

Submission Note to the *Office of the United Nations High Commissioner for Human Rights*

First of all, thank you. We appreciate that the *Office of the United Nations High Commissioner for Human Rights*, has sought input from interested stakeholders in conducting the detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.

The Purpose of this submission is three fold:

1. To draw your attention to the use of the concept 'affordability' in the context of human rights, to question its validity in the specific context of human right to water, and to suggest an alternative.
2. To highlight the importance of recognizing that a large majority of water poor live in rural areas and that meeting their 'right to water' entails ensuring that water is available for healthy ecosystems maintenance.
3. To suggest that adopting a rights-based National Water Policy is a necessary precondition to ensure that 'development' efforts through international, national and regional policies and/or trade and investment agreements do not violate the human right to water.

1. Human Right to Water and the Question of Affordability:

A note in response to the references to 'affordability' in the Sub-Commissions Guidelines for the Realization of the right to drinking water and sanitation, by Report of the Special Rapporteur, El Hadji Guissé (August 2006)ⁱ and General Comment on Right to Waterⁱⁱ.

This note appreciates the guidelines, in particular those for '**Preventing discrimination and addressing the needs of vulnerable or marginalized groups**' and '**State actions to implement the right to water and sanitation**'. Particularly noteworthy is 2.3dⁱⁱⁱ. Given that the author had to work within the concept of affordability already articulated in general comments, the guidelines on **Affordability** are commendable too, especially 6.4.^{iv}

However here I wish to question the relevance of the concept of affordability in the context of human right to water (first articulated in the General comments on right to water). I also wish to examine the ideological origins of it in the context of UN Committee on Economic, Social and Cultural Rights.

In examining the records, and documents of the [Office of the High Commissioner for Human Rights \(OHCHR\)](#), between 1990 and 2007, I became aware that the term affordability began appearing as a positive term especially since early 2001.

One can find a handful of references to affordability in the OHCHR documents prior to 2000. Some of them primarily asked questions such as 'whether economic affordability was a collective social responsibility'^v and 'Is there a national definition of “affordability” of housing (e.g. a maximum of one-third of any household income be required to obtain adequate housing)? How does un-affordability of housing contribute to women’s vulnerability?’^{vi}

They also include references to state obligations/ measures taken 'to harmonise national law and policy' with the provisions of the U.N. Convention on the Rights of the Child. 'Federal child care legislation should establish key principles for federally funded children’s services - accessibility, affordability and equity.'^{vii} There is also a reference in the context of housing: 'Legislation concerning the rights of tenants to security of tenure, to protection from eviction; to housing finance and rental control (or subsidy), housing affordability, etc.'^{viii}

These references indicate the discomfort with which the term affordability was used in the context of human rights discourse at the time.

II

But a different understanding of affordability emerges from around 2001. One major articulation of this understanding is in a paper written in early 2001, by Alfredo Sfeir-Younis (World Bank’s institutional focal point on human rights and economic development, and its Special Representative to the United Nations and The World Trade Organization, Geneva). The paper frames the issue of affordability as 'central to others [development themes] such as mainstreaming, and universality in the application of rights'.^{ix} This paper recognizes that there are people who argue 'that everyone needs to have access to a minimum level of education, health or ecological welfare independently of the beneficiary’s level of income' but dismisses it as a claim by people who do not understand how trade-offs work in a resource poor situation.

Note that this paper was 'written **for the sole purpose** of contributing to an internal discussion within the Committee on Economic, Social and Cultural Rights.' The author reminds his audience at the Committee: '*It is easy to answer no, and leave the question of hierarchy, progressivity, trade-offs and affordability on the side. However, as a matter of fact, because the “train is moving” and the state of play is such that rights are being violated, the attainment of rights in practice must somehow focus on the availability of resources and how best to allocate these resources among competing uses*'.

In another intervention, in the context of a Debate On Right to Development (on Poverty, Debt Burdens, Widening Gap Between Rich and Poor), earlier in the year Mr.

Alfredo Sfeir-Younis said: *'While the right to development would be the milieu through which societies defined the "desirable", economic and financial forces tended to define the "possible." Thus, the Bank's emphasis on trade-offs, affordability and universality, and the importance of incorporating the role of the private sector into the debate.'*^x In fact this is one of the first references that argue for the concept of affordability (and role of private sector) to be central to the discussions on rights and treats them at par with universality.

Most of the documents of the Office of the High Commissioner for Human Rights (OHCHR), that refer to affordability have been dated post mid 2001.

III.

