



he clouds. Nor would there be a drink bottled water.

ot wait for these changes to imple- water reuse technology industry and n this sector must clearly be geared narily, in countries or communities he only safe water to drink, govern- tling industry, insisting that it be publicly controlled, and the bottles nd goal, however, must be to do away ter everywhere.

The Right to Water: An Idea Whose Time Has Come

Finally, the global water justice movement is demanding a change in international law to settle once and for all the question of who controls water. It must be commonly understood that water is not a commercial good, although of course it has an economic dimension, but rather a human right and a public trust. What is needed now is binding law to codify that states have the obligation to deliver sufficient, safe, accessible and affordable water to their citizens as a public service. While “water for all, everywhere and always” may appear to be self-evident, the fact is that the powers moving in to take corporate control of water have resisted this notion fiercely. So have many governments, either because, in the case of rich governments, their corporations benefit from the commodification of water or, in the case of poor governments, because they fear they would not be able to honor this commitment. So groups around the world are mobilizing in their communities and countries for constitutional recognition of the right to water within their borders and at the United Nations for a full treaty that recognizes the right to water internationally. (The terms *covenant*, *treaty* and *convention* are used interchangeably at the UN.)

Rosmarie Bar of Switzerland’s Alliance Sud explains that behind the call for a binding convention or covenant are questions

of principle. Is access to water a human right or just a need? Is water a common good like air or a commodity like Coca-Cola? Who is being given the right or the power to turn the tap on or off – people, governments or the invisible hand of the market? Who sets the price for a poor district in Manila or La Paz – the locally elected water board or the CEO of Suez? The global water crisis cries out for good governance, says Bar, and good governance needs binding, legal bases that rest on universally applicable human rights. A UN covenant would set the framework for water as a social and cultural asset, not an economic commodity. As well, it would establish the indispensable legal groundwork for a just system of distribution. It would serve as a common, coherent body of rules for all nations, rich and poor, and clarify that it is the role of the state to provide clean, affordable water to all of its citizens. Such a covenant would also safeguard already accepted human rights and environmental principles in other treaties and conventions.

Michigan lawyer Jim Olson, who has been deeply involved in the fight against Nestlé, says the point must be “repeated and repeated” that privatization of water is simply incompatible with the nature of water as a commons and therefore, with fundamental human rights. “Water is always moving unless there is human intervention. Intervention is the right to use, not own and privatize to the exclusion of others who enjoy equal access to use water. It is important to distinguish between sovereign ownership and control of water, enjoyed by states or nations through which water flows or moves, and private ownership. Sovereign state ownership is not the same and has to do with control and use of water for the public welfare, health and safety, not for private profit.” If on the other hand, says Olson, the state sides with the World Bank and negotiates private rights to its water with corporations, that state has violated the rights of its citizens who would have redress under the principle of human rights if the covenant is well crafted.

A human rights convention or covenant imposes three obligations on states: the Obligation to Respect, whereby the state

must refrain from any action or policy that interferes with the enjoyment of the human right; the Obligation to Protect, whereby the state is obliged to prevent third parties from interfering with the enjoyment of the human right; and the Obligation to Fulfill, whereby the state is required to adopt any additional measures directed toward the realization of that right. The Obligation to Protect would oblige governments to adopt measures restraining corporations from denying equal access to water (in itself an incentive for water companies to leave) as well as polluting water sources or unsustainably extracting water resources.

At a practical level, a right-to-water covenant would give citizens a tool to hold their governments accountable in their domestic courts and the “court” of public opinion, and for seeking international redress. Says the World Conservation Union, “Human rights are formulated in terms of individuals, not in terms of rights and obligations of states vis-à-vis other states as international law provisions generally do. Thus by making water a human right, it could not be taken away from the people. Through a rights-based approach, victims of water pollution and people deprived of necessary water for meeting their basic needs are provided with access to remedies. In contrast to other systems of international law, the human rights system affords access to individuals and NGOs.”

The union also states that a right-to-water covenant would make both state obligations and violations more visible to citizens. Within a year of ratification, states would be expected to put in place a plan of action, with targets, policies, indicators and timeframes to achieve the realization of this right. As well, states would have to amend domestic law to comply with the new rights. In some cases, this will include constitutional amendments. Some form of monitoring of the new rights would also be established and the needs of marginalized groups such as women and indigenous peoples would be particularly addressed.

