territorial jurisdiction. This also includes occupied areas, such as the Palestinian Territories occupied by Israel, which are a priority of Austrian Development Cooperation.<sup>5</sup>

**Duty bearers** are primarily states but also in part the international community and - at least indirectly - private institutions. As with all other human rights, duty bearers must **respect, protect and fulfil** the right to water.

- **States:** States must **respect** the right to water. This means they may not breach the rights of individuals guaranteed under the right to water either directly or indirectly. States must **protect** the right to water by safeguarding individuals against interventions by third parties, particularly if they delegate water supply to third parties or private enterprises. States must **fulfil** the right to water. This means they must take various measures that contribute to the effective implementation of the right to water. As for lack of resources, for example, it is often not possible to implement the right to water immediately but only gradually, states are obliged to **take all possible measures** to ensure the right to water for all, particularly for unserved or underserved people. In any case, they must meet the core obligations of the right to water (see page 4f.).
- **International community/donors:** All states are obliged to respect the right to water of other states. Accordingly, they must, for example, refrain from imposing embargos or similar measures and **prevent their own or commissioned enterprises/individuals to infringe the right to water in other states**. As far their own resources allow, they must also provide **financial and technical assistance** to implement (fulfil) the right to water in other states. Developed countries have a special obligation here and are required by the UN Human Rights Council to apply the human rights-based approach in development cooperation (DC). In addition, states must ensure that account is taken of the right to water in international (trade) agreements and exert their influence in international financial institutions in favour of respect for the right to water.
- **Private/Non-governmental actors:** Private sector stakeholders engaged in the water sector are obliged to exercise **due diligence** so as not to actively commit or contribute to (complicity) violations of human rights. Private companies must also conduct their activities in a non-discriminatory and transparent way and effective mechanisms of accountability must be in place.

## What are the entitlements/obligations of the right to water?

**Contents of the right to water:** General Comment No. 15 has identified the following main components of the right to water:

- **Availability:** To secure human dignity, livelihood and health, a minimum amount of water must be available and meet the requirements of drinking water supply and personal and household hygiene (the World Health Organisation (WHO) sets 20 litres per day per person as an absolute minimum.).
- **Quality/Safety:** Water must be of sufficient quality and/or meet the quality criteria of WHO (including absence of pathogens).
- **Accessibility:** Everyone must have secure access to water and sanitation. This entails physical access as well as safety, the protection of privacy, particularly in the use of sanitary facilities or

<sup>4</sup> Besides Austria, the states parties to the Covenant include the ADC priority countries Ethiopia, Albania, Armenia, Burkina Faso, Georgia, Moldova, Nicaragua, Serbia and Uganda as well as Israel, which is relevant for the ADC priority, the Palestinian Territories. The ADC priority countries Bhutan and Mozambique have not yet ratified.

<sup>5</sup> Even though Israel has always rejected the application of the Covenant (and other human rights treaties) to the occupied areas, this has also always been refuted by relevant UN bodies and legal experts (on this, see only the comments by Amnesty International 2009: 90 ff.). The Committee on Economic, Social and Cultural Rights has stressed, for example, that the obligations of states under the Covenant apply wherever the state exerts effective control over populations and territories (UN Committee on Economic, Social and Cultural Rights 2003a: paras. 31 and 15). International humanitarian law also places obligations on Israel. Article 27 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, for example, requires Israel to refrain from discrimination or treat all people equally. It is also obliged under Article 55 to guarantee food and medical care, foodstuffs and sanitary facilities or the like as well as access to water in the occupied territories, even if the requisite resources are insufficient in these areas.



taking account of cultural and gender aspects. Physical access means in or in immediate proximity to every household, workplace or each educational institution or, if this is not possible, at a distance of approx. 20 minutes on foot or less than a kilometre away. Access to relevant information on the right to water also belongs to this category.

- **Economic accessibility/Affordability:** Water must be affordable for all, particularly for poor, disadvantaged and vulnerable groups. Expenditure on water must not be so high as to preclude the purchase of other vital goods. As a standard, the costs of water supply and sanitation should not exceed five per cent of available household income.
- **Non-discrimination:** Water and water facilities must be affordable, accessible and available at adequate quality **for all**, particularly for poor, disadvantaged and vulnerable groups. No discrimination is ever allowed and cannot be justified with lack of resources. Transparency and access to information are particularly important.