This use of the concept 'affordability' is framed by an idea of **progressivity**, as the quote above indicates. 'Progressivity' assumes that economic, social and cultural rights are not as important as civil and political rights. It ignores 'the indivisibility and interdependence of civil and political rights and economic, social and cultural rights are fundamental tenets of international human rights law.'^{xi}

The World Conference on Human Rights (1993) acknowledges that there is a common perception that economic, social and cultural rights, are 'only to be fulfilled progressively over time', but does not endorse this perception. In fact Vienna Declaration reminds us that even though 'Economic, social and cultural rights are often viewed as effectively "second-class rights"-unenforceable, non-justiciable, only to be fulfilled "**progressively**" over time', 'such perspectives, however, overlook a postulate of the global human rights system formulated as long ago as 1948 with the adoption of the Universal Declaration of Human Rights.'^{xii}

All the credit for this increased emphasis on affordability (economic accessibility) cannot be attributed to the role played by the World Bank's Special Representative to the UN and WTO, Geneva. However, its ideological origins may be attributed to the inputs by the Bank. These were bolstered by the lingering perception that economic, social and cultural rights are not as important as civil and political rights. This emphasis on progressivity is what makes it still possible for OHCHR to use the term affordability in the context of economic, social and cultural rights.

IV.

Affordability is generally defined as the ability to buy a particular commodity or to enjoy a specific standard of living, and may be relevant when it comes to a commodity. The concept of affordability is thus particularly applicable to commodities.

But is water primarily a commodity? Is it different from food, clothing, housing, the other '*component elements of an adequate standard of living*' (UN, 1956, pp. 216) that

were already recognised in Article 25 of the Universal Declaration of Human Rights, (UN General Assembly, 1948)?

In his article *'The Human Right to Water'* Peter Gleick argues that possibly, *'the framers of the UDHR considered water to be implicitly included as one of the "component elements" – as fundamental as air'* ^{xiii}

The distinguishing character of air and water is that they are fundamental to life. Every human, irrespective of race, gender, age, economic or social class, needs them for basic survival. Thus many argue (and we concur) that it is the responsibility of society to ensure that every human has access to clean water and air, irrespective of the ability or willingness to pay.

V

We acknowledge the socio-economic reality that human beings tend to waste resources if available free in excess of their basic needs, and that water is also an economic good. Consequently, we acknowledge that it is essential that people pay appropriate water tariffs if they need water in excess of what is determined by a particular society as *'necessary amount to meet basic survival needs.'* However we insist that this need to charge for water in excess of basic survival needs should not be allowed to obscure the underlying right to water.

Thus rather than the concept of affordability, we argue for the use of the concept 'responsibility' in the context of upholding human right to water. While priority must be given to satisfaction of basic needs, it is **essential that people share responsibility** for water use through increased awareness (and practice) of water conservation methods. In the context of water, responsibility and right are the twin sides of a coin, and upholding both is necessary to help meet the basic water needs of current and future generations.

2. Rights-Based Approach to Solving the Water Crisis^{xiv}: Need to Focus on Ecosystem protection.

I base my arguments for this section on 'A Rights-Based Approach to Solving the Water Crisis', one of the several documents on water that we brought out towards World Summit on Sustainable Development, 2002. (www.waterobservatory.org)

It argues that a discourse on right to water needs to include the specific right to 'safe, and adequate water for ecosystem protection' as an integral component of it. This is crucial even from a human-centric point of view, not only for ensuring right to water for future generations, and even more urgently to ensure that the basic water needs of a large majority of the 'water poor' in the world are met, and their right to water is upheld.

Arguing that a large majority of the world's water poor live in rural areas, the document stresses the importance of:

- Ensuring healthy ecosystems, upon which the great majority of the water poor directly depend to meet their water needs.
- Ensuring that the basic safe water flows are maintained.
- Ensuring that wetlands are maintained to act as flood plain buffers and filters.

It further says:

This calls for respecting the “fundamental rights of people and ecosystems to safe water.” Only if such a right is universally recognized and respected, can we ensure that “development efforts” through international, national and regional policies and trade and investment agreements contribute towards addressing the water crisis rather than exacerbating it. In practical terms this means:

- Internalization of social and environmental costs of water used in profit making enterprises, and application of the polluter pays principle, incentives and disincentives, for managing point and non-point sources [of pollution].
- Application of demand management and conjunctive use of water management in river basins for allocating available water and meeting basic needs in source areas – for people and for the ecosystem.
- Increase in water use efficiency especially in [irrigated] agriculture, which accounts for about 70% of water use, [and *contributes only 40 percent of total food production* (applied on about 20 percent of cropland)].
- Institutional support for community initiatives in water augmentation and management, [with special focus on rain-fed farming systems, as has been elaborated in a recent publication, *Water Crisis and Food Sovereignty from a Gender Perspective* at <http://www.waterobservatory.org>].
- Strengthening of public sector water utilities and regulatory authorities to ensure that public utilities function with efficiency and meet the public health standards.
- Application of a block tariff system, with the lowest block priced at zero to ensure that basic water [for domestic water supply and sanitation] is free for all, and [use of] cross subsidies to ensure that the long-term viability of the system is built in.
- Development of an international framework on freshwater that recognizes the fundamental human right to water to meet basic needs for people and for ecosystems [protection]; and that [ensures that] water is kept outside the purview of the WTO [and other trade agreements], and [that] strengthens existing treaties dealing with freshwater issues.