A covenant would also include specific principles to ensure civil society involvement to convert the UN convention into national law and national action plans. This would give citizens

an additional constitutional tool in their fight for water. As stated in a 2003 manifesto on the right to water by Friends of the Earth Paraguay, “An inseparable part of the right is control and sovereignty of local communities over their natural heritage and therefore over the management of their sources of water and over the use of the territories producing this water, the watersheds and aquifer recharge areas.” A right-to-water covenant would also set principles and priorities for water use in a world destroying its water heritage. The covenant we envisage would include language to protect water rights for the Earth and other species and would address the urgent need for reclamation of polluted waters and an end to practices destructive of the world’s water sources. As Friends of the Earth Paraguay put it, “The very mention of this supposed conflict, water for human use versus water for nature, reflects a lack of consciousness of the essential fact that the very existence of water depends on the sustainable management and conservation of ecosystems.”

Progress at the United Nations

Water was not included in the 1947 United Nations Universal Declaration of Human Rights because at that time water was not perceived to have a human rights dimension. The fact that water is not now an enforceable human right has allowed decision-making over water policy to shift from the UN and governments toward institutions and organizations that favor the private water companies and the commodification of water such as the World Bank, the World Water Council and the World Trade Organization. However, for more than a decade, calls have been made at various levels of the United Nations for a right-to-water convention. Civil society groups argued that, because the operations of the water companies had gone global and were being backed by global financial institutions, nation-state instruments to deal with water rights were no longer sufficient to protect citizens. International laws were needed, we argued, to control the global reach of the water barons. We also noted that at the 1990 Rio Earth Summit, the key areas of water, climate

change, biodiversity and desertification were all targeted for action. Since then, all but water have resulted in a UN convention.

This lobbying started to pay off and the right to water was recognized in a number of important international UN resolutions and declarations. These include the 2000 General Assembly Resolution on the Right to Development; the 2004 Committee on Human Rights resolution on toxic wastes; and the May 2005 statement by the 116-member Non-Aligned Movement on the right to water for all. Most important is General Comment Number 15, adopted in 2002 by the UN Committee on Economic, Social and Cultural Rights, which recognized that the right to water is a prerequisite for realizing all other human rights and “indispensable for leading a life in dignity.” (A General Comment is an authoritative interpretation of a human rights treaty or convention by an independent committee of experts that has a mandate to provide states with an interpretation of the treaty or convention. In this case, the interpretation applies to the International Covenant on Economic, Social and Cultural Rights.) General Comment Number 15 is therefore an authoritative interpretation that water is a right and an important milestone on the road to a full binding UN convention.

But as John Scanlon, Angela Cassar and Noemi Nemes of the World Conservation Union point out in their 2004 legal briefing paper, *Water as a Human Right?* General Comment Number 15 is an interpretation, not a binding treaty or convention. To clearly bind the right to water in international law, a binding covenant is needed. So the pressure for a full covenant intensified. In early 2004, Danuta Sacher of Germany’s Bread for the World and Ashfaq Khalfan of the Right to Water program at the UN Center on Housing Rights and Evictions called a summit and a new international network called Friends of the Right to Water was born. The network set out to mobilize other water justice groups and national governments to join the campaign to strengthen the rights established in General Comment Number 15 and put in place the mechanisms to ensure implementation of the right to water through a covenant.

In November 2006, responding to a call from several countries, the newly formed UN Human Rights Council requested the Office of the High Commissioner for Human Rights to conduct a detailed study on the scope and content of the relevant human rights obligations related to access to water under international human rights instruments, and to include recommendations for future action. While the request does not specifically refer to a covenant, many see this process as having the potential to lead to one. In April 2007, Anil Naidoo of the Council of Canadians' Blue Planet Project, another founding member of Friends of the Right to Water, organized to present a letter of endorsement calling for a right-to-water covenant to UN Commissioner Madam Louise Arbour, signed by 176 groups from all over the world.

It has been essential to gain the support of governments in the global South, many of whom fear that their citizens could use a covenant against them if they are unable to immediately fulfill their new obligation. Proponents of a covenant emphasize that the application of a new human rights obligation is understood to be progressive. States without the power to implement the full right are not held accountable for not immediately delivering. What is required is the need to rapidly take minimal steps for implementation that will increase as capacity increases. But some governments are using their incapacity as an excuse to cover real priorities, such as funding the military rather than public services. A rights-based approach to development distinguishes between inability and unwillingness. As agreed at the 1993 UN World Conference on Human Rights, "While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights." A government that fails to ratify a right-to-water covenant should not try to hide behind capacity arguments.

Nor should relatively water-rich governments such as Canada hide behind a false fear (which Canada is doing) that they will be forced to share the actual water supplies within their territories. A human rights treaty is between a nation-state and its citizens. Recognition of the right to water in no way affects a

country's sovereign right to manage its own water resources. What will be expected of First World governments and their development agencies is adequate aid to help developing countries meet their goals and ensure that their aid, and that of the World Bank, is directed toward not-for-profit public water services.

Dueling Visions

While the global water justice movement is excited and encouraged by these developments, there is a growing concern that this process could be hijacked by the water corporations, some northern countries and the World Bank, and used to create a convention that would enshrine the inclusion of private sector players. There is now a widespread understanding that the right to water is an idea whose time has come and some who opposed it until very recently have decided to drop their opposition and help shape both the process and the end product in their image. The irony here is that this new scenario may just have arisen out of the very success of the global water justice movement's hard work. Until recently, the global institutions and the big water companies adamantly opposed a right to water convention. So did many European countries such as France, England and Germany, home to the big water companies. At the World Water Forums in The Hague and Kyoto, World Water Council members and governments refused civil society calls for a right-to-water convention and said that water is a human need, not a human right. These are not semantics: you cannot trade or sell a human right or deny it to someone on the basis of inability to pay.

At the Fourth World Water Forum in Mexico City, the ministerial declaration once again did not include the right to water. But the World Water Council did release a new report called *The Right to Water: From Conception to Implementation*, a bland restatement of many UN documents with almost no mention of the private sector (except to say that the right to water can be implemented in a "variety of ways") and with no reference to the public-private debate raging around it. While the report falls far short of recommending a convention on the right to water, the

first words of the foreword (written by Loïc Fauchon, president of the World Water Council and senior executive with Suez) capture the essence of the situation in which these corporations and the World Bank now find themselves: “The right to water is an element that is indissociable from human dignity. Who today, would dare say otherwise?” Who indeed?

The World Water Council is working with Green Cross International, an environmental education organization headed up by Mikhail Gorbachev, which has launched its own high-profile campaign for a UN convention on the right to water, and it is just the sort of convention that Loïc Fauchon could live with. Although the Green Cross draft convention admits that there is a problem with “excessive profits and speculative purposes” in the private exploitation of water, it nevertheless places the commercial and human right to water on an equal footing, sets the stage for private financing for water services, allows for the private management of water utilities and says that water systems should follow market rules. In a legal analysis of the Green Cross draft convention, Steven Shrybman, a Canadian trade expert and legal counsel to Canada’s Blue Planet Project, says it is “so seriously flawed as to represent a retreat from current international legal protection for the human right to water.” Yet Gorbachev defended his pro-corporate proposal in an interview with the *Financial Times* when he said that corporations are the “only institutions” with the intellectual and financial potential to solve the world’s water problems and that he is “prepared to work with them.”

The global water justice movement would never endorse a convention or covenant of this kind. In submissions to the High Commissioner, hundreds of groups have urged the United Nations to take a clear stand in favor of public ownership of water. For them, a covenant must explicitly describe water not only as a human right but also as a public trust. As well, a UN covenant on the right to water will have to address the two great shortcomings of existing human rights law if it is to be accepted by civil society. Those shortcomings are their failure to establish

meaningful enforcement mechanisms and the failure to bind international bodies.

In his submission to Madam Arbour, lawyer Steve Shrybman said that the most significant development in international law has not been taking place under the auspices of the United Nations, but rather, under the World Trade Organization and the thousands of bilateral investment treaties between governments that have codified corporate rights into international law. “Under these rules, water is regarded as a good, an investment and service, and as such, it is subject to binding disciplines that severely constrain the capacity of governments to establish or maintain policies, laws and practices needed to protect human rights, the environment or other non-commercial societal goals that may impede the private rights entrenched by these trade and investment agreements.”

Moreover, states Shrybman, these agreements have equipped corporations with powerful new tools in asserting proprietary rights over water with which the state cannot interfere. “The codification of such private rights creates an obvious and serious impediment to the realization of the human right to water.” Private tribunals operating under these treaties are now engaged in arbitrating conflicts between human rights norms and those of investment and trade law – a role they are ill-suited to serve. He goes on to challenge the High Commissioner to recognize the need to deal with this reality and warns that unless UN bodies are able to reassert their role as the fundamental arbiter of human rights, they risk becoming bystanders as private tribunals operating entirely outside the UN framework resolve key questions of human rights law. To be effective, the covenant must assert the primacy of the human right to water where there is a conflict with private and commercial interests. As well, this instrument must apply to other institutions beside states, most importantly, transnational corporations, the WTO and the World Bank.

Grassroots Take the Lead

Clearly, the stage has been set for another form of contest. Having been successful in forcing the United Nations to deal with the

right to water, the global water justice movement must now work hard to ensure it is the right kind of instrument. There are many good signs. While several important countries remain opposed to the right to water, most notably the United States, Canada, Australia and China, many more have come on board in recent years. The European Parliament adopted a resolution acknowledging the right to water in March 2006, and in November 2006, as a response to the 2006 UN Human Development Report on the world's water crisis, Great Britain reversed its opposition and recognized the right to water. As Ashfaq Khalfan of the Centre on Housing Rights and Evictions explains, most countries in one form or another have supported the notion of the right to water in various resolutions at the United Nations and can be counted on to do so again. The challenge is to get support for a covenant that will truly be able to deliver on the promise. This is where civil society groups can be so effective. In many countries, water justice groups are hard at work to convince their governments to support the right kind of tool.

But they are not waiting for the United Nations. Many are also working hard within their countries to assert the right of water for all through domestic legislative changes. On October 31, 2004, the citizens of Uruguay became the first in the world to vote for the right to water. Led by Adriana Marquisio and Maria Selva Ortiz of the National Commission for the Defence of Water and Life and Alberto Villarreal of Friends of the Earth Uruguay, the groups first had to obtain almost three hundred thousand signatures on a plebiscite (which they delivered to Parliament as a "human river"), in order to get a referendum placed on the ballot of the national election calling for a constitutional amendment on the right to water. They won the vote by an almost two-thirds majority, an extraordinary feat considering the fear-mongering that opponents mounted. The language of the amendment is very important. Not only is water now a fundamental human right in Uruguay, but also social considerations must now take precedence over economic considerations when the government makes water policy. As well, the constitution now

reflects that “the public service of water supply for human consumption will be served exclusively and directly by state legal persons” that is to say, not by corporations.

Several other countries have also passed right-to-water legislation. When apartheid was defeated in South Africa, Nelson Mandela created a new constitution that defined water as a human right. However, the amendment was silent on the issue of delivery and soon after, the World Bank convinced the new government to privatize many of its water services. Several other developing countries such as Ecuador, Ethiopia and Kenya also have references in their constitutions that describe water as a human right, but they, too, do not specify the need for public delivery. The Belgium Parliament passed a resolution in April 2005 seeking a constitutional amendment to recognize water as a human right, and in September 2006, the French Senate adopted an amendment to its water bill that says that each person has the right to access to clean water. But neither country makes reference to delivery. The only other country besides Uruguay to specify in its constitution that water must be publicly delivered is Netherlands, which passed a law in 2003 restricting the delivery of drinking water to utilities that are entirely public. But Netherlands did not affirm the right to water in this amendment. Only the Uruguayan constitutional amendment guarantees both the right to water and the need to deliver it publicly and is therefore, a model for other countries. Suez was forced to leave the country as a direct result of this amendment.

Other exciting initiatives are underway. In August 2006, the Indian Supreme Court ruled that protection of natural lakes and ponds is akin to honoring the right to life – the most fundamental right of all according to the court. Activists in Nepal are going before their Supreme Court arguing that the right to health guaranteed in the country’s constitution must include the right to water. The Coalition in Defense of Public Water in Ecuador is celebrating its victory over the privatization of its water by demanding that the government take the next step and amend the constitution to recognize the right to water. The Coalition

Against Water Privatization in South Africa is challenging the practice of water metering before the Johannesburg High Court on the basis that it violates the human rights of Soweto's citizens. President Evo Morales of Bolivia has called for a "South American convention for human rights and access for all living beings to water" that would reject the market model imposed in trade agreements. At least a dozen countries have reacted positively to this call. Civil society groups are hard at work in many other countries to introduce constitutional amendments similar to that of Uruguay. Ecofondo, a network of sixty groups in Colombia, has launched a plebiscite toward a constitutional amendment similar to the Uruguayan amendment. They need at least one and a half million signatures and face several court cases and a dangerous and hostile opposition. Dozens of groups in Mexico have joined COMDA, the Coalition of Mexican Organizations for the Right to Water, in a national campaign for a Uruguayan-type constitutional guarantee to the right to water.

A large network of human rights, development, faith-based, labor and environmental groups in Canada has formed Canadian Friends of the Right to Water, led by the Blue Planet Project, to get the Canadian government to change its opposition to a UN covenant on the right to water. A network in the United States led by Food and Water Watch is calling for both a national water trust to ensure safekeeping of the nation's water assets and a change of government policy on the right to water. Riccardo Petrella has led a movement in Italy to recognize the right to water, which has great support among politicians at every level. Momentum is growing everywhere for a right whose time has come.



This, then, is the task: nothing less than reclaiming water as a commons for the Earth and all people that must be wisely and sustainably shared and managed if we are to survive. This will not happen unless we are prepared to reject the basic tenets of market-based globalization. The current imperatives of competition,