Common myths around entitlements/obligations of the right to water

Wrong	Right
A state automatically infringes the right to water <b>if any citizens on its territory lack access to water and sanitation.</b>	A state infringes the right to water if it takes no specific steps within its means to implement the right to water and sanitation for all, particularly, however, for unserved or underserved people.
The right to water obliges states to provide water <b>free of charge.</b>	Free provision is only obligatory in exceptional cases, if due to factors beyond their control individuals are no longer able to meet their water needs (e.g. in refugee shelters, detention centres).
The right to water obliges states to supply water themselves, etc.	<b>Delegation</b> of tasks in the water sector and/or <b>privatisation</b> are consistent with the right to water. States must, however, provide for an adequate framework so that third parties can contribute to implementing the right to water and do not infringe it (e.g. through regulations, laws, monitoring of regulations and the creation of complaints mechanisms, etc.).
The right to water entitles citizens of a country to demand water resources from other countries.	Citizens of a country cannot demand/lay claim to access water from other countries or the like. Under international customary law, however, transboundary watercourses must be jointly used/shared in an equitable and adequate way, taking account of basic human needs. <sup>6</sup>

Source: following BMZ 2010: 10 and COHRE 2008: 14, 162.

**Core obligations** comprise all those requirements of states to enable the individual to satisfy his/her minimum basic needs. **If states do not meet these obligations**, they must give an **assurance** that they have made *every* effort and have used *all* of the resources available to them to meet the minimum requirements or that the reason is **shortage of resources and not unwillingness**. The core obligations are:

- Non-discriminatory access to water facilities and a minimum quantity of water of sufficient quality for personal and household use, particularly for disadvantaged and vulnerable groups
- Availability in adequate quality and quantity and regular physical access to water supply facilities with a sufficient number of water outlets at an adequate distance from households

<sup>6</sup> Regulated in more detail in the UN Convention on the Law of the Non-Navigational Use of International Water Courses currently in process of ratification by Austria (<http://untreaty.un.org/cod/avl/ha/clnuiw/clnuiw.html>), whose provisions (at least COHRE 2008: 162) reflect the present state of international customary law on international watercourses; see also Dellapenna 2001; International Court of Justice 1997: par. 78



- Guaranteed personal security in access to water
- Securing the equitable/balanced distribution of water facilities and supply systems
- Adoption of a water strategy/plan of action that contains verifiable indicators and benchmarks as well as their regular monitoring in transparent and participatory procedures
- Supervision of the implementation of the right to water and/or water supply
- Conducting water programmes at minimum cost for the protection of disadvantaged and vulnerable groups (low-cost targeted water programmes)
- Prevention, treatment and control of diseases due to poor quality or insufficient quantity of water and ensuring access to sanitary facilities (private or public facilities for faeces disposal)

## Is the right to water legally enforceable?

Although disputed for a long time the **right to water is increasingly enforceable**. However its enforceability still varies from state to state. This is of special importance particularly for individuals who see their right to water breached and above all also for civic organisations engaged in the water sector. At international level, after entry into force of the relevant Protocol<sup>7</sup> and provided that national legal remedies have been exhausted, the Committee on Economic, Social and Cultural Rights will be able to admit and consider complaints from individuals and groups about infringements of the right to water and issue recommendations. As the right to water has been legally recognized as a human right by relevant executive bodies of human rights treaties and implicitly also in other human rights treaties, complaints can also be submitted to committees that oversee these treaties (e.g. UN Human Rights Committee). International bodies can, however, only make legally non-binding recommendations and only be convened after the national remedies have been exhausted. Recourse can be made to national courts, depending on state (particularly in countries where the right to water is embodied in the constitution).

## What does the right to water mean for ADC?

Generally, human rights exert a powerful normative influence that can lead at national level to changes and/or guarantees in certain areas, for example through the anchoring of international human rights at the national legislative level. By virtue of its close connection with other human rights, the right to water and sanitation is also very important for many areas of life and/or for the implementation of a variety of human rights. The implementation of the right to water, for example, is essential for one of the most central human rights, that is, the right to life. Water is also needed for the production of food (right to food) but also for ensuring a hygienic environment (right to health) or securing a livelihood (right to work). It is also essential for certain cultural and religious practices (right to freedom of religion and right to take part in cultural life), etc. The human rights implications therefore go well beyond the framework specified by the right to water and thus have far-reaching implications for ADC.