3. Need for a Rights-Based National Water Policy

Since water resource management is at a critical juncture today, a **Rights-Based National Water Policy** that makes 'a more all-encompassing reference to people's

general sense of equity, justice, entitlement and/or fairness' becomes especially important.^{xv} Many regions, and even some countries, are facing acute water shortages already. In the coming decades water related services will become increasingly important. The provision of these services will have to be planned and implemented at the local level, while many of them will be negotiated at regional, national or international levels. For example in the context of GATS (commitments that are irreversible once signed), it is critically important that target countries analyze the environmental (and specifically the water quality and quantity-related) implications of the commitments they are requested to make before making commitments in any sector, since it may affect the nations ability to uphold the right to water to its citizenry. Thus there is a need to develop strong national regulatory mechanisms under national water policies. (These arguments have been elaborated in our publication, GATS and Water.)^{xvi}

Such a Water Policy needs to both recognize anew *and prioritize* the rights of people to meet their basic water needs and to guarantee minimum safe water flows for ecosystem protection. Beyond these priorities, water users should be charged appropriately, as a key tool for demand management. Thank you.

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ⁱ Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-seventh session, Item 4 of the provisional agenda, 11 July 2005,

http://www.ohchr.org/english/issues/water/docs/SUB_Com_Guisse_guidelines.pdf

ⁱⁱ <http://daccessdds.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement>

ⁱⁱⁱ Refrain, and ensure that private persons and organizations refrain from interfering with the enjoyment of the right to water and sanitation or any other human rights, unless such interference is permitted by law and includes appropriate procedural protection. No one whose access to water and sanitation may be legally curtailed after the appropriate procedures have been followed should be deprived of the minimum essential amount of water or of minimum access to basic sanitation services.

^{iv} 6.1 States should ensure that they have appropriate water and sanitation pricing policies, including through flexible payment schemes and cross-subsidies from high-income users to low-income users.

6.2 States should subsidize water and sanitation services for low-income households and poor areas that lack the means to secure access to such services. Subsidies should normally be used for connection to distribution networks or for the construction and maintenance of small-scale water supply and sanitation facilities, such as wells, boreholes and latrines.

6.3 Where public resources cannot guarantee high-quality services for all, States should offer a range of services, including low-cost technology options, to promote affordable access for low-income households.

6.4 States should ensure, before a person's access to water and sanitation services is reduced owing to non-payment, that account is taken of that person's ability to pay. No one should be deprived of the minimum essential amount of water or access to basic sanitation facilities.

^v <http://www.unhchr.ch/tbs/doc.nsf/0/272e6bf0b7a5a8aac12569ba003a367e?OpenDocument>

^{vi} <http://www.ohchr.org/english/issues/housing/docs/questionnaireEn.doc>

^{vii} <http://www.unhchr.ch/tbs/doc.nsf/0/5d604215991f582e41256330004abb77?OpenDocument>

^{viii} [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1991.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1991.1.En?Opendocument)

^{ix} Committee on Economic, Social and Cultural Rights, Twenty-fifth session, Geneva, 23 April-11 May 2001, Item 5 of the provisional agenda,
[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e194857e0ab2cb57c1256a3f004a2415/\\$FILE/G0141054.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e194857e0ab2cb57c1256a3f004a2415/$FILE/G0141054.pdf)

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<http://www.unhchr.ch/hurricane/hurricane.nsf/0/77D1D8CCCEF9F75AC1256A1D0049584F?opendocument>

^{xi} Vienna Declaration and Programme of Action (Part 1, Para. 5), Adopted by the World Conference on Human Rights, Vienna, 25 June 1993; Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights, http://www.unhchr.ch/html/menu6/2/fs16.htm#*2

^{xii} *ibid.* Para 2.1,2.2; Fact Sheet No.16, at http://www.unhchr.ch/html/menu6/2/fs16.htm#*2

^{xiii} http://www.pacinst.org/reports/basic_water_needs/human_right_to_water.pdf

^{xiv} Rights-based approach, as used here refers to 'a more all-encompassing reference to people's general sense of equity, justice, entitlement and/or fairness' not just 'an attempt to integrate the norms, standards, and principles of the international human rights system into the plans, policies, and processes of development', Eyben (2003), quoted in Sangameswaran, Priya (2007), Review Of Right To Water: Human Rights, State Legislation, And Civil Society Initiatives In India, Centre for Interdisciplinary Studies in Environment & Development, Bangalore.

^{xv} *Ibid.*

^{xvi} <http://www.waterobservatory.org/library.cfm?refid=78807>