For ADC (see also SDC 2008: 3, 9f.) generally, the right to water means that in accordance with the basic principles of the human rights-based approach

- the international human rights treaties and their interpretation and relevant national legislation on the right to water should be taken as a reference for the implementation of programmes, projects and other measures as well as policy dialogue;
- measures in the water sector are compatible with international standards (at least the core obligations) on the right to water and these should also be applied for preparing strategies or laws;
- right holders must be strengthened in their rights (for example, through raising awareness, legal advice, access to information, participation in decision-making processes) and duty bearers should be assisted in and/or sensitised about complying with their obligations (e.g. information to states on the value added of the right to water and/or reminder of the obligation to realize the right to water under international law; promoting transparency, including calls to tender, support and strengthening of capacities – including transfer of know-how – in establishing effective accountability mechanisms or non-discriminatory regulations and measures).

<sup>7</sup> At present (as at August 2012), this has, however, only been ratified by eight states (Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Slovakia and Spain). A total of ten states must ratify for it to enter force.



**In practice**, for ADC this also means that

- in water supply account must be taken of the needs and priorities of poor, disadvantaged and vulnerable groups, particularly of minorities, children, women and persons with disabilities (in privatisation, for instance, there is a need to ensure that the state takes measures and establishes regulations to ensure that all geographical areas or sections of the population are supplied and/or that tariffs are regulated so that water is affordable for as many as possible);
- precedence must be given to the personal use of water and sanitary installations for the satisfaction of basic human needs over the intensive agricultural or industrial use;
- human rights impact assessments and monitoring are carried out in accordance with the principles of the right to water (quality/safety, affordability, accessibility, etc.) and that project/programme indicators are aligned with these principles and/or contribute to their implementation;
- tariffs for water and sanitation services are regulated in a way to ensure affordability for all user groups and that also enable the commercially sustainable operation and maintenance of infrastructure facilities. This can, for example, be effected through progressive tariffs charging higher unit rates for higher private water consumption. At the same time, however, there is also a need for reasonable and non-discriminatory subsidies or other measures (such as cash transfers or safety nets) for very poor, disadvantaged and vulnerable groups;
- infrastructure investments should abide at least by the core obligations. This implies that investment capital should be allocated in keeping with the principle of ‘some for all’ instead of ‘all for some’ to reach as many people as possible, primarily poor, underprivileged and vulnerable groups through cost-efficient infrastructure facilities;
- investments are made in services that particularly serve people with no or insufficient access to water;
- procedures in the water sector are transparent (including access to information) and are carried out in a participatory way, also to guard against the danger of corruption;
- states are supported in their legislative capability and/or codifying the right to water and sanitation in effective laws and other regulations and their implementation;
- governments lacking political will are reminded of their obligations under international law to implement the right to water and civil society is strengthened to demand these;
- governments in developing countries are not put under pressure to privatise, through donor conditionalities for example; in any case, the decision to privatise water supply and/or delegate it to third parties must be taken in a transparent and democratic way and in consideration of local conditions;
- also in the case of delegated service delivery,<sup>8</sup> the state must be obliged to pass and implement laws that enforce compliance with the principles of the right to water and sanitation;
- in the case of delegated service delivery enterprises are reminded of their obligation to exercise due diligence in their activities and are advised on this (also in accordance with, for example, with the UN Global Compact or the OECD Guidelines for Multinational Enterprises) to prevent possible complicity in breaching human rights (by refraining from concluding contracts that can result in human rights violations, for instance). Particularly in the case of delegated service delivery, transparent and participatory procedures should be required.

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<sup>8</sup> Besides providing the corresponding services themselves, states can also assign service delivery to third parties, mostly non-governmental actors, usually larger, private transnational enterprises but also smaller local businesses, non-governmental organisations or community-based organisations. This task can, however, also be entrusted to state-owned enterprises. For more details, see UN Independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation: 2010a.



## VI. Useful links

### ADC

- ADA/Ludwig Boltzmann Institute of Human Rights (2010). Human Rights Manual, [http://www.entwicklung.at/uploads/media/HUMAN\\_RIGHTS\\_Manual\\_July\\_2010\\_01.pdf](http://www.entwicklung.at/uploads/media/HUMAN_RIGHTS_Manual_July_2010_01.pdf).
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- UN Committee on Economic, Social and Cultural Rights (2003). Concluding Observations, Israel, 5-23 May 2003 (E/C.12/1/Add.90), [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/b313a3503107f1e6c1256d33002cea38?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/b313a3503107f1e6c1256d33002cea38?Opendocument).
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### **Non-governmental organisations/Other sources**

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- Article 31: <http://article31.org/>.
- Blue Planet Project – Right to Water: <http://www.blueplanetproject.net/RightToWater/>.
- Centre on Housing Rights and Evictions (COHRE) – Water and sanitation: <http://www.cohre.org/topics/water-and-sanitation>.